JD-55-06
Lafayette, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALCOA, INC.

And

LOCAL 115A, UNITED STEELWORKERS, AFL-CIO-CLC, a/w UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

Cases 25-CA-29487
25-CA-29611
25-CA-29649
25-CA-29701
25-CA-29860

Steve Robles, Esq., for the General Counsel.
Marcia A. Mahony, Esq., Kightlinger and Gray, LLP, of Indianapolis, Indiana, for the Respondent.
Chris Bolte, Staff Representative, of Jasper, Indiana, for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. The first four dockets in this case were tried in Lafayette, Indiana, on February 27-March 1, 2006. The trial resumed on June 6, 2006 to take evidence in case 25-CA-29860, which I consolidated with the other matters. The charges giving rise to this case were filed between February 7, 2005 and February 6, 2006. A consolidated complaint was issued for the first four dockets on October 28, 2005. The Regional Director issued the Complaint in Docket 25-CA-29680 on April 7, 2006.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Alcoa, Inc., a corporation, processes aluminum products at its facility in Lafayette, Indiana, where it annually purchases, receives, sells and ships good valued in excess of $50,000 directly from or to points outside the State of Indiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, United Steelworkers Local 115A, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Alleged violations related to Respondent's change in policy which no longer gave employees an excused absence to attend monthly union meetings.

Many of the alleged violations in this case stem from Respondent's decision in the spring of 2005 to cease its practice of allowing employees an excused absence to attend the union's monthly membership meetings. These meetings were held generally on the third Tuesday of each month. The Union has represented employees at Alcoa's Lafayette plant for decades. The latest collective bargaining agreement between the Union and Respondent pertaining to this matter was effective from May 31, 2001 until May 31, 2006.[1]

For at least ten years prior to the Union's June 21, 2005 meeting, employees working on the first shift (7:00 a.m. to 3:00 p.m.) were allowed to clock out up to 2 hours early to attend the monthly union meeting, which began at 1:30 p.m. and generally ran about an hour and a half. Employees were not paid for this absence but it did not count against them on their attendance record. Some employees started work early so that they could work an eight hours shift and attend the union meeting. Prior to June 21, an employee had only to inform his or her supervisor the day of the union meeting that he or she was going to be leaving early, or the day before if he or she was to work a flexible schedule.[2]

In the late winter of 2005, Alcoa's management concluded that over 2100 man hours of production were being lost as a result of employees leaving work early to attend the monthly union meeting. As business was picking up dramatically in 2004 and 2005, Respondent apparently decided that this was luxury that it could no longer afford.

On March 8, 2005, Pamela Leonard, the human resources manager for Alcoa's Lafayette operations, and Deborah Spidel, a human resources supervisor, met with Gerald Misner, the Union President, and Spencer Buchanan, the Union's Vice-President. Leonard informed Misner and Buchanan that Respondent was losing 2100 man hours of production due to the fact that employees were leaving work early to attend the union's monthly membership meetings. Leonard asked the Union to provide an alternative schedule, such as holding multiple meetings.

Misner told Leonard that she was "rocking the boat." He also asked Leonard if she wanted to negotiate about such a change. Leonard responded that she did not have to do so.[3]

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[1] The International Union and Alcoa apparently reached agreement on a new master agreement on May 31, 2006.

[2] Respondent may have sent a letter to the Union in May 1998 to the effect that employees are required to get permission to leave the plant early on personal business, Exh. R-30. However, in practice such permission was granted routinely. Indeed, there is no evidence that any employee's request to leave early had ever been denied prior to June 21, 2005.

[3] Leonard, in her testimony about the March 8, 2005 meeting did not contradict Misner's testimony on this point (Tr. 444-447). I therefore credit Misner because his testimony is uncontradicted and consistent with Leonard's May 18, 2005 letter (Exh. G.C. – 11) in which she stated, "Although it [excused absences for union meetings] is not a mandatory subject of bargaining,…"

Leonard testified Misner told her he was unwilling to negotiate in answer to her counsel's leading question about Leonard's response to Misner. Counsel asked Leonard how Misner responded to "your suggestions and your attempt to negotiate?" (Tr. 447). Although Misner

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Misner also told Leonard that for many years, Respondent had considered an employee's early departure for union meetings to be an excused absence and that he considered this matter to be part of Respondent's attendance policy. He told Leonard that the Union did not wish to bargain about the matter at this time.[4]

On March 31, 2005, Leonard emailed Misner (GC Exh. 15). She mentioned her March 8, discussion with Misner about "the number of hours the company was excusing employees to attend regular union meetings. At that time I asked you for a proposal on or alternative to shutting down equipment to excuse employees to leave work to attend these meetings…"

Misner responded on April 8, by asking for documentation regarding the man hours lost. Leonard responded the same date with a list of equipment that Respondent claims was shut down in order to excuse employees to attend the Union meeting on March 15, 2005. At a meeting of April 28, Leonard again asked Misner for a proposal regarding union meetings. Misner responded that the union's proposal was to leave the union meeting schedule alone. He confirmed this response in writing the next day, GC Exh. 19.

On May 18, Leonard informed Misner that, effective June 1, 2005, regular union membership meetings would no longer be an excused or approved absence. She also reiterated her view that this issue was not a mandatory subject of bargaining, GC Exh. 11. Leonard drafted a notice to employees, dated May 19, informing them that attendance at union meetings would no longer be excused, GC Exh. 2, which she emailed to management personnel and asked that they post it in the facility.

Leonard also disseminated "Supervisor Guidelines for Responding to Leave Without Permission," GC Exh. 5, sometime prior to June 21. These guidelines directed supervisors to tell employees that union meetings were no longer excused absences and that they may be subject to discipline up to and including discharge, if they left early to attend. The guidelines also directed supervisors to stand by each time clock to give employees a final warning and to keep a record of which employees left the plant. Although not explicit, these guidelines applied only the day of the next scheduled union meeting, June 21, 2005. With a few exceptions for employees whose flexible schedules had been approved in advance, employees were also not allowed to work flexible schedules that day to attend the union meeting.

On June 20, Respondent disseminated a letter under the signature of Plant Manager Robert Morrison reiterating this new policy and informing employees that Morrison had been advised of rumors of a mass walk-out.[5] The Morrison letter, GC Exh. 3, advised employees that

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never changed his position regarding the Union's monthly meeting, I find that Leonard told him that Respondent did not have to bargain over this change in policy, did not offer the Union an opportunity to bargain and in fact did not bargain. Respondent offered the Union an opportunity to acquiesce in a change in policy.

[4] Respondent's written attendance policy is Exhibit R-7.

[5] The basis for this rumor appears to be a May 19 email from David Musi, Respondent's extrusion plant manager, to Pamela Leonard, Exh. R-31, which recounts a conversation Musi apparently had with employee Jerry Weaver. Respondent introduced this document into evidence through Leonard, rather than through Musi, who had testified earlier.

There is no reliable evidence that Respondent had a reasonable basis for expecting a work stoppage or slowdown on June 21. The contents of Musi's email apparently became a rumor, which in an enhanced form, circulated amongst management personnel (e.g., Tr. 366). This rumor was then communicated to some bargaining unit employees. At no time did Respondent

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Respondent may consider leaving the plant without permission on June 21, to constitute insubordination, as well as a violation of the parties' collective bargaining agreement. In this letter Morrison informed employees that if they left the plant early without permission to attend the union meeting, they would be subject to discipline up to and including discharge.[6]

Pamela Leonard sent an email to Union President Misner on the afternoon of June 20th asking him to follow the union business call-out procedure to enable union executive board and grievance committee chair people to attend the union's monthly meeting the next day. The Union did not take this suggestion.

On June 21, at least some supervisors warned employees of the potential consequences of clocking out early that day. Some supervisors also stationed themselves by the time clocks to document which first shift employees left work early. Five employees did so. Two of these, Mark Hewitt and James Howard, were summoned to a meeting with management officials, including Leonard, on June 23.

Leonard advised Hewitt that she was investigating possible insubordination. She asked him why he left early on June 21. Hewitt told Leonard that he left to run some personal errands and then to attend the union meeting in his capacity as a union official. She made similar inquires to Howard, who told her that he attended to personal errands, but did not attend the union meeting. Respondent did not take any disciplinary action against any first shift employee for leaving work early on June 21. Approximately 10-12 employees attended the Union's membership meeting that day. On other occasions, 25-60 employees attended.

Analysis

First of all, Respondent was required to bargain over its decision to prohibit employees from taking unpaid leave to attend union meetings. Leave or attendance policies are a term and condition of employment and thus are mandatory subjects of bargaining, *Kendell College of Art,* 288 NLRB 1205, 1213 (1988).

Alcoa had an established practice of allowing employees to take unpaid leave to attend the monthly union meetings. During the life of a collective bargaining agreement, an employer may not unilaterally change a term or condition of employment, not covered by the agreement, which has become an established practice, *Dow Jones & Co.,* 318 NLRB 574 (1995).[7]

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make inquires to the Union as to whether it was planning a "mass walkout" at 11:00 a.m. on June 21—although Leonard may have mentioned the contents of the Musi email to Misner and Union Vice President Buchanan.

I note that the Musi email is the purest form of hearsay given the fact that Musi didn't testify about his purported conversation with Weaver and the fact that Weaver did not testify. Moreover, the email on its face does not indicate that employees were planning a work stoppage, slowdown or mass walkout. Musi's email suggests merely that employees planning to attend the union meeting would clock out at 11:00 a.m. rather than 1:00 p.m.

[6] While the letter read out of context could be interpreted to apply to days other than union meetings days, it was implicitly applicable only to June 21.

[7] Neither party has alleged that the issue of whether employees were entitled to unpaid leave was governed by the parties' collective bargaining agreement or by Section 8(d) of the Act. The sole basis on which this case was litigated was whether Respondent had implemented a unilateral change with regard to a mandatory subject of bargaining. Alcoa's sole argument is that although it was not required to bargain with regard to any changes it made, it had in fact

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A unilateral change in leave policies is unlawful if it is material, substantial and significant, *Flambeau Arnold Corp.,* 334 NLRB 165 (2001); *Toledo Blade Co.,* 343 NLRB No. 51 (2004). Given the fact that the Respondent's change in policy prevented union members who wished to attend their monthly union meeting the opportunity to exchange their views regarding the terms and conditions of their employment with all similarly motivated employees from all three shifts, I find that Respondent's unilateral change was material, substantial and significant. Indeed, the facts herein are similar in this regard to *Dow Jones & Co, supra,* in which the Board found that an employer violated Section 8(a)(5) in changing its practice of allowing the union to use its premises for union meetings.

Respondent contends that it bargained to impasse. However, Respondent clearly did not offer the Union notice and an opportunity to bargain over the proposed change in leave (attendance) policy. Respondent gave the Union notice that it wanted the Union to implement a change in the way it conducted its monthly meetings. Even with regard to this issue, Respondent did not bargain in that it did not offer the Union anything; it merely asked the Union to alter the way meetings were conducted without offering anything in return. More importantly, Respondent did not notify the Union in advance of its intention to prohibit unit employees on the first shift from taking unpaid leave or working a flexible schedule on the day of the Union meetings. It simply announced this change on May 18, without notice and an opportunity to bargain.

Respondent violated Section 8(a)(1,) as alleged in Complaint paragraphs 5(a) & 5(b), by threatening unit employees with discipline if they left Respondent's facility early on the first shift on June 21, 2005 and by informing employees that it would engage in surveillance, and by engaging in surveillance, to determine who was leaving early on June 21. Respondent also violated Section 8(a)(1), as alleged in paragraph 5(c), by interrogating Mark Hewitt and Jim Howard as to why they left the facility early on June 21 and whether or not they attended the Union meeting on that date.

It is uncontroverted that Respondent threatened employees with discipline, up to and including discharge if they left the Lafayette facility early on June 21. It is also uncontroverted that supervisors stood by the time clocks to discourage employees from leaving and to document who did leave. Since I find that Respondent violated Section 8(a)(5) in unilaterally changing its leave policy to prevent employees from attending the June 21 meeting, I find that all measures it took to enforce that change violated Section 8(a)(1). Similarly, the interrogations of Hewitt and Howard on June 23 violated the Act.

Respondent has defended its conduct in part on the grounds that it had reason to believe that a mass walkout was going to occur on the afternoon of June 21. I find that Respondent did not have a reasonable basis for this belief. This rumor appears to have originated within management and then been shared with some unit employees.

Extrusion Plant Manager David Musi, who did not testify about this rumor, sent an email to Pamela Leonard on May 19, 2005 regarding a conversation with unit employee Jerry Weaver, who was not a witness at this hearing. According to the email (R. Exh. 31),[8] Weaver told Musi that employees would clock out at 11:00 a.m. rather than at 1:00 p.m. on union meeting days if Respondent no longer excused employees to attend the monthly union meeting. First of all, the

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provided the Union notice of the change in policy and an opportunity to bargain with regard to it.

[8] There are two Exhibits numbered R-31 in the record. One received on March 1, 2006; the other on June 6. The Musi email is the R-31 received on March 1.

only evidence that Weaver said the above to Musi is classic hearsay and entitled to no weight. Secondly, even on their face, Weaver's statements did not indicate that more employees would leave the plant to attend the union's monthly meetings that would do so ordinarily. The specter of a "mass walkout" was entirely a figment of management's imagination.

Respondent subcontracts the Total Predictive Maintenance (TPM) work on the 5-inch drive shaft cell in the tube mill.

Paragraphs 6(a) and 9 of the Complaint allege that Respondent violated Sections 8(a)(3) and (1) of the Act by subcontracting the cleaning work associated with a total predictive maintenance (TPM) event scheduled for the 5-inch drive shaft cell in the tube mill. The General Counsel alleges that Respondent violated the Act because the decision to subcontract was discriminatorily motivated. He does not allege a Section 8(a)(5) violation and concedes that the parties' collective bargaining agreement permits Respondent to subcontract this work. Respondent concedes that this is bargaining unit work.

In the spring of 2005 Respondent planned the first ever TPM event at the Lafayette facility. This work was to entail a comprehensive cleaning, inspection and repair of the 5-inch drive shaft cell in the tube mill. Respondent proposed to use supervisory personnel, including some from other Alcoa facilities to do this work, as well as bargaining unit employees. It asked the Union to agree to this plan.

The Union, by Local President Misner, refused to agree to allow supervisors and other non-bargaining unit employees to perform this bargaining unit work. It proposed that the work, which was scheduled for a weekend, be accomplished by offering bargaining unit employees overtime. In response, Respondent, on April 21, 2005, decided to contract out the work, GC Exh. 17, R. Exh. 29.[9]

Analysis

The General Counsel argues that Respondent violated Section 8(a)(3) and (1) in that it essentially retaliated against the Union for its failure to agree to the use of supervisory personnel in the TPM event. Respondent submits, at page 8 of its brief, that the record establishes a legitimate business purpose for contracting out, i.e., "that bargaining unit employees alone could not do the work without negatively impacting production."

The record, however, establishes no such non-discriminatory business purpose. Respondent relies completely on the hearsay testimony of Human Resources Director Pamela Leonard. She testified that she first considered contracting out the TPM event when she "realized that the union was not going to be agreeable either to a contractual remedy and at the point where the department manager said we can't do it with the resources we have, you know, we will miss making product and miss shipments if we pull from other areas to bring people in to open it up, open up the overtime…(Tr. 433)"

[9] In a meeting with the Union in which the TPM event was discussed, Ms. Leonard stated that she would offer the Union the full contract remedy if supervisors were permitted to do some of the TPM work. However, she did not explain the details of what that remedy entailed (Tr. 135, 435-36). What this remedy might be is not readily apparent to this judge from reading the parties' collective bargaining agreements, Exhibits G.C. 21 and 22.

Thus, there is no first hand evidence that the decision to contract out the TPM event was due to anything but Respondent's reaction to the Union's refusal to allow supervisory employees to perform bargaining unit work. I thus find that Respondent violated Section 8(a)(3) and (1) as alleged in the Complaint.

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil and Gas Co.,* 337 NLRB 1120 (2002).

In the instant case, the General Counsel has established that represented employees engaged in protected activity by insisting that bargaining unit work be performed by bargaining unit employees. Respondent was aware of this protected activity and bore animus towards the Union and its officers as a result of their refusal to allow supervisors to perform the TPM work and their refusal to change the schedule for monthly union meetings. In the absence of any alternative motive, I infer that Respondent was motivated by this animus in contracting out the TPM work. Respondent has not established any affirmative defense.

Respondent's suspension of Mark Hewitt

The General Counsel alleges that Respondent violated Sections 8(a)(3) (4) and (1) in suspending Mark Hewitt for thirty days on August 4 and 5, 2005. Mark Hewitt is a crane operator in Respondent's tube mill department. He has worked at the Lafayette plant for 27 years. Hewitt is also the financial secretary of the Union serves on the union's safety committee and is a steward for the tube mill (Tr. 196).

On the morning of August 4, 2005, bargaining unit employee Kevin Cripe asked Hewitt to represent him at a disciplinary meeting. Hewitt arrived at the meeting after it started. Aside from Cripe and Hewitt, Phyllis Parks, a union tube mill committee person, also attended the meeting. Doug Foster, who is both Cripe and Hewitt's supervisor, and Donald Thomas, the tube mill manager, and Scott Burnett, another Alcoa manager, attended the meeting on behalf of Respondent.

Respondent discussed disciplining Cripe for an incident which started when Supervisor Foster questioned Cripe regarding Cripe's production on a previous day operating the heat treat furnace. Cripe apparently responded by putting his face very close to Foster's and saying something like that is "a stupid fucking question. We're only going to get three or four fucking loads when we are training new people."[10]

After Hewitt arrived at the meeting, he made a plea for leniency on Cripe's behalf. Foster responded that he thought a suspension was appropriate. Hewitt then pointed at Foster, who was sitting across a table from him and said something like, "if you tell this egotistical

[10] Neither Cripe nor Foster testified at the instant hearing. I have quoted Plant Manager Donald Thomas' account of the discussion of the incident at the disciplinary meeting. Hewitt may not have been present when the incident was discussed.

fucker to quit talking to people the way he does, this wouldn't happen." Plant Manager Thomas cut Hewitt off and Cripe was given either a three-day or five-day suspension.

Later on August 4, Hewitt was called to Thomas' office, where he was given a three-day suspension for insubordination and abusive and offensive behavior towards a supervisor. Respondent later instructed Hewitt by letter to call Thomas the next day regarding possible further discipline.

On August 5, Hewitt called Thomas, who imposed an additional 27-day suspension for a total of 30 days—without pay. Respondent based the additional 27 days on the fact that Hewitt had a prior offense, resulting in a "one on one" discussion (an oral counseling) on May 5, 2005. At that time, Respondent counseled Hewitt for using the word "fucking" over the radio, when complaining about the way maintenance employees had attached a motor to his crane. A supervisor told Hewitt that the radio was used by departmental and administrative offices and that was the reason profanity should not be used over the radio. Generally, but not exclusively, Respondent's disciplinary program is progressive. A "one on one" verbal warning is generally followed by a written warning, then a one day suspension, a three day suspension and further discipline or discharge, GC Exh. 24.

Hewitt served the entire suspension imposed in August. The Union filed a grievance regarding the suspension, which at the time of the hearing was awaiting Respondent's answer in the third step of the grievance procedure.

Analysis

As was the case with the subcontracting of the TPM event, in order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

Mark Hewitt was engaged in activity generally protected by Section 7 when he made the remark for which Respondent suspended him. However, he may lose these protections depending on consideration of four factors: (1) the place of the discussion between the employee and the employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice; *Atlantic Steel Co.,* 245 NLRB 814 (1979); *Trus Joist MacMillan,* 341 NLRB 369 (2004).

After considering these factors, I conclude that Hewitt lost the protection of Section 7, insofar as the initial three-day suspension is concerned. Taking the last factor first, his outburst was not provoked by an unfair labor practice. It was a response to Supervisor's Foster's insistence on a three-day suspension for Kevin Cripe, which has been not been shown to violate the Act in any way. Secondly, the other three factors cut against Hewitt. His outburst was gratuitous and took place in a grievance hearing which concerned the alleged insubordinate use of profanity by Cripe towards Foster, both of whom were present at the meeting. Foster was not only Cripe's supervisor, but also Hewitt's supervisor. Given this context, Hewitt's comment would tend to undermine Foster's authority and detract from the message being conveyed to

Cripe as to the change in his behavior called for by the discipline imposed upon him.[11] I therefore conclude that Respondent did not violate the Act in suspending Hewitt for three days.

On the other hand, however, I find that Respondent did violate the Act in tacking on another 27 days to Hewitt's suspension. Respondent was well aware of Mark Hewitt's union activities, which included not only his representation of Kevin Cripe on August 4, but also his position as the union's financial secretary, safety committee person and tube mill steward (Tr. 57, 196). Further, Respondent's animus towards Hewitt's union activities is established by its interrogation of him on June 23, 2005, regarding his reason for leaving the plant early on June 21, to attend the monthly union meeting.

I also infer that the additional 27 days suspension was motivated by Respondent's animus towards the Union and Hewitt's union activities in particular. I draw this inference from the fact that Respondent ignored the normal progression of its disciplinary procedure by adding the 27 days, without any satisfactory nondiscriminatory explanation for doing so.

Respondent issued Hewitt a formal discipline report on May 6, 2005. On the previous day, Hewitt was unhappy with the way in which a maintenance crew had hooked a motor to his crane. He used the word "fucking" as an adjective over the plant radio. Respondent imposed a "one on one" discussion in part because the radio is used in Alcoa's administrative offices. There is no indication that Hewitt directed his profanity at any individual.

Respondent's formal discipline report form indicates that normally a "one on one" discussion is followed by a written warning, a one-day suspension and a three-day suspension before Respondent imposes a 3 day plus 27 day suspension. Alcoa has offered no explanation as to why Hewitt's prior offense, a far less serious matter, warranted the imposition of an additional 27 day suspension for his outburst on August 4.

On the other hand, the record is replete with evidence of animus towards the Union at this time and towards Hewitt's union activities in particular—most notably his leaving work early on June 21 to attend the monthly union meeting. I find that but for the Respondent's animus towards the Union and Hewitt emanating from the controversies surrounding the June 21 union meeting as well as the "fallout" from the TPM event, it would not have imposed the additional 27 day suspension. I therefore find that Respondent violated Section 8(a)(3) and (1) in this regard.[12]

Union Information Requests

Complaint paragraphs 7 alleges that Respondent violated Section 8(a)(5) in refusing to provide information requested by the Union in January 2005 which the General Counsel and

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[11] By way of contrast, the alleged discriminatee in *Felix Industries,* 331 NLRB 144 (2000); 339 NLRB 195 (2003 on remand), made his comments to a supervisor on the telephone and thus no other employees heard or observed his statement. The Board found therefore that the discriminatee's comments did not have any direct impact on workplace discipline.

[12] Respondent, in its brief, overlooks and ignores the fact that the Union alleged a violation of Section 8(a)(3) and (1) in its charge and that the General Counsel alleged that Hewitt's suspension violated Section 8(a)(3) and (1) in the Complaint. The General Counsel did not proceed exclusively, or even primarily, on the theory that Hewitt's suspensions violated Section 8(a)(4) and (1).

Union allege are relevant and necessary to the Union's duties as collective bargaining representative for unit employees.

Paragraph 7(d) concerns grievance T & D[13] 02-04 filed on behalf of unit employee Kevin Marsell, who apparently had been disciplined for an alleged drug offense. On January 17, 2005, the Union requested a chain of custody form for Marsell's drug tests and a copy of all test results for the last two years in which Lifeloc Technologies was involved in testing any Alcoa employee at Lafayette. On February 18, 2005, Respondent, by Human Resources Supervisor Debby Spidel, informed the Union that it needed a release from Marsell for the chain of custody form pertaining to his tests and that it would not provide any test data for any other employee without a release. Since February 18, Respondent has changed its policy and no longer requires a release for medical records pertaining to the grievant. The Union received the chain of custody documents in May 2005.

Complaint paragraph 7(e) concerns information requests made by the Union in connection with the processing of grievance on behalf of unit employee Troy Jones. Respondent sent Jones for drug tests on several occasions. The Union asked for documentation as to whether Jones had been paid for the time that he was being tested. Alcoa sent the Union time and attendance records indicating that Jones did not lose any time, but it did not send the Union copies of its payroll register, which showed what Jones was actually paid, R. Exh. 27,Tr. 426-27. However, an employee's pay is based on the time clock readings that were provided to the Union.

Paragraph 7(f) relates to an information request filed in connection with grievance LR 17-04, concerning unit employee Duane Lord. Among the documents requested were alcohol test results for any employee in which the result was .001 or higher and the copies of documentation of any discipline that was administered as a result of such tests. The Union indicated that it believed such documentation existed for two individuals, one of whom was Jeffrey Suralt. Respondent, on February 18, 2005, informed the Union that it would not provide testing information without a signed release from each employee identified and in any event would not provide information regarding Suralt, who it asserts is a salaried employee, R. Exh. 18.

Paragraph 7(g) relates to grievance Ext. (extrusion) 27-04, filed on behalf of unit employee Darrell Weathers. Weathers was disciplined for violating Respondent's lock-out procedure and thus exposing himself to a very serious safety hazard. The Union asked for information regarding discipline for non-unit employees, Dick Wilson and Kathy South (alleged lock-out-tag out violations) and human resources supervisor Debby Spidel (an alleged failure to comply with Respondent's safety rule regarding the wearing of safety glasses). The company responded by acknowledging that its safety rules applied to all employees, but that the Union was not entitled to information regarding discipline taken or not taken with regard to salaried employees.[14] Eventually, Respondent provided the information regarding Kathy South to the Union.

Complaint paragraph 7(h) relates to an information request concerning grievance LR-16-04, which was filed on behalf of Steve Niece, an employee who was terminated for missing work six consecutive days without leave. The Union asked that Respondent verify the attendance

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[13] Signifying that the employee works in the tool and die department.

[14] The company's refusal to provide Wilson's records on February 4, 2005, appears to be the earliest violation of Section 8(a)(5) in this matter, Exh. R-10.

record of another employee, Kimberly Olands and to verify whether she was on FMLA leave, or any other type of leave, anytime between June 17, and June 30, 2004. It also asked for information indicating the reason(s) why Respondent denied Niece leave for June 14-18, and June 21, 2004.

On February 25, 2005, Respondent informed the Union that Kimberly Orland's attendance record was provided on February 4, and that this record was accurate. The Union contends that it received conflicting records regarding Orland's attendance and that Respondent never clarified which records were correct.

Respondent also informed the Union that it needed a release to give it any of Niece's medical information. Apparently, sometime after February 25, Respondent decided that it did not need a release to provide the Union the grievant's medical information, but the Union contends that it did not have any information relating to the reasons for which Niece was denied leave. Respondent contends that the information provided to the Union answers this inquiry in that it contains a note from Niece's physician indicating that he was able to work on the days in question.

Docket 25-CA-29860: This case involves oral requests by the Union in January 2006, which were followed up by written requests asking for specific information regarding disciplinary measures Respondent took against two supervisory employees, Mike Howe and Theresa Spitznagel.

Supervisor Mike Howe was approached by Robert Branstetter, a bargaining unit employee. I assume this occurred sometime during 2005. Branstetter alleged that Howe was performing bargaining unit work. After some discussion, Howe told Branstetter to "get the fuck out of here."

On another occasion, I assume in 2005, Supervisor Theresa Spitznagel grabbed the sleeve of bargaining unit employee Jerry Barnett and said something like, "don't you walk away from me."

Respondent has been willing to inform the Union only that it took corrective action with regard to these incidents. It has refused to respond to the Union's requests for specific information as to the manner in which these supervisory employees were disciplined.

The Union alleges that this information is relevant to its ability to process grievances, particularly those of bargaining unit employees Mark Hewitt, Kevin Cripe and Curtis Bray. As discussed earlier Hewitt was suspended for thirty days for calling a supervisor "an egotistical fucker" during a grievance meeting regarding Cripe. Cripe was suspended for three days for telling his supervisor that his inquiry was the stupidest fucking question he'd ever heard. Bray was suspended for three days for telling his supervisor, Jennifer Vandergrift, that "he would mess with her, if she messed with him."[15]

The Union contends the information regarding the discipline meted out to Howe and Spitznagel is relevant to the Hewitt, Cripe and Bray grievances in assisting them in determining

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[15] Respondent has offered to settle the Cripe, Hewitt and Bray grievances. The Union has not accepted Alcoa's offers and all three matters are pending arbitration. On April 25, 2006, three months after the third step grievance meeting at which Bray's suspension was discussed, Respondent offered to reduce his discipline to a written warning.

whether the bargaining unit employees are being treated disparately when compared to salaried employees. Respondent contends that supervisory discipline is not relevant because it has means available for correcting supervisor conduct, i.e., denying promotions that are not available in correcting the conduct of bargaining unit employees. Additionally, Respondent argues that to give the Union specific information regarding the discipline imposed on supervisory personnel would undercut the supervisor's authority in managing the workplace.

Analysis

Generally applicable principles

When a collective bargaining representative seeks information from an employer regarding matters pertaining to bargaining unit employees, the request is presumptively relevant and the employer generally has a duty to provide such information. However, when a union seeks information concerning matters outside the bargaining unit, the union is required to make a showing of relevancy and necessity. However, the burden of establishing relevancy and necessity is not an exceptionally heavy one. The union must show a probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities, *Frito-Lay, Inc.,* 333 NLRB 1296 (2001).

In the instant case, the Union made it clear to Respondent that it sought the disciplinary records of salaried employees in order to determine whether certain unit members were being treated in a disparate manner. Since Respondent concedes that its salaried employees are held to the same standards of conduct as unit employees, the Union has met its burden of showing relevancy and necessity with respect to those salaried employees who committed comparable offenses to those for which unit employees were disciplined, *Holiday Inn on the Bay,* 317 NLRB 479, 482 (1995).

In dealing with union requests for relevant but assertedly confidential information, the Board is required to balance a union's need for the information against any legitimate and substantial confidentially interest established by the employer. However, an employer possessing the information and refusing to disclose it on confidentiality grounds has a duty to seek an accommodation through the bargaining process, *Exxon Co. USA,* 321 NLRB 896 (1996). The burden of formulating a reasonable accommodation is on the employer; the union does not need to propose a precise alternative to providing the requested information unedited, *Borgess Medical Center,* 342 NLRB 1105 (2004). Potential avenues for accommodation include redaction of confidential information and protective orders.

Unreasonable delay in furnishing information relevant to the processing of grievances and contract negotiations is as much a violation of the Act as a refusal to furnish any information at all, *Bundy Corp.,* 292 NLRB 671 (1989). The record herein establishes that much of the information requested by the Union in January 2005 was furnished to it by Respondent in May 2005, after Respondent initially refused to furnish this material. Since the General Counsel did not litigate this matter on a theory of unreasonable delay and because I have no basis, on this record, for determining whether or not the delay was unreasonable, I dismiss all the Complaint items relating to information that was furnished in May 2005.

Principles applied to the facts herein

I dismiss paragraph 7(d) of the Complaint relating to the Union's request for the chain of custody documents relating to Kevin Marsell on the grounds that they were provided in May 2005. It is unclear from this record whether or not Respondent has provided tests results for

other employees. If it has not done so, I will order Respondent to furnish the Union with these results and negotiate to seek an accommodation with the Union if it claims that these results are confidential.

Regarding paragraph 7(e) I find a violation and will order Respondent to provide the Union with copies of its payroll register so that the Union can be certain as to what Troy Jones was actually paid.

I find that Respondent violated the Act as alleged in Complaint paragraph 7(f). It has not sought an accommodation with the Union regarding the test results of employees whose tests for blood alcohol were .001 or higher and the disciplinary records of salaried employee Jeffrey Suralt may well be relevant to the issue of whether grievant Duane Lord was disparately disciplined.

With regard to paragraph 7(g), I find a violation with regard to the disciplinary records of Dick Wilson, but not with regard to Debby Spidel. The Union sought the disciplinary records of these two salaried employees to compare them with the discipline of unit employee Darrell Weathers. Wilson's and Weathers' violations both involve Respondent's lock-out procedure, a very important safety matter, also covered by OSHA regulations. Wilson's disciplinary record may be relevant to determining whether Weathers was treated disparately in comparison. Spidel's records have not been shown to be relevant. She apparently failed to wear safety glasses, an offense not relevant to the discipline meted out to Weathers.

I affirm the violation alleged in paragraph 7(h). Respondent will be ordered to produce all records requested which may bear upon the question as to whether unit employee Steve Niece was treated disparately when compared to Kimberly Olands. If Respondent maintains that anything in Olands' records is confidential, it must negotiate an accommodation with the Union, for example, a possible redaction of confidential information.

Regarding Docket 25-CA-29860, I find that Respondent violated Section 8(a)(5) in refusing to furnish the Union the disciplinary records of salaried employees Mike Howe and Theresa Spitznagel. Howe's offense, i.e., telling a unit employee to "get the fuck out of here," may be useful to the Union in its arbitration of the Cripe, Hewitt and Bray grievances. Particularly since Hewitt's punishment, even if reduced to three days, is predicated on his prior offense of using the word "fuck" over the radio, the discipline imposed upon Howe may be relevant to his arbitration.

Sptiznagel's discipline, similarly, may be relevant to the discipline imposed upon unit employee Curtis Bray, who was first given a three-day suspension, later reduced to a written warning, for allegedly threatening and/or being insubordinate to Supervisor Jennifer Vandergrift.

Summary of Conclusions of Law

Respondent, Alcoa, Inc., at its Lafayette, Indiana facility, violated Section 8(a)(5) and (1) of the Act by unilaterally changing its leave policy to prohibit unit employees from taking unpaid leave to attend monthly union meetings.

Respondent violated Section 8(a)(1) of the Act by threatening employees with discipline if the left Respondent's facility early on June 21, 2005; in informing employees that Respondent would engage in surveillance to determine who was leaving early on that date and by engaging in such surveillance on June 21.

Respondent violated Section 8(a)(1) on June 23, 2005, by interrogating unit employees Mark Hewitt and Jim Howard as to the reasons for which they left the Lafayette facility early on June 21.

Respondent violated Section 8(a)(3) and (1) of the Act in contracting out the TPM event at the facility in April 2005 in order to retaliate against the Union's insistence that bargaining unit employees perform bargaining unit work.

Respondent violated Section 8(a)(3) and (1) of the Act in suspending Mark Hewitt for an additional 27 days for his comments at the August 4, grievance meeting.

Respondent violated Section 8(a)(5) and (1) of the Act in failing to provide the Union with the following information:

> All drug test results not previously provided as requested in connection with grievance T & D 02-04;
>
> All records not previously provided that were requested by the Union in connection with grievance LR 17-04, including disciplinary records regarding Jeffrey Suralt;
>
> Payroll register documents pertaining to Troy Jones, as requested by the Union;
>
> Disciplinary records pertaining to salaried employee Dick Wilson's violation of Respondent's lock-out/tag-out rules;
>
> All records relating to the treatment of Kimberly Olands, as compared to grievant Steve Niece and any documents not previously provided regarding the reasons for which Niece was denied leave;
>
> Disciplinary records previously requested regarding salaried employees Mike Howe and Theresa Spitznagel.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to 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[16]

[16] 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.

ORDER

The Respondent, Alcoa, Inc., Lafayette, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in the terms and conditions of bargaining unit employees without notifying the Union and according the Union an opportunity to bargain over such proposed changes;

(b) Threatening employees with discipline for engaging in union or other protected activities;

(c) Threatening to place employees' protected activities under surveillance;

(d) Engaging in the surveillance of unit employees' union or other protected activities;

(e) Interrogating unit employees regarding their union or other protected activities;

(f) Subcontracting bargaining unit work in retaliation for the Union's refusal to allow salaried employees to perform bargaining unit work;

(e) Increasing the discipline imposed on employees in retaliation for their union or other protected activities;

(g) Refusing and failing to provide union information, requested by the Union, that is relevant to its statutory duties and responsibilities, including the disciplinary records of salaried employees who have committed violations of Respondents' rules that are comparable to those for which unit employees have been disciplined.

(h) Refusing and failing to provide the Union information it has requested, which Respondent deems confidential, without negotiating with the Union to seek an accommodation with regard to such information.

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

(a) Make unit employees whole for any work they would have performed in connection with the 2005 TPM event for the 5-inch drive shaft cell in the tube mill.

(b) Rescind 27 days of the 30 day suspension imposed on Mark Hewitt for his conduct on August 4, 2005.

(c)Make Mark Hewitt whole for any loss of earnings or other benefits he may have suffered at the result of the additional 27 days of suspension imposed for his conduct on August 4, 2005. Back pay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987);

(d) Provide to the Union those documents with respect to which I have found that the Respondent violated the Act in failing to provide previously;

(e) Reinstate its established past practice of granting unit employees unpaid leave, or flextime, to attend monthly union meetings.

(f) Remove any attendance occurrence imposed on any employee who either left work early or took leave in order to attend the Union meeting on June 21, 2005 or July 19, 2005.

(g) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful additional 27-day suspension of Mark Hewitt, and within 3 days thereafter notify him in writing that this has been done and that the 27-day additional suspension will not be used against him in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Lafayette, Indiana facility, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 4, 2005.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 28, 2006.

_____
Arthur J. Amchan
Administrative Law Judge

[17] 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."

JD-55-06
Lafayette, IN

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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT make unilateral changes in the terms and conditions of employment of bargaining unit members, such as our leave and attendance policies, without notifying the Union in advance and according the Union an opportunity to bargain over such proposed changes.

WE WILL NOT threaten employees with discipline for engaging in union or other protected activities.

WE WILL NOT threaten to place employees' union or other protected activities under surveillance and WE WILL NOT engage in surveillance of such activities.

WE WILL NOT interrogate employees regarding their union or other protected activities.

WE WILL NOT subcontract bargaining unit work in retaliation for the Union's refusal to allow non-bargaining unit employees to perform bargaining unit work.

WE WILL NOT increase the discipline imposed on a bargaining unit employee in retaliation for their union or other protected activities.

WE WILL NOT refuse or fail to provide the Union with the disciplinary records of salaried employees that the Union has requested, if those salaried employees have committed violations of company rules that are comparable to infractions for which bargaining unit employees have been disciplined.

WE WILL NOT refuse or fail to provide the Union with information it has requested, which we deem confidential, without negotiating with the Union to seek an accommodation regarding these documents.

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

WE WILL make unit employees whole for any work they would have performed in connection with the 2005 TPM event for the 5-inch drive shaft cell in the tube mill.

JD-55-06
Lafayette, IN

WE WILL rescind the last 27-days of the 30-day suspension given to Mark Hewitt for his conduct at a grievance meeting on August 4, 2005.

WE WILL make Mark Hewitt whole for any loss of earnings or other benefits he may have suffered as a result of the additional 27-days of suspension tacked onto the three day suspension imposed for his conduct at a grievance meeting on August 4, 2005.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful 27-day additional suspension of Mark Hewitt and any attendance occurrences issued to any employee for leaving work early or taking leave on June 21, 2005 or July 19, 2005 to attend the union meeting and WE WILL, within 3 days thereafter, inform Mark Hewitt and any employee who received an attendance occurrence for leaving work early or taking leave on June 21, 2005 or July 19, 2005 to attend the union meeting, in writing, that this has been done and that the additional suspension days and/or occurrences will not be used against them in any way.

WE WILL provide to the Union documents previously requested that pertain to the disciplinary records of salaried employees who committed infractions comparable to those for which bargaining unit employees have been disciplined.

WE WILL negotiate with the Union in order to seek an accommodation with respect to requested documents not previously provided on the grounds of confidentiality.

WE WILL reinstate our established past practice of granting unit employees unpaid leave or flextime so that they can attend the Union's monthly membership meetings.

ALCOA, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Federal Building, Room 238
Indianapolis, Indiana 46204-1577
Hours: 8:30 a.m. to 5 p.m.
317-226-7382.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 317-226-7413.