Fairmont Hotel Company d/b/a the Fairmont Hotel *and* Hotel and Restaurant Employees Union, Local 2, AFL–CIO. Case 20–CA–22700

August 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On June 20, 1990, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1] The California Hotel & Motel Association filed an amicus curiae brief.[2]

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,[3] and conclusions and to adopt the recommended Order.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We deny the General Counsel's motion to strike the amicus curiae brief.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent filed a motion to reopen the record to include evidence regarding its pretrial settlement offer and additional evidence concerning the complaining guest's purported request for privacy. The General Counsel opposes the motion, We deny the motion for the following reasons: First, evidence of the Respondent's pretrial settlement offer, if adduced and credited, would not require a different result. Second, the record shows that the issue of guest confidentiality was litigated at the hearing, and we agree with the judge's finding that the record does not establish that the complaining guest, in fact, had requested confidentiality. We also note that the Respondent does not contend that the evidence it seeks to introduce of the guest's request for confidentiality was previously unavailable or newly discovered. Nor does the Respondent contend that it was prevented from presenting this evidence at the hearing.

In agreeing with the judge's determination that the identity of the complaining guest was not shown to be confidential as alleged by the Respondent, we note that the Respondent failed to establish that it promised anonymity to the complaining guest at any time or that she had any reasonable expectation of privacy. In fact, the guest appeared as a witness at the arbitration proceeding and her identity was revealed at that time. Moreover, we agree with the judge that even had the Respondent established its claim of confidentiality so as to trigger the balancing of such confidentiality concerns with the Union's needs as collective-bargaining representative, the Respondent failed to show that it met its obligation to come forward with an offer to accommodate these two competing interests. Member Oviatt finds it unnecessary here to reach the issue of what the Respondent's obligation would be had it established its claim of confidentiality.

The Respondent contends that the Union was not entitled to the requested information because the past practice was to the contrary and the Union had waived its right to the information. We disagree. There is no evidence in the record demonstrating the parties' mutual understanding in the past that the Respondent need not provide the requested information, and the Respondent has not referred us to contractual language containing a waiver or any other persuasive evidence that the Union waived this statutory right.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Fairmont Hotel Company d/b/a the Fairmont Hotel, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Karen Clopton, Esq., for the General Counsel.
Geoffrey M. Faust, Esq. (Titchell, Maltzman, Mark, Bass, Ohleyer & Mishel), of San Francisco, California, for the Respondent.
Elliot Beckelman, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried before me in San Francisco, California, on February 5, 1990. The complaint, based on a charge filed by Hotel and Restaurant Employees Union, Local 2, AFL–CIO (Union), alleges that Fairmont Hotel Company d/b/a the Fairmont Hotel (Respondent) has refused to supply the Union with certain requested information since about June 20, 1989, thereby violating Section 8(a)(5) and (1) of the National Labor Relations Act (Act).[1]

I. JURISDICTION, LABOR ORGANIZATION

Respondent is a California corporation engaged in the operation of a hotel in San Francisco. The parties agree, and I find, that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

The parties further agree, and I find, that the Union is a labor organization within Section 2(5) of the Act.

II. THE ALLEGED MISCONDUCT

A. *Facts*

Respondent and the Union were party to a collective-bargaining agreement effective from August 14, 1986, to August 14, 1989. Among the classifications covered by the agreement were chefs, cooks, food servers, bus persons, cashiers, checkers, bartenders, dishwashers, bell persons, and room cleaners.[2]

On May 26, 1989, based on a guest's complaint, Respondent suspended one of its room cleaners, Jewel Taplin, for 5-1/2 days. The record does not disclose the nature of the guest's complaint,[3] or the manner in which it was lodged.

The Union shortly grieved Taplin's suspension, and a meeting comprising steps 1 and 2 of the contractually prescribed grievance/arbitration procedure followed on May 30. During the meeting, which resolved nothing, Bill Hester, a business representative for the Union, asked Respondent's di-

[1] The charge was filed on June 26, 1989. The complaint issued on August 10.

[2] The covered classifications are set forth in Appendix A of the agreement. I conclude that a unit so comprised is appropriate for purposes of the Act.

[3] The General Counsel's brief states that the guest complained of Taplin's failure to provide ''turndown'' service.

rector of personnel, Noel Lopez, for the complaining guest's name. Hester explained that this was necessary to the Union's investigation of the matter. Lopez replied either that the information would be provided, or that the guest would be present, if necessary, at the next step—an adjustment board hearing.

The Union formally requested an adjustment board hearing on June 6, and it took place, likewise without resolution, on June 20. The complaining guest was not there. Both Hester and the Union's assistant grievance officer, Bill Higgins, asked why not. They also asked for the guest's name, address, and telephone number, so they could reach him after the meeting. Respondent's general manager, Herman Wiener, replied that Respondent ''would never'' bring a guest to an adjustment board hearing, and that it would ''see'' the Union ''in arbitration.'' Wiener added that he was especially concerned that this particular guest, an official of the American Automobile Association, not be ''upset.'' Douglas Cornford, a labor relations consultant for Respondent, injected that it would not reveal the guest's identity ''prior to the arbitration,'' but would make the guest available at that proceeding.

Cornford or Wiener also stated that Respondent would rely on three employee witnesses, in addition to the guest, in the arbitration hearing. Higgins asked their identities, as well. Cornford refused to comply. Higgins testified, ''We had no idea if they were bargaining-unit personnel or management representatives.''

An arbitration hearing was set for September 29. Anticipating it, Higgins sent Wiener a letter, dated July 17, in which he requested ''the name, telephone number and address'' of the complaining guest, and ''the names, positions, telephone numbers and addresses of all . . . employee witnesses.'' Respondent did not comply; and, by letter to Lopez dated August 29, Higgins repeated the request. Respondent again failed to comply. On September 6, at the Union's behest, Arbitrator Charles Askin issued a subpoena duces tecum commanding Respondent to provide the Union with that and other information by September 15. Respondent answered by letter to Higgins dated September 18, identifying two employee witnesses, but stating with regard to the guest: ''Information is not being supplied; guest will testify at arbitration hearing.'' That was followed by a letter from Cornford to the arbitrator, dated September 19, ''requesting the deletion from the subpoena'' of items going to the guest's identity. The letter stated, in support of the request, that Respondent deemed that information ''confidential in nature'' and feared that disclosure ''may have certain adverse legal consequences . . . pursuant to a hotel guest's right to privacy.'' The letter added that Respondent intended to make the guest ''available for testimony at the September 29th hearing.''

Also on the 19th, Higgins wrote the arbitrator that Respondent had not complied with several items in the subpoena, including those bearing on the guest's identity; and asked that he compel compliance.

Respondent persisted in its noncompliance regarding the guest. The guest appeared and testified at the arbitration hearing as promised.[4]

[4] The record does not disclose the outcome of the arbitration proceeding.

Neither Respondent nor the Union proposed an alternative arrangement, prior to arbitration, that would protect the guest's anonymity.

Higgins testified that, in grievance matters involving guest complaints at other major San Francisco hotels, he has never participated in an adjustment board hearing where the hotel has not provided ''information concerning the complaining guest.'' He recounted a 1988 adjustment board hearing concerning the St. Francis Hotel in which the guest, in Phoenix, was questioned by means of a conference-call telephone arrangement. The guest, however, was not identified during the call, according to Higgins.[5]

Wiener testified that Respondent does ''everything possible to ensure the privacy and the confidentiality . . . of the guests''; that it does not ''give out any information to any persons about the guests'' absent ''a subpoena by [a] court.'' He continued, ''This is a legal obligation to us.'' Asked the basis of that obligation, he testified: ''Well, it's mostly between the—I—with the state law and all—that we understand that the guest comes into the hotel, expects privacy 100 percent.''

Wiener further testified that Respondent ''common[ly]'' imposes discipline based on customer complaints; and that, in some such instances, when the employee learned the guest's identity, the guest ''was harassed . . . and then we had big problems with the guest.'' Wiener went on, ''I can't come up with the individual, but there's been quite a few complaints from guests'' about this.

Wiener ventured that, were Respondent to reveal a complaining guest's identity before arbitration, and then the guest were to be ''called at home and harassed,'' the guest ''would never show up . . . for us, to be as a witness, on a complaint.'' Wiener then averred that he ''know[s] for a fact'' that complaining guests have been ''harassed'' by union officials, as well as employees, only to concede: ''Official of the Union? To my knowledge, no.''

Respondent placed in evidence a questionnaire on which it invites guests to rate their stay in sundry respects—the courtesy and efficiency of various personnel, the condition of the guest room on arrival, the quality of housekeeping during the stay, etc. The questionnaire notes that Respondent ''strive[s] to uphold the quality of services and personnel upon which [its] reputation has been built,'' and that ''the information obtained . . . will be used to continue to provide . . . the standards that have become synonymous with the Fairmont name.'' Wiener testified that this affords ''one way to evaluate the performance of'' Respondent's 800 to 850 employees, and that this use would be compromised were the identities of complaining guests not protected. The questionnaire includes a space for the guest's name, address, and telephone number, and nowhere indicates that that information will be held in confidence.

Although Respondent asserts in its brief that ''the guest involved here had requested confidentiality,'' the record contains no evidence that this is so.

[5] Higgins testified that the Union previously had learned the guest's identity. He did not say if the St. Francis had provided the information.

B. *Conclusions*

The applicable legal principles were recently summarized by the Board in *Howard University*:[6]

> [A]n employer has an obligation to provide a union with information relevant to its duty as a representative of the employees. *Washington Gas Light Co*., 273 NLRB 116 (1967). This obligation extends to information required by the union to process a grievance. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *Designcraft Jewel Industries*, 254 NLRB 791 (1981). The standard for the relevancy of the information sought by the Union is set forth in *W-L Moulding Co*., 272 NLRB 1239 (1984), in which the Board, citing *NLRB v. Rockwell-Standard Corp*., 410 F.2d 953, 957 (6th Cir. 1969), stated, ''The Board's only function in such situation is in 'acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'''

The Board then qualified:[7]

> Relevancy, however, is not the sole factor in deciding whether the information must be produced by the [employer]. Although the requested information may be relevant, an employer may not be required to produce it if such production violates confidentiality and privilege. The [employer's] claim of confidentiality must be balanced against the union's need for relevant information in pursuit of its role as a representative of the employees. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). . . . The party asserting confidentiality has the burden of proof. *McDonnell Douglas Corp*., 224 NLRB 881 (1976).

More to the present point, the Board held in *Transport of New Jersey*,[8] that an employer's refusal to comply with a union's request for the names and addresses of passenger-witnesses to a bus accident, in the context of the employer's determination that the driver was at fault, violated Section 8(a)(5) and (1). And, in *Anheuser-Busch, Inc*.,[9] citing *Transport of New Jersey*, the Board offered this dictum:[10]

> An employer does have a duty to furnish a union, upon request, the names of witnesses to an incident for which an employee was disciplined.

I conclude, based on the above, that Respondent violated Section 8(a)(5) and (1) as alleged by withholding the identity of the complaining guest until the arbitration hearing and by failing to disclose the identities of the employee-witnesses for some 3 months after the Union first requested them.[11]

This information plainly ''would be of use to'' the Union in investigating Taplin's alleged misconduct, and thus in deciding whether and to what extent to grieve her suspension; and Respondent has failed to persuade me that its avowed reasons for withholding the guest's identity warrant exemption from the general rule.[12] Wiener was unable to cite the law Respondent would violate by disclosing the guest's identity,[13] and I doubt in any event that such a law would preempt an obligation arising under the Act.[14] The record contains no evidence, moreover, that the guest requested or was promised anonymity; and one might surmise from the guest's having complained without such a request or assurance, and from Respondent's stated intent all along to call the guest as a witness in the arbitration proceeding, that tactics rather than privacy was the primary consideration.[15]

Further, Wiener's professed concerns about harassment, should the guest's identity be revealed before arbitration, were strained, nebulous, and generally unconvincing. As the Board stated in *Transport of New Jersey*,[16] faced with a similar contention:

> [T]he dangers suggested by Respondent are at most speculative and the likelihood of their occurrence is substantially outweighed by the Union's need to obtain information relevant and necessary to the proper performance of its statutory function of processing grievances.

Wiener's other attempted justifications for withholding the identification of complaining guests—that they would be discouraged from serving as witnesses for Respondent if they were ''called at home and harassed'' beforehand, and that Respondent's use of guest complaints as a tool for evaluating employees would be compromised—likewise turn on speculative possibilities readily eclipsed by the Union's need for the information.

Conclusion of Law

By failing and refusing to furnish to the Union, promptly on its request, the names, addresses, and telephone numbers of the complaining guest and employee-witnesses in connection with the grievance arising from the suspension of Jewel Taplin in May 1989, Respondent violated Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[17]

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[6] 290 NLRB 1006 at 1007 (1988).

[7] Id. at 1007.

[8] 233 NLRB 694 (1977).

[9] 237 NLRB 982 (1978).

[10] Id. at 984 fn. 5. *Anheuser-Busch, Inc*. involved an employer's refusal to provide witness statements to the union before arbitration. The Board held that to be lawful.

[11] Belated compliance does not exonerate. *Interstate Food Processing*, 283 NLRB 303, 306 (1987).

[12] Respondent does not argue the point as concerns the employee-witnesses.

[13] Respondent in its brief cites a provision in the California constitution which states: ''All people are by nature free and independent and have inalienable rights. Among them are . . . pursuing and obtaining safety, happiness, and privacy.''

[14] See *Howard University*, supra.

[15] Even if Respondent's concern for guest privacy were sincere and valid, it was obliged to ''come forward with some offer to accommodate both its concerns and its bargaining obligation.'' *Tritac Corp*., 286 NLRB 522 (1987). This, so far as the record shows, it did not do.

[16] Supra at 233 NLRB 695.

[17] All outstanding motions inconsistent with this recommended Order are denied. 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, Fairmont Hotel Company d/b/a the Fairmont Hotel, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing or failing to bargain in good faith with the Union by withholding from it requested information relevant to the processing of grievances or the administration of their collective-bargaining agreement.

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

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

(a) On request, furnish the Union with the names, addresses, and telephone numbers of the complaining guest and employee-witnesses in connection with the May 1989 suspension of Jewel Taplin, which information is needed to enable the Union to process a grievance on her behalf.

(b) Post at its hotel in San Francisco, California, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by 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.

[18] 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 or fail to bargain in good faith with the Hotel and Restaurant Employees Union, Local 2, AFL–CIO by withholding from it requested information relevant to the processing of grievances or the administration of our collective-bargaining agreement.

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

WE WILL, on request, furnish the Union with the names, addresses, and telephone numbers of the complaining guest and employee-witnesses in connection with the May 1989 suspension of a bargaining unit employee, which information is needed to enable the Union to process a grievance on that employee's behalf.

FAIRMONT HOTEL COMPANY D/B/A THE FAIRMONT HOTEL