Exxon Company USA *and* Gulf Coast Industrial Workers' Union

Exxon Chemical Americas *and* Gulf Coast Industrial Workers' Union. Cases 16–CA–16494 and 16–CA–16495

July 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On charges filed on January 21, 1994, by Gulf Coast Industrial Workers' Union, the General Counsel of the National Labor Relations Board issued a consolidated complaint on June 30, 1994, against Exxon Company USA in Case 16–CA–16494 and against Exxon Chemical Americas in Case 16–CA–16495. The General Counsel alleged that the Respondents violated Section 8(a)(5) and (1) by refusing to provide the Union with the identities of specific unit employees whom the Respondents had audited in an effort to verify the accuracy of employee self-disclosure reports made pursuant to the Respondents' ''Alcohol and Drug Use Policy.'' The Respondents filed a timely answer and amended answer that admitted in part and denied in part the allegations in the consolidated complaint.

On February 2, 1995, the General Counsel, the Respondents, and the Charging Party filed with the Board a stipulation of facts and motion to transfer the case to the Board. The parties agreed that the stipulation and attached exhibits contained all relevant facts and evidence necessary for a decision in these cases. They waived a hearing before and decision by an administrative law judge. On April 6, 1995, the Board approved the stipulation and transferred this proceeding to the Board for issuance of a decision and order. The General Counsel, the Respondents, and the Charging Party filed briefs.

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

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents are divisions of Exxon Corporation, a New Jersey corporation, which manufactures assorted petroleum products, and has its principal office in Irving, Texas, with branches worldwide. During the 12 months immediately preceding the execution of the stipulation of facts, a representative period, the Respondents, in the course and conduct of their business operations, each sold and shipped from their Texas facilities products, goods, and materials valued in excess of $50,000 directly to points located outside the State of Texas.

We find that the Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The General Counsel alleges, the Respondents admit, and we find that Gulf Coast Industrial Workers' Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

On July 18, 1963, the Union was certified as the exclusive collective-bargaining representative of all production and maintenance employees, including employees listed by specific job categories, at Respondent Exxon Company USA's refinery and at Respondent Exxon Chemical Americas' chemical plant, both located in Baytown, Texas. On January 31, 1990, after negotiations with the Union, the Respondents implemented an ''Alcohol and Drug Use Policy.'' The policy established certain ''Designated Positions'' critical for safety.

Employees seeking designated positions were required to complete a ''Compliance Statement'' that disclosed information necessary to assess the applicant's qualifications to serve in a ''Designated Position.'' The Respondents and the Union agreed to treat the information disclosed on the compliance statements as confidential, except on a need-to-know basis. The parties further agreed that no background checks (audits) of compliance statements would be conducted by the Respondents. Two hundred and eleven union-represented employees completed compliance statements. The Respondents provided the Union with the identity of these employees.

Over the next 4 years, the Respondents experienced over 40 positive alcohol or drug tests for employees who had executed compliance statements. Thereafter, prior to September 1, 1993, the Respondents conducted limited background checks of some compliance statements without prior notice to the Union. The Respondents selected compliance statements for audit based on whether an employee had disclosed one or more prior incidents of drug and/or alcohol involvement. Respondents' security personnel checked compliance statements against local court records in the employees' county of residence and employment.

Twenty-two union-represented employees met the Respondents' selection criteria and had their compliance statements audited. This number was not disclosed to the Union. The Respondents' audit identified one employee with an apparent discrepancy between his self-disclosure and the Respondents' verification. This employee identified himself to the Union. Subsequently, four additional employees, whose compliance

statements had not been audited, voluntarily advised the Respondents about potential inaccuracies in their compliance statements.

The Respondents maintain, pursuant to the stipulated record, that three of the above four employees who came forward either identified themselves to the Union or were identified to the Union by the Respondents after the employee had given his or her consent and that the identity of one employee, who had disclosed a potential misstatement in the compliance statement, is not known to the Union. However, they assert that investigation by the Respondents has determined that this employee accurately completed the compliance statement. On the other hand, the General Counsel and the Union maintain by way of stipulation that whether the Union knew the identity of the above-described employees is not relevant or material because, as set forth below, the Respondents did not furnish this information when it was requested by the Union.

On September 1, 1993, the Respondents advised the Union that the above-mentioned audits had been undertaken and that the Respondents wished to enter into discussions to regain the right to conduct background checks for employees who occupied sensitive positions. By letters dated September 7 and 28, 1993, the Union requested, inter alia, the following information: (a) the identity of union-represented employees who were audited, and (b) the identity of all union-represented employees for whom discrepancies between the self-disclosure and the audit were found. The Respondents declined to provide this information, citing privacy and confidentiality concerns. Specifically, the Respondents stated, ''Due to the sensitivity of this information and in an effort to protect the privacy of these employees, we are not willing to provide you [with] the names of [these] GCIWU-represented employees . . . .''

On September 29, 1993, the Union initiated a class-action grievance objecting to the Respondents' conduct, which the grievance characterized as ''breaching the agreement with the Union regarding designated positions.'' The remedy sought by the grievance was restoration of the status quo ante; destruction of any documentation produced as a result of the background checks and expunction of such documentation from personnel files; and cessation of all background checks until negotiations over the proposed changes were completed.

Thereafter, the parties met on eight separate occasions to bargain over background checks. During these negotiations, the Respondents advised the Union about the existence of the individuals who had voluntarily informed management about apparent discrepancies in their compliance statements. Also during these negotiations, the Respondents agreed to actively encourage employees, who had been audited, to identify themselves to the Union, or, alternatively, to permit the Respondents to divulge their identity to the Union.[1]

On January 28, 1994, the Union expanded its outstanding information requests to include the identity of the union-represented employees who had voluntarily informed management about apparent discrepancies in their compliance statements. The Respondents again declined to provide this information and cited the same privacy and confidentiality concerns.

As stipulated, the Union maintains that it told the Respondents during negotiations over background checks that it needed the information requested to conduct intelligent bargaining and to evaluate its grievance. On the other hand, the Respondents maintain that the Union did not specify its need for the information as it related to its grievance.

Negotiations over background checks culminated in the Respondents' final offer on January 28, 1994. The parties have not told us what this offer was or what happened thereafter.

B. *The Parties' Contentions*

The General Counsel and the Union argue that the Union has a compelling need for the requested information to enable it to fulfill its collective-bargaining responsibilities by properly representing its members and pursuing its grievance. In this regard, they assert that the Union has a duty (1) to determine whether any adverse impact to represented employees occurred as a result of the Respondents' breach of their agreement to forego background checks; (2) to advise employees of their rights in case of adverse impact; and (3) to respond in an appropriate fashion either through the grievance procedure or otherwise.

In addition, the General Counsel and the Union assert that the Respondents have failed to demonstrate a legitimate and substantial confidentiality interest. They emphasize that the compliance statements contain no assurance of confidentiality. Further, they assert that because the sources for the audit data gathered by the Respondents were ''public records,'' the names of the persons who made the disclosure should not be considered confidential.

Assuming arguendo that the Respondents have demonstrated a legitimate and substantial confidentiality interest, the General Counsel and the Union argue that such confidentiality concerns do not outweigh the Union's need for the identity of the employees audited. They assert that disclosure causes no detrimental impact to the Respondents and does not violate any employee expectations of confidentiality. Finally, they argue that the Union did not waive access to the information set forth in the compliance statements by its

[1] Pursuant to the stipulated record, the Respondents maintain that they adhered to this commitment and met with the employees. The Union maintains that it has no knowledge of this.

agreement to treat such information as confidential, except on a need-to-know basis.

In contrast, the Respondents contend that the Union has failed to show that the information requested is relevant and necessary to evaluate its grievance or to engage in intelligent bargaining regarding administrative changes to the Respondents' alcohol and drug use policy. According to the Respondents, the identity of the specific individuals who were audited is not relevant or necessary to resolution of the Union's grievance because the grievance relates to whether management had the right to conduct the audit, and not to who was audited. Similarly, the Respondents assert that the individual identity of employees audited in the past bears no relationship to negotiations over the future right to conduct audits.

Assuming arguendo that the information requested is in fact relevant and necessary, the Respondents argue that the Union's showing of need is clearly outweighed by confidentiality concerns under *Detroit Edison* criteria.[2] Applying that criteria, the Respondents submit that the nature of the information sought is inherently private and highly sensitive; that the burden imposed on the Union is minimal; and that the Respondents' concern for confidentiality is genuine. Thus, on balance, the Respondents argue that they have not violated Section 8(a)(5) by refusing to furnish the Union with the identities of persons who have disclosed prior drug or alcohol-related arrests or convictions, or who have participated in a structured rehabilitation program.

C. *Analysis and Conclusions*

At the outset, we reject the Respondents' argument that the requested information is not relevant and necessary to enable the Union to fulfill its statutory duty to process the grievance and fairly represent the unit employees. The Board and the courts apply a liberal, discovery-type standard of ''probable or potential relevance'' in determining whether a bargaining representative is entitled to requested information for these purposes.[3] As explained below, the information requested by the Union here meets this standard.

The Union's need for the requested information arises from the Respondents' own breach of their no-audit pledge. Until the Union ascertains the identity of the 22 unit employees who had their compliance statements audited, the Union has no way of verifying whether the Respondents accurately applied their asserted selection criteria when conducting the background audits in contravention of their prior agreement not to do so. The Union also needs the requested information to verify the accuracy of the Respondents' methods when conducting the background checks. For example, the Union is not required to accept the Respondents' determination of the number of unit employees who had disclosed prior incidents of drug or alcohol involvement on their compliance statements. It is entitled to verify independently the Respondents' determination.

In addition, the Union needs to know the identity of the 22 unit employees who were audited in order to request and examine their personnel files and determine whether, and for whom, the expunction remedy that was requested in the Union's grievance is and remains appropriate. Without knowledge of the identity of the employees who have been affected by the audit, the Union has no way of determining which personnel files to examine.

For these reasons, we conclude that the Union has established the relevancy and necessity of the requested information.

A union's interest in relevant and necessary information, however, does not always predominate over other legitimate interests. As explained by the Supreme Court in *Detroit Edison*, ''a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested.''[4] Thus, in dealing with union requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any ''legitimate and substantial'' confidentiality interest established by the employer. It is also well settled that, as part of this balancing process, the party making a claim of confidentiality has the burden of proving that such interests are in fact present and of such significance as to outweigh the union's need for the information. *Jacksonville Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). Thus, to trigger a balancing test, an employer must first timely raise and prove its confidentiality claim. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072–1074 (1995). Further, an employer possessing the information and refusing to disclose it on confidentiality grounds has a duty to seek an accommodation through the bargaining process. Thus, when a union is entitled to information about which an employer has legitimately advanced a confidentiality concern in a timely manner, the employer must bargain towards an accommodation between the union's need for the information and the employer's justified confidentiality concern. *Pennsylvania Power Co*., 301 NLRB 1104, 1105–1106 (1991).

Applying these principles here, we find some merit in the positions taken by both parties. As explained above, the Union needs the information to fulfill its responsibility to represent unit employees and pursue its grievance on their behalf. On the other hand, we find that the Respondents have timely raised and established a legitimate confidentiality concern about any

[2] *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

[3] *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435 (1967).

[4] 440 U.S. at 314.

unguarded disclosure of sensitive information. We also find, however, for the reasons discussed below, that the Respondents have not demonstrated that the confidentiality concerns that they have raised are of such significance as to outweigh the Union's need for the information.

As a threshold matter, the parties agreed to treat the information disclosed on the compliance statements as confidential, except on a need-to-know basis. However, unlike the situation in *Detroit Edison*, supra, the Respondents have not established that they made any promise of confidentiality to the employees. The privilege in question belongs to the employees, not to the Respondents. See *Johns-Manville Sales Corp*., 252 NLRB 368 (1980).

In *Johns-Manville*, the administrative law judge found, inter alia, that the respondent had violated Section 8(a)(5) by failing to provide the union with the names of employees whose medical files had been ''red-tagged'' (a status known to affected employees) because the respondent's doctors had diagnosed them as being partially disabled by pneumoconiosis, a lung disease. The judge found that the union had demonstrated its need to know the identities of the ''red-tagged'' employees for the purpose of administering the seniority provision of the extant collective-bargaining agreement that gave ''red-tagged'' employees certain additional seniority rights. He also found that the respondent failed to show that its doctors had kept the identities of red-tagged employees confidential and failed to show that it would suffer harm if the identities of such employees were disclosed to the union. Accordingly, the judge ordered the information turned over to the union.

The Board reversed the judge, in part, and struck the balance against disclosure. The Board found that the union had an alternative means to fulfill its bargaining responsibilities without the information and because the employer demonstrated a good-faith effort to accommodate the union by submitting disclosure consent forms to employees and then turning over to the union the names of employees who had consented to disclosure.

In this case, the Union has demonstrated its need to know which employees have been audited. Unlike in *Johns-Mansville*, the affected employees do not know their status. Although the Respondent agreed to actively encourage the audited employees to identify themselves to the Union or to permit the Respondents to divulge their identity after obtaining employee consent, the Respondents have not demonstrated that they have even submitted consent forms to affected employees, or demonstrated that they actually bargained with the Union over this issue. In addition, there is no evidence that the Respondents themselves treated the employees' identities in a strictly confidential manner or had obtained consent from the employees they investigated prior to conducting the audits. Thus, although we find that the Respondents have timely raised a legitimate confidentiality concern, we conclude that they have not shown that this concern outweighs the Union's need for the requested information.

Nonetheless, we have decided not to require disclosure of the requested information at this time. On balance, we conclude that an appropriate accommodation of the countervailing interests here can best be achieved by further bargaining. Our cumulative practical experience counsels that in similar circumstances, where there is counterbalancing substance to the positions taken by both sides, there should be, and almost always is, a way that the parties can effectively bargain toward a confidentiality agreement or protective order that will permit the disclosure of the needed information subject to safeguards negotiated by the parties to ensure its proper use.

Applying this reasoning and balancing the legitimate needs of both parties, we conclude that a conditional disclosure order is warranted. The Respondents have failed to establish that they sought to bargain with the Union in good faith towards a confidentiality agreement or protective order that would accommodate the Union's need for the information while safeguarding the information from unnecessary disclosure. Accordingly, we shall order the Respondents to disclose the requested information to the Union conditionally. The disclosure will be subject to the parties' bargaining in good faith to a mutually satisfactory confidentiality agreement, protective order, or other appropriate procedure.

ORDER

The National Labor Relations Board orders that the Respondents, Exxon Company USA and Exxon Chemical Americas, Baytown, Texas, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to supply Gulf Coast Industrial Workers' Union, on request, with the identity of union-represented employees who were audited, of those for whom discrepancies between self-disclosure and the audit were found, and of those who voluntarily informed management about apparent discrepancies in their compliance statements, without first bargaining in good faith for a mutually satisfactory confidentiality agreement, protective order, or other procedure that will accommodate the Union's need for the requested information set forth above while safeguarding it from unnecessary disclosure.

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

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

(a) On request, bargain with the Union in good faith for a mutually satisfactory confidentiality agreement, protective order, or other procedure that will accommodate the Union's need for the requested information while safeguarding it from unnecessary disclosure, and if such good-faith bargaining efforts are successful, disclose the requested information to the Union subject to the provisions of the parties' agreement.

(b) Within 14 days after service by the Region, post at their refinery and chemical plant in Baytown, Texas, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents 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 Respondents 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 Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since January 21, 1994.

(c) 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 Respondents have taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Gulf Coast Industrial Workers' Union, by refusing to supply the Union, on request, with the identity of union-represented employees who were audited, of those for whom discrepancies between self-disclosure and the audit were found, and of those who voluntarily informed management about apparent discrepancies in their compliance statements, without first bargaining in good faith for a mutually satisfactory confidentiality agreement, protective order, or other procedure that will accommodate the Union's need for the requested information set forth above, while safeguarding it from unnecessary disclosure.

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, on request, bargain with the Union in good faith for a mutually satisfactory confidentiality agreement, protective order, or other procedure that will accommodate the Union's need for the requested information while safeguarding it from unnecessary disclosure, and if such good-faith bargaining efforts are successful, disclose the requested information to the Union subject to the provisions of the parties' agreement.

EXXON COMPANY USA AND EXXON CHEMICAL AMERICAS