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

Advice Memorandum

DATE: August 22, 2008

TO : Ralph R. Tremain, Regional Director
Region 14

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

SUBJECT: Sabreliner Corporation 122-0100
Case 14-CA-29342 530-6067-6067-8100

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by refusing to respond to certain questions submitted by the Union in preparation for the arbitration of a discharge grievance.

We conclude that the Employer violated the Act by refusing to provide the requested information. Although the grievance was already scheduled for arbitration, the Union's request sought information about facts and witnesses in support of the underlying grievance rather than the legal theory and evidentiary information upon which the Employer intended to rely in arbitration, which would be considered unenforceable pre-arbitral discovery. Nevertheless, further proceedings would not effectuate the purposes and policies of the Act since the arbitration has concluded and the Union has stated that it no longer needs the information. Further, this Employer has no prior history of meritorious unfair labor practices. Accordingly, consistent with General Counsel Memorandum 95-15, OM Memorandum 01-76 and 02-15, absent withdrawal, the Region should issue a merit dismissal of the instant charge.

Facts

The Employer is involved in the maintenance, repair, and modification of aircraft. Teamsters Local 600 (the Union) represents the Employer's production, maintenance, and warehouse employees at three plants in Missouri. The current collective-bargaining agreement is effective August 2005 to August 2009.

In January 2008,[1] an employee was terminated for making personal projects on the Employer’s water jet cutter during work time on December 14, 2007. On January 18, the Union filed a grievance alleging that the employee had been unlawfully discharged, asserting that the personal project

[1] All dates herein are in 2008 unless otherwise noted.

was training done under the authority of management. The grievance was referred to arbitration on January 30. On March 6, the parties selected an arbitrator. On April 1, the Union submitted a request for information to the Employer. The Union requested 16 items that it referred to as "Information" and 5 items of "Documentation."

On April 22, the Employer wrote a letter to the Union stating that it was gathering all of the "Documentation" requested by the Union but that it would not respond to the remaining 16 "Information" items because they were in the form of interrogatories. The Union responded by letter on April 25, stating that the Employer was obligated to respond to the "Information" requests despite the fact that they are in the form of interrogatories.

On May 15, the Employer provided the Union with over 800 pages of documentation in response to its inquiry. All information was provided except answers to the following:

4. Identify all supervisors who have ever observed, or had knowledge of, [the employee's] making of personal projects. For each such supervisor, describe his/her observations and/or knowledge and the date(s) thereof.

5. State whether [the employee] was ever asked by [one particular] supervisor ... to make personal items.

6. State whether [the employee] was ever asked by ... [the] Sr. Manager-Human Resources to make personal items (including but not limited to Christmas ornaments).

7. Identify all lunch and break periods available to [the employee] on December 14, 2007. For each, identify the length of the period and whether [the employee] required supervisory permission before taking a break or lunch.

9. Describe any subsequent training provided to employees on the water jet cutter.

12. State whether, during the period from January 1, 1998 through December 31, 2007, any supervisor or manager ever gave permission for an employee to work on a personal project. If so, state:
    a. date;
    b. identity of employee;
    c. description of personal project; and
    d. identity of supervisor/manager

The Union explained to the Region that this information is relevant to the employee's contentions in the discharge grievance that the Employer acquiesced to his working on personal projects; that a supervisor and manager had asked him to make personal items for them using the water-jet cutter; that he was still on his lunch break when he was caught working on a personal project on December 14; and that because training on the water-jet cutter was inadequate, the Employer had allowed employees to spend some time each day experimenting on the machine in order to become proficient.

The parties arbitrated the grievance on June 13.

Action

We conclude that the Employer violated the Act by refusing to provide the requested information. Although the grievance was already scheduled for arbitration, the Union's request sought information about facts and witnesses in support of the underlying grievance rather than the legal theory and evidentiary information upon which the Employer intended to rely in arbitration, which would constitute unenforceable pre-arbitral discovery. Nevertheless, further proceedings would not effectuate the purposes and policies of the Act since the arbitration has concluded and the Union has stated it no longer needs the information. Accordingly, absent withdrawal, the Region should issue a merit dismissal of the instant charge.

The duty to bargain in good faith under Section 8(d) of the Act includes an obligation to process grievances, and, as with all aspects of collective bargaining, grievance processing necessarily involves a "give and take" between the parties. These negotiations may serve to narrow the scope of the grievance and ultimately may lead to the resolution of the grievance short of an arbitration.[2] In order to reach a grievance settlement, good faith sharing of relevant information between the parties is critical.[3] Thus, the obligation to provide information is a

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[2] NLRB v. Acme Industrial Co., 385 U.S. 432, 438 (1967), enforcing Acme Industrial Co., 150 NLRB 1463 (1965): "Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened."

[3] Id. at 436.

necessary adjunct to processing grievances and complying with the parties' obligation to bargain in good faith.

A party is obligated to provide requested information that may prove relevant to contract negotiation and contract administration, including determinations of whether to file a grievance and whether to proceed to arbitration.[4] The mere fact that a party has decided to seek arbitration does not extinguish a party's obligations under the NLRA to provide information potentially relevant to that dispute.[5] Rather, the Board has held that in addition to providing information to assist in the decision of whether to pursue arbitration, a party must provide requested information simply to help the requesting party prepare for an arbitration that is already pending.[6]

In cases scheduled for arbitration, the Board in California Nurses Association[7] recognized a dichotomy between requests for legal theories and evidentiary information upon which a party intends to rely in the arbitration, which constitute arbitral discovery that is not enforceable under the Act, and enforceable requests for factual material, documents, and witnesses that support the underlying grievance. In that case, the employer had asked the union for facts, documents, and witnesses regarding incidents assertedly caused by the employer's work redesign program, which the union alleged threatened patient safety and jeopardized nurse licensures.[8] The Board found that the union violated the Act by failing to turn over certain

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[4] Service Employees local 144 (Jamaica Hospital), 297 NLRB 1001, 1002-03 (1990).

[5] See California Nurses Assn., 326 NLRB 1362, 1366 (1998).

[6] Jewish Federation Council, 306 NLRB 507, n.1 (1992). See also National Broadcasting Company, 352 NLRB No. 15, slip op. at 23 (February 14, 2008) (fact that case was already scheduled for arbitration does not change the nature and relevancy of information request); Fawcett Printing Corp., 201 NLRB 964, 972 (1973) (production required where information would "assist the parties in preparing the case for arbitration and thereby tend both to shorten the arbitration hearing and to make the evidence received at the hearing more complete"); Chesapeake and Potomac Telephone Co., 259 NLRB 225, 227 (1981) and cases cited therein.

[7] 326 NLRB at 1362.

[8] Id. at 1365.

facts and documents and the names of individuals on whom the union was relying in support of its grievance. However, it also affirmed the ALJ's conclusion that the union was not obligated to "define and explain its theories" or to isolate specific facts within the documents that it intended to use at the upcoming arbitration.[9]

Here, after referring the grievance to arbitration, the Union requested certain information in order to prepare for the arbitration. We agree with the Region that the requested information is relevant to the underlying grievance. Although the case was already scheduled for arbitration, the Union's request was for factual material and witnesses that support the underlying grievance. This is not the kind of information that delves into the Employer's legal theory or litigation strategy for the arbitration, which the Board might view as unenforceable pre-arbitral discovery.[10] Thus it does not matter that the Union had already decided to process the grievance to arbitration.[11] And the mere fact that the questions were posed in interrogatory form is not determinative.[12]

As to the Employer's refusal to answer items 5 and 6, they assertedly are requests for admissions and amount to pre-hearing discovery. While an argument can be made that those questions sought evidentiary admissions, i.e., facts the Employer would either contest or admit, the responses nevertheless were critical to the Union's contention that management had condoned the making of personal projects and could have led to the possible resolution of the grievance.[13] We therefore conclude that the Employer was obligated to provide that information as well.

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[9] Id. at 1367.

[10] See National Broadcasting Company, 352 NLRB No. 15, slip op. at 22-23 (no request that respondent "supply the names of witnesses it intends to call, evidence it intends to rely [on], or any other information that would delve into Respondent's litigation strategy at the arbitration.")

[11] See, e.g., Jewish Federation Council, 306 NLRB at n. 1 (union entitled to information even though it had already decided to process the grievance to arbitration).

[12] See, e.g., Ormet Aluminum Mill Products, 335 NLRB 788, 789 (2001) (production required even though questions asked in interrogatory form).

[13] See generally Chesapeake and Potomac Telephone Company, 259 NLRB at 227 (violation for failure to supply information as to whether other employees had been

In these circumstances, the Employer's failure to provide the information requested (items 4-7, 9, and 12) violated Section 8(a)(5) of the Act, since such responses would have aided in the preparation for the arbitration or even obviated the need for it altogether.[14] Nevertheless, further proceedings would not effectuate the purposes and policies of the Act since the arbitration has concluded and the Union no longer needs the information and there is no prior history of meritorious unfair labor practices. Accordingly, absent withdrawal, the Region should issue a merit dismissal of the instant charge.

B.J.K.

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suspended for a particular offense where information was critical to union's claim of disparate treatment).

[14] See California Nurses Assn., supra, at 1366 (information required "so that the parties to the grievance procedure have the opportunity to 'evaluate the merits of the claim' and work toward settlement"), quoting Firemen and Oilers Local 288 (Diversy Wyandotte), supra at 1008.