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NLRB Majority: Employer Not Required To Disclose Identity Of Bargaining Unit Informant

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An employer's duty to provide information to the union representing its employees is a frequent of topic of interest to labor relations practitioners because it is very easy to violate the law. For example, an employer's assertion that the information is confidential is not enough to justify failing to turn over the information. And, for a brief period of time we even saw it become unlawful for an employer to *fail to respond to an information* request even though there was no legal obligation to provide any information. Finally, we have reviewed how some unions seek to weaponize information requests by asking for information, such as how an employer spent any savings from a tax cut, in a blatant attempt to cause an employer to refuse to respond thereby giving reason to file unfair labor practice charges.

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In recent years, the NLRB has even demolished black letter precedent holding that witness statements need not be disclosed pursuant to an information request.

In Michigan Bell Telephone Co., 367 NLRB No. 74 (January 24, 2019),the NLRB addressed a situation where the union had requested the identity of a workplace "informant," a bargaining unit employee who had reported potential misconduct, and the employer refused to provide the information.

Background – A History of Overtime Disputes

The employer provides telephone service through the use of technicians who are represented by a union. The employer historically required the employees to work a great deal of mandatory overtime. A few years ago, union members got together and protested mandatory overtime by holding a "family night," whereby the employees banded together and refused to work on a certain evening. Like most collective bargaining agreements, the parties' agreement prohibited strikes. The union and employer had a dispute over the family night which resulted in a settlement agreement which included discipline for all unit employees who participated in the event.

The employer issued a new mandatory overtime policy which automatically extended the workday until management expressly released the techs. At a union meeting held shortly after the announcement of the new policy, bargaining unit members expressed their anger, and at least one technician suggested the group engage in another family night.

An informant employee told management that another family night could possibly occur that evening. Management assembled additional supervision to confront any employees who attempted to leave work without permission. 19 technicians returned without authorization and were questioned by management. All stated they were acting individually and not in a concerted fashion. The employer ordered all 19 technicians to return to work, and all returned to the job, except for five technicians who refused. The employer suspended the five technicians.

Union Wants Name of Informant and Other Information

The union learned that an informant had given information to the employer. The union requested the identity of the informant, a summary of what the informant told the employer, and a list of who in management had received

the information. The employer told the union it did not feel comfortable turning over any of the information requested and refused to do so.

The union filed a grievance alleging that the employer violated a provision of the collective bargaining agreement which states that if any union employees engage in a prohibited work stoppage, "without the authority and sanction of the [union], the Parties shall cooperate to enable [the employer] to carry on its operations without interruption or other injurious effect."

The General Counsel issued a complaint asserting all the requested information sought by the union was relevant and the employer should have provided it. The complaint also contained an allegation that the delay in turning over the information was a separate violation of the Act. After a trial, an Administrative Law Judge dismissed the complaint finding the information was not relevant to the processing of the grievance.

NLRB Majority Concludes Informant Identity was Not Relevant, But Summary of Information Triggered Duty to Provide Information

The NLRB majority (Chairman Ring and Member Kaplan) reviewed the law, and noted, "[a]n employer, as part of its duty to bargain, must provide requested information to a union if that information is relevant to the union's duties as the employees' collective-bargaining representative, including the union's grievance processing duties." Applying this standard to the case, the NLRB noted that the grievance filed by the union concerned whether the contract's prohibition against unauthorized work stoppages had been violated. In particular, the issue in the grievance was whether the employer had an obligation to cooperate with the union over stopping or minimizing such disputes. The Board concluded:

> The summary [of information provided by the informant] is relevant to the Union's evaluation and prosecution of [its] grievance because it directly answers the question of what the Respondent knew about the potential for a family night ….However, the Informant's identity and the distribution list are not relevant to the …grievance. Whether the Respondent had an obligation under [the collective-bargaining agreement] to cooperate with the Union does not depend on the identify of the specific employee informant or the identities of the managers to whom the Respondent disseminated the Informant's tip.

Thus, the employer's failure to turn over the summary of information was a violation of Section 8(a)(5) of the Act. Because the NLRB found the summary of the informant's tip was relevant, the Board also found the employer violated Section 8(a)(5) by failing to respond to the information request in a timely fashion.

Dissent Would Find All Information Relevant

Member McFerran agreed that the summary of information was relevant but would also have found that the identity of the informant and the list of managers to whom the informant's information was distributed were also relevant. In Member McFerran's opinion, "disclosure of that information would allow the Union to attempt to question the Informant and the people on the distribution list to verify the accuracy of the summary."

Takeaways

If employer's had to disclose the names of all witnesses to events in a bargaining unit then it is very likely no one would ever come forward to report misconduct. Anyone who has ever participated in a labor arbitration knows it is rare for bargaining unit employees to testify against one another. In this case, the decision of the majority was made easier by the fact it was undisputed the employees did not have a right to refuse overtime, in a concerted or other fashion. That a family night would violate the no strike provision was undisputed. The issue being litigated in the grievance was fairly novel, and fairly narrow: whether the employer had an obligation to cooperate with the union in the latter's attempts to stop an unauthorized walkout. This dispute did not depend at all on the identity of the informant or the information provided by the informant. For this reason, it is doubtful this case can be interpreted as a blanket rule that employers must not identify witnesses. Still, it is instructive, and it again shows the perils of simply not responding to an information request, even when the employer believed the information was not relevant.