Borgess Medical Center *and* Michigan Nurses Association. Case 7–CA–44040

September 20, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On March 5, 2002, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

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,[1] and conclusions as modified below and to adopt the recommended Order as modified..

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to supply hospital incident reports[2] requested by the Union that were relevant to the Union's preparation for an arbitration proceeding regarding the discharge of employee Harry Wagner. We agree with the judge's decision, as clarified below, but we will not require the Respondent to furnish the requested incident reports, nor to bargain with the Union over an accommodation of the Union's request.

Factual Background

Registered Nurse Wagner was discharged after giving the wrong medication to a patient—causing temporary paralysis—and then attempting to cover up the error, in part by omitting to file an incident report. (An incident report was filed instead by Wagner's supervisor.) Wagner grieved his discharge, and the Union, in preparation for arbitration, requested the Respondent's incident reports concerning other medication errors. The Respondent refused to supply this information on the grounds that it is confidential and protected from disclosure by State law.

The judge concluded that, although the Respondent made a timely claim that the incident reports were confidential, the Union's need for the reports outweighed the Company's asserted interest in withholding them. In addition, the judge concluded that the Respondent did not fulfill its affirmative duty to seek an accommodation with the Union. The judge ordered the Respondent to permit the Union to view the requested incident reports.

As discussed below, we find that the Respondent established a legitimate confidentiality interest in the requested incident reports. We further find that the Respondent failed to satisfy its duty to accommodate its interests and the Union's need for the information. Nonetheless, we do not order the Respondent to produce the incident reports, because we find, in agreement with the Respondent's argument in exceptions, that the Union has no present need for the information.[3]

Confidentiality

The Board has recognized that state law deeming certain information confidential may be considered in assessing whether there is a legitimate confidentiality interest in that information. See *GTE California Inc.*, 324 NLRB 424, 427 fn. 10 (1997). Here, the record shows that Michigan state law protects from disclosure health care facilities' self-review documentation.[4] The judge found that the public policy behind the statute was to insure that these facilities provide the best and most competent healthcare possible. No party disputes that finding, and it is undisputed that the Respondent uses its incident reports to identify trends and improve its processes so as to reduce the likelihood that a patient will suffer serious injury or death as a result of a treatment error. We acknowledge the State of Michigan's public policy interest in such self-critical documentation in the health care context. Furthermore, the Michigan Supreme Court has recognized the importance of the "assurance of confidentiality" provided by state law in fostering candid self-assessment by health care facilities to improve patient care. See, e.g., *Dorris v. Detroit Osteopathic Hospital*, 594 N.W.2d 455, 462–464 (Mich. 1999). We

[1] The judge found it unnecessary to make credibility determinations in this case. The Respondent excepts to that finding but has not identified any material conflict in the testimony of the witnesses that would require a credibility determination. We find no merit in the Respondent's exception.

[2] An incident report is a preprinted form, subtitled "Confidential Report in Contemplation of Litigation," that the Respondent requires employees to complete in order to document problems that occur in treating patients. The Respondent's Management Guide explains that the reports are used to "(1) detect trends; (2) develop appropriate remedies; (3) minimize claims; (4) ultimately reduce or stabilize insurance premiums; and (5) contribute to the overall safety and quality of care at Borgess."

[3] Because we find the Union's information request moot, we need not order bargaining, and we need not balance the parties' respective interests.

[4] Michigan's Peer Review Statute states: "The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena." MCLA 333.20175 (8); see also MCLA 333.21515.

therefore find that the Respondent has established a legitimate confidentiality interest in the incident reports.[5]

Accommodation

Nonetheless, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by failing to offer a reasonable accommodation of the Union's request.[6] When an employer demonstrates a substantial confidentiality interest, it cannot simply ignore the Union's request for information. It must still seek an accommodation of its concerns and the Union's need for the requested information. The burden of formulating a reasonable accommodation is on the employer; the union need not propose a precise alternative to providing the requested information unedited. *United States Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998) (citing *Tritac Corp.*, 286 NLRB 522, 522 (1987)).

Here, the Respondent failed to offer a reasonable accommodation to the Union. In so finding, we do not rely on the judge's view that the Respondent "made no effort" to negotiate an accommodation. The Respondent's attorney did offer, during a conversation with the Union's attorney on the day of the request, to produce its Emergency Department director to assert that there were other employees who made medication errors and had not been disciplined, rather than turning over the requested incident reports.

We conclude, however, that the Respondent's offer failed to adequately fulfill its duty to accommodate. As the Union attorney explained during her discussion with the Respondent's attorney, the Emergency Department director's testimony could not supply the Union with the information it needed to assess Wagner's grievance. The Respondent did not offer to provide any evidence regarding the specific circumstances of previous incidents, which would be necessary to determine whether Wagner had in fact been unfairly treated. (The incident reports, in contrast, provided some description of what each incident involved.) Certainly, the testimony offered by the Respondent would not establish whether other employees had self-reported and, if not, whether failure to do so had been treated as a coverup warranting discipline.[7] In a letter subsequent to this conversation between the parties' attorneys, the Respondent simply stated its willingness to discuss the matter and did not offer any specific accommodation.[8] We therefore conclude that the Respondent did not adequately offer to accommodate its confidentiality interests and the Union's need, as required under Section 8(a)(5) and (1).

REMEDY

Although we find that the Respondent has violated the Act, we do not order the Respondent to permit the Union to view the requested incident reports, as recommended by the judge. Rather, we agree with the Respondent that, under the circumstances here, the Union no longer has an on-going need for the information requested.

The Union requested the incident reports with respect to a grievance it filed on behalf of discharged nurse Wagner. That grievance went to arbitration, and the arbitrator issued a decision in the Respondent's favor on July 18, 2001. According to the Respondent (and there is no evidence to the contrary), no appeal was taken by the Union. The Union has not asserted that it needs the information to pursue Wagner's grievance in another forum and has not indicated that it needs the incident reports for any other matter. We therefore find that the Union's need for the requested information has ceased and we decline to order the Respondent to produce the information. See, e.g., *Westinghouse Electric Corp.*, 304 NLRB 703 fn. 1, 709 (1991) (no affirmative order to produce requested information in light of judge's finding that only demonstrated relevance of information was to a concluded arbitration that the arbitrator was without authority to reopen); cf. *Postal Service*, 307 NLRB 429 fn. 2 (1992) (limiting denial of an affirmative order to case in which there is a showing that the only possible relevance of requested information is in connection with a

[5] Because the incident reports are not prepared by an attorney or by participation with an attorney, we find no merit in the Respondent's assertion that the requested documents are protected by the attorney-client and work product privileges. See *ASARCO, Inc.*, 276 NLRB 1367, 1368–1369 (1985), enf. denied in part on other grounds 805 F.2d 194, 199–200 (6th Cir. 1986). The Respondent's associate general counsel, Heather Hudson, testified that, once completed by an employee, an incident report is sent to the department director for review and then forwarded to the risk management staff of the legal affairs and risk management department, most of whom are not attorneys, for entry into the Respondent's database. Only incident reports that concern severe occurrences are forwarded to individual attorneys in the department for legal consideration.

[6] Contrary to the dissent, we have made no finding that the Respondent violated Sec. 8(a)(5) by failing to turn over the incident reports. The violation was the failure to bargain about a possible accommodation."

[7] Although the Respondent's associate general counsel testified that the incident reports did not document coverups, it would presumably be apparent from viewing them whether or not other employees who committed medication errors had self-reported. Moreover, by cross-checking the incident reports against the Respondent's corrective action reports, which the Respondent provided at the Union's request, the Union could determine instances in which medication errors had been made that were not self-reported yet did not result in corrective action.

[8] Although the Respondent had, on previous occasions, given the Union summaries of requested incident reports as well as the names of the employees who filed the reports, the Respondent made no such offer to accommodate here.

closed arbitration proceeding that the arbitrator has no authority to reopen).[9]

Our dissenting colleague asserts that the finding of a violation here *requires* that we order the Respondent to provide access to the requested information. That assertion is incorrect. We have found that the Respondent refused to bargain in good faith because it refused to offer a reasonable accommodation of the Union's request. If the information were not moot, the appropriate remedy would have been to order the Respondent to bargain with the Union. If bargaining had not resolved the matter, the Board would then balance the interests. *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999) ("The appropriate remedy in these cases is to give the parties an opportunity to bargain" over an accommodation). We need not decide these matters because the Union's request is now moot.

The dissent's assertion that the conclusion of a grievance proceeding does not moot the Union's entitlement to the information is not supported by the cases it cites. In *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1989), enfd. 943 F.2d 741 (7th Cir. 1991), the Board ordered the Respondent to provide the requested information because, despite subsequent events, the Board found that the Union still needed the information. The dissent also cites *Bloomsburg Craftsmen*, 276 NLRB 400 fn. 2 (1985), which relies on *Washington Gas Light Co*., 273 NLRB 116 (1984) for support in ordering an employer to provide information after the conclusion of a grievance procedure. However, there was no mootness claim made in *Washington*, and the Board ordered the employer to provide the information because the union's need outweighed the employer's asserted confidentiality interest. Id at 116–117. By contrast, we do have a mootness claim here.

We agree with our colleague that the issue of whether there is a violation is to be determined by the facts as they existed at the time of the union request. However, the *remedy* for that violation must take into account the facts as they exist at the time of the Board's order. Where, as here, there is no longer a need for the information, it is pointless to order bargaining about its supply, or to engage in the delicate act of balancing important interests.

Contrary to the assertion of our colleague, we do not suggest that a union has the burden of showing an ongoing need for the information. We hold that the Respondent has met its burden of showing that the stated need for the information is no longer present. And, although our colleague speculates that there could be other needs for the information, the Union has not shown any other need.[10]

We do not agree with our colleague that our approach creates an incentive for employers to delay in the furnishing of information. That would be true only for employers who wish to flout the law and only in situations where such employers accurately predict that the request will be moot by the time of a Board order. We are unwilling to speculate that those propositions will generally be true.

Our colleague says that there may be another need for the information. There is not even a contention by the union that this is so, and any such need is purely speculative.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Borgess Medical Center, Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"1(a) Failing and refusing to offer a reasonable accommodation to the Union concerning the Union's request to view the incident reports."

2. Delete paragraph 2(a) and reletter subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the administrative law judge.

MEMBER LIEBMAN, dissenting in part.

Despite finding that the Respondent violated the Act by failing to turn over the incident reports requested by the Union or to bargain with the Union for an accommodation, the majority declines to order the Respondent to produce the reports, citing the end of the arbitration proceeding that prompted the request.[1] But it is well established that the

[9] The dissent's attempt to limit *Westinghouse* to its facts is unavailing. *Westinghouse* and *Postal Service* both stand for the proposition that where it is shown that there is no longer any need for requested information, the Board will not require the Respondent to provide it. Here, not only is the grievance procedure complete, but the Union has not even argued that it is prejudiced by the lack of the requested information. Cf. *Metropolitan Edison Co.*, supra at 107 fn. 6. (finding request not moot despite grievance settlement because information was still "potentially relevant").

[10] Even if the arbitrator here could reopen the arbitral proceeding, there is not even a request that he do so.

[1] My colleagues observe that if not for their finding of mootness, "the appropriate remedy would have been to order the Respondent to bargain with the union" and that only where bargaining does not resolve the matter does "the Board . . . then balance the interests." In fact, the analytical framework is not so clearly defined as the majority suggests. See, e.g., *Washington Gas Light Co.*, 273 NLRB 116, 116–117 (1984) (ordering the employer to produce employee disciplinary records that did not refer to medical problems because employer's confidentiality interest was not so great as to warrant refusal to provide any of the requested information and was outweighed by union's need). In any case, in light of my colleagues' conclusion that the request is moot, their statement of the analysis that would apply absent such a

> right of the Union to the information requested must be determined by the situation which existed at the time the request was made, not at the time the Board or the courts get around to vindicating that right.

Mary Thompson Hospital, 296 NLRB 1245, 1250 (1989), enfd. 943 F.2d 741 (7th Cir. 1991). Indeed, the Board specifically has held that the conclusion of a grievance proceeding does not moot the union's entitlement to information. See, e.g., *Bloomsburg Craftsmen*, 276 NLRB 400, 400 fns. 2, 405 (1985). That approach is necessary to avoid creating an incentive for employers to refuse to promptly disclose requested information and to foster a productive bargaining relationship between employers and their employees' representatives. My colleagues err, then, in departing from precedent.

My colleagues assert that *Westinghouse Electric Corp.*, 304 NLRB 703 fn. 1 (1991), and *Postal Service*, 307 NLRB 429 fn. 2 (1992), stand for the general proposition that "where it is shown that there is no longer any need for requested information, the Board will not require the Respondent to provide it" and state that, here, "the Union has not even argued that it is prejudiced by the lack of the requested information." I am not persuaded that the cases support my colleagues' view. To the extent the majority intends to suggest that the Union here bears the burden of showing an on-going need for the requested information, which the Respondent has unlawfully refused to provide or adequately bargain over, that view is simply contrary to the law. See *Postal Service*, 307 NLRB at 429 fn. 2 (ordering production of requested information because the respondent made no showing that the circumstances existed to vitiate the union's entitlement to the information). Thus, my colleagues' reliance on the fact that the Union has not shown that it needs the information to pursue Wagner's grievance in another forum or for some other purpose incorrectly places the burden on the Union.[2]

To the extent the majority recognizes that the Respondent here bears the burden of showing mootness, but intends to suggest that the Respondent has met that burden, I disagree. As the Board later explained, the denial of an affirmative order in *Westinghouse Electric* was based on the judge's unexcepted-to findings that the only possible relevance of the requested information was to a proceeding to reopen the arbitration, which the arbitrator was powerless to do. *Postal Service*, 307 NLRB 429 fn. 2 (1992). Because there were no such findings in *Postal Service*, the Board ordered the employer to provide the requested information. Here, the Respondent relies solely on the assertion that no appeal had been taken from the arbitrator's decision. But this assertion is insufficient, in itself, to satisfy the Respondent's burden, particularly where the Respondent has failed to establish, or even argue, that the arbitrator cannot reopen the proceeding. Cf. *Westinghouse Electric Corp.*, 304 NLRB at 703 fn. 1. Thus, there is no basis for denying the Union the requested information.

In focusing on the pendency of the grievance process as the sole possible basis for relevance of the requested information here, the majority loses sight of the larger context in which requests for information occur. The parties' relationship is not limited to the confines of a particular grievance proceeding. Rather, an individual employee's grievance implicates the on-going relationship between the parties. As the Supreme Court recognized in *NLRB v. City Disposal Systems Inc.*, 465 U.S. 833, 832–833 (1984), "collective bargaining is a continuing process." See also *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967) ("There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties . . . . Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of the agreement." (Citations omitted.)). The outcome of a particular grievance or reconsideration of a grievance may become a bargaining chip between the parties in future negotiations. The view that the relevance of information germane to resolving a grievance endures only through the arbitration proceeding is short-sighted in that it fails to recognize the on-going relationship between the parties of which the grievance process is only a part. That relationship benefits from a free flow of information. This is precisely what the Board's liberal discovery-type standard for determining relevancy of requested information is designed to encourage. *Local 13, Detroit Newspaper*

finding is dicta. Because the Respondent has failed to meet its duty to bargain with the Union for an accommodation and has not, in my view, shown that its confidentiality interest outweighs the Union's need, I would order production of the incident reports here. Id; cf. *BP Exploration*, 337 NLRB 887, 887 (2002) (employer has no duty to supply information where it showed that it had a strong confidentiality interest that outweighed the union's need for the requested documents and had offered an adequate accommodation).

[2] It may be that the majority simply means to imply that once the respondent shows the termination of a grievance proceeding with regard to which information has been requested, the charging party has a burden to produce some evidence of future need. If so, that approach has not been clearly articulated in the Board's law. Thus, even assuming such a burden exists, the Union here could not be expected to be aware of it. The Board should therefore remand this case to the administrative law judge to give the Union an opportunity to meet the burden the majority for the first time imposes.

Printing and Graphic Communications Union v. NLRB, 598 F.2d 267, 271 (D.C. Cir. 1979).

The majority's position here also creates a tempting incentive for employers to refuse to provide unions with relevant information in connection with grievance proceedings: with enough delay, the request may be mooted.[3] An unreasonable delay in furnishing information that is relevant to the Union's role as the employees' bargaining representative, meanwhile, is as much a violation of Section 8(a)(5) of the Act as an outright refusal to furnish the information. *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001); *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992); *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). Where, as here, the union is handling an employee's grievance, such delay ultimately overburdens the arbitral process by undermining the union's ability to evaluate the merits of the grievance. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967). Because that result is clearly contrary to the Act's policies, as well as to constructive collective bargaining, I dissent.

APPENDIX B
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 refuse to bargain with Michigan Nurses Association, as the exclusive bargaining representative of the employees in the following bargaining unit, concerning the Union's request to view our archives of incident reports when such are relevant and reasonably necessary for administering the labor agreement and for the processing of grievances:

> All registered Professional Nurses and Graduate Nurses employed by the Company and classified as full-time, regular part time, and part-time employees (part-time employees are regular scheduled to work sixteen (16) hours or more per week), excluding Directors, Supervisors, Clinical Nurse Specialists, Nurse Educators, Clinical Managers, Nurse Practitioners, Infection Control Specialists, Stomal Therapists, Employee Health Outcome Specialists, members of the Order of the Sisters of St. Joseph, PRN Nurses, and other employees.

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.

BORGESS MEDICAL CENTER

Steven E. Carlson, Esq., for the General Counsel.
David M. Buday, Esq., for the Company.
Anita Szczepanski, Esq., for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a refusal to provide information case. At the close of a 1-day trial in Grand Rapids, Michigan, on February 5, 2002, and after hearing oral argument by government, union and company counsel, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (Board) Rules and Regulations setting forth findings of fact and conclusions of law. This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (Exceptions) to the Board.

For the reasons stated by me on the record at the close of the trial, I found Borgess Medical Center, (Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) when since on or about April 19, 2001, and thereafter, it refused to allow the Michigan Nurses Association (Union) access to view the Company's archives of incident reports. I concluded the requested information was relevant and necessary for the Union, which represents the Company's registered nurses, to properly perform it duties in representing the unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The record established the Union requested the information in question in preparation for an arbitration proceeding related to the discharge of one of the unit registered nurses. While the Company made a claim of confidentiality related to the incident reports in question, I concluded that on balance the Union's obtaining the information outweighed the Company's need to retain it. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). I also noted the Company did not fulfill its affirmative duty to seek an accommodation with the Union on the requested information at the time it refused to provide the information. *GTE*

[3] Unions should take heed from today's decision. Given the unfortunate delay in the Board's handling of cases, a grievance proceeding may well have terminated by the time the Board decides whether an employer failed to provide information unlawfully. As evidenced in the majority's decision today, that fact may render a remedy for the request moot if the union does not expressly identify a potential future need for the requested information, aside from its immediate need when the request was made.

California Inc., 324 NLRB 424 at 427 (1997). I directed the Union to designate an individual to view the incident reports and authorized the Company to redact patients names, social security numbers and other patient identifying information on the incident reports. I also directed that if the Union sought to use redacted incident reports in any proceeding it would seek a protective order from the presiding judge or arbitrator before attempting to introduce such into evidence. While recognizing that the application of an attorney-client privilege to a corporate client poses a somewhat different set of considerations I, nonetheless, rejected the Company's contention the privilege was applicable in this case. I likewise rejected the Company's contention the matter was moot because the arbitrator has issued his award in the underlying grievance.

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 148 to 169, containing my bench decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I recommend the Company be ordered to, upon request, provide the Union access to view incident reports that are relevant and reasonably necessary for administering the labor agreement and for the processing of grievances. I specifically note the Company may redact from the incident reports patients names, social security numbers and other patient identifying information. I recommend the Company be ordered, within 14 days after service by the Region, to post at its facility an appropriate "Notice to Employees," copies of which are attached hereto as "Appendix B" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these conclusions of law, and on the entire record, I issue the following recommended[2]

ORDER

The Company, Borgess Medical Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to allow the Union access to view its archives of incident reports.

(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, allow the Union access to view our incident reports.

(b) Within 14 days after service by the Regional Director of Region 7 of the National Labor Relations Board, post at its facility, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken 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 Company has gone out of business or closed, the Company shall duplicate and mail, at its own expense, a copy of the notice to employees, to all employees employed at any time since April 19, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

APPENDIX A

BENCH DECISION

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JUDGE CATES: On the record. This is my decision in Borgess Medical Center herein Company in Case No. GR 7–CA–4040.

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First, I wish to thank the parties for their presentation of the evidence. If you will reflect over the Trial, I have not asked any questions and that is always an indication Counsel have done their job and developed the evidence fully and I thank you for that.

Let me also state that it has been a pleasure being in Grand Rapids, Michigan. I understand from someone just a little while ago that this is the hometown of Gerald R. Ford and I wish him well.

This is an unfair labor practice Case prosecuted by the National Labor Relations Board, herein Board's General Counsel, herein Government Counsel, acting through the Regional Director for Region 7 of the Board. Following an investigation by Region 7's staff, the Regional Director for Region 7 of the

[1] I have corrected the transcript pages containing my bench decision and the corrections are as reflected in appendix C which is unpublished.

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgement of the 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".

Board issued a Complaint and Notice of Hearing, herein Complaint on July 30, 2001 based on an unfair labor practice Charge filed on May 22, 2001 by Michigan Nurses Association, herein union.

Certain pertinent facts in this Case are admitted, stipulated and undisputed. It is necessary in Board Cases to set forth jurisdictional and related information, which I shall now do.

It is admitted the Company is a Corporation with an office and place of business located in Kalamazoo, Michigan where it is engaged as a healthcare provider in the operation of an acute care hospital. During the calendar year ending December 31,

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2000, a representative period, the Company derived gross revenues in excess of $250,000.00 and purchased and received at its Kalamazoo location goods valued in excess of $50,000.000 directly from suppliers located outside the state of Michigan. The evidence establishes, the parties admit and I find the Company is an Employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the National Labor Relations Act as amended, herein Act. The evidence establishes, the parties admit and I find the union is a labor organization within the meaning of Section 2(5) of the Act. The parties admit that the following employees of the Company constitute an appropriate unit for the purpose of collective bargaining within the meaning of the Act. "All Registered Professional Nurses and Graduate Nurses employed by the Company and classified as full-time, regular part-time and part-time employees (part-time employees are regular, scheduled to work 16 hours or more per week) excluding Directors, Supervisors, Clinical Nurse Specialists, Nurse Educators, Clinical Managers, Nurse Practitioners, Infection Control Specialists, Thomo (phonetic) Therapists, Employee Health Outcome Specialists, members of the Order of the Sisters of St. Joseph, PRN Nurses and other employees."

It is admitted that since on or about March 19, 1999 and at all times material herein, the union has been the designated exclusive collective bargaining representative of the employees

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in the unit and has been so recognized, at least, since that time by the Company. Such recognition has been embodied in a collective bargaining agreement, which is effective from March 19, 2001 to March 18, 2004. The parties, also, admit that since March 19, 1999, based upon Section 9(a) of the Act, the union has been the exclusive collective bargaining representative of the unit.

It is admitted the union requested of the Company in writing on April 19, 2001 that it be provided with certain information. The specific information sought by the union is the Company's archives of, "incident reports," It is admitted the Company has not provided access to or the reports in question.

It is alleged the information sought is relevant and necessary for the union's performance of its duties as the collective bargaining representative of the unit. Specifically, it is alleged the Company's failure to provide access to review or the requested information violates Section 8(a)(5) and (1) of the Act.

The Company denies having violated the Act in any manner alleged in the Complaint.

This Case, unlike most cases, does not require that I make any credibility determinations. The facts that I will set forth I have gleaned from the union Counsel's testimony from Associate General Counsel Hudson's testimony; that is, Company Associate

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General Counsel and from the Executive Nurse's testimony, very brief though it was. According to Company Associate General Counsel Hudson, the Company operates a large Medical Center that employs approximately 2,500 employees, 600 of which are in the bargaining unit, which is composed, as I understand it, of Registered Nurses and those otherwise set forth in the unit description that I referred to earlier.

The Medical Center provides acute care, emergency, trauma and other medical services to the area of Kalamazoo, Michigan. Pertinent to this Case is what is referred to throughout as incident reports. An incident report is a document that appears to, in its general form, be a one-page document and it is so labeled as an incident report. Underneath it, that is underneath the caption, incident report, are the words, confidential report in contemplation of litigation (not part of medical or personnel record).

According to Associate General Counsel Hudson, the reports could be prepared by anyone and there are certain items that are to be checked on the report, if applicable; that is, if it involves a patient or if it simply involves an employee of the hospital. More will be said about the report as we proceed through the decision.

The facts herein are that a bargaining unit member, specifically, Registered Nurse, Harry Wagner, was discharged by The Company on or about March 8, 1999. Pursuant to the party's

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collective bargaining agreement and more specifically, pursuant to Article VI thereof, the union on or about June 23, 1999 filed a grievance with the Company regarding Registered Nurse Wagner's discharge. The grievance was taken through the grievance arbitration procedure up to and including arbitration.

Prior to the arbitration Hearing, conducted before Arbitrator Peter D. Jansen, the union, by its Attorney, on April 10, 2001 made a written request for certain information from the Company. The union, by its Attorney, on April 21, 2001, modified its request for certain information, limiting the request to union's Counsel being allowed to view the Company's "archives of incident reports".

The union's Attorney spoke with the Company's Attorney on April 19, 2001 about the union's information request. She spoke with outside Company Counsel. The conversation took place via telephone with the Company's Attorney wanting to know why the union wished to view the incident reports. The union's Attorney explained she wished to see if medication errors were reported on incident reports where no discipline was administered as a result of the medical errors. It appears medication errors were of concern in the grievance regarding the discharge of Registered Nurse Wagner.

The Company's Attorney explained to union Counsel that Michigan state statutes precluded the release of the requested

"incident reports". The two Attorneys had no

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further oral communication prior to the date of the arbitration on the matter of the information request. However, the Company Attorney wrote union Counsel about the information request on April 25, 2001. In the April 25, 2001 letter, the Company Attorney explained that the information sought that was contained in the incident reports was protected by the privilege afforded by the Peer Review Privilege as reflected in Michigan law, specifically, MCLA 333.20175(8) and 333.21515. The Company's Attorney explained that Peer Review Privilege is designed to allow hospitals to review its practices and procedures in order to improve the quality of care provided to its patients.

The Company's Attorney stated, in his April 25, 2001 letter that the Company's interest in reducing mortality and generally protecting the interests of its patients and improving healthcare outweighed any interests the union might have or could make of the requested information and accordingly, it was refusing to provide the information.

It is undisputed the Company never, at any time, provided the incident reports to the union, as requested in its April 19, 2001 modified request. When I say, modified request, the April 10, 2001 request of the union was broader than its narrow April 19, 2001 request.

The union's Attorney testified the union needed the information to see if medication errors always

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resulted in discipline; to see who initiated incident reports; to see where no incident report was made, if the Company in those situations contended such constituted a "cover up"

I note that a, "cover up," of medication errors was a concern in the arbitration related to the discharge of Registered Nurse Wagner.

The union's Attorney also explained the union needed the information in the incident reports to ascertain, if when an employee failed to file an incident report, did the employee's Supervisor do so? The union's Attorney indicated that Wagner's Supervisor, Dee Hoffman filed an incident report in the Wagner discharge and that Wagner did not do so.

Again, the union's Attorney testified the union needed to review the incident reports to see if where there was no self-reporting by the Registered Nurse involved, was the Registered Nurse charged by the Company with a cover up of the incident?

As I indicated earlier, in-house Associate General Counsel, Heather Hudson, testified anyone could file an incident report at the hospital. Associate General Counsel Hudson testified there are essentially two types of incident reports, one involving patients and visitors and the other employee incident reports. Hudson testified that after an employee files an incident report, such goes to the Department Director of the filing employee for the Director's comments and then is directed to the Legal Affairs and Risk Management Department where she,

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two other Attorneys, the Company's General Counsel, along with certain Legal Assistants work. Associate General Counsel Hudson testified there are nine individuals employed in the Legal Affairs Risk Management Department.

Associate General Counsel Hudson, in her testimony, explained the purpose of the Company's "incident reports," was to detect trends, to develop remedies, to minimize claims, to reduce and stabilize insurance premiums and to contribute to the overall safety and quality of care at the Company. Hudson explained that all information on the incident reports is confidential and used only for carrying out professional practice reviews.

Associate General Counsel Hudson explained that the incident reports are protected and if released to anyone outside Legal Affairs and Risk Management, would jeopardize the state's statutorily provided protection the reports are afforded. Associate General Counsel Hudson explained the danger of releasing such information to say the union, in this Case, that she feared the plaintiff's bar might subpoena the information from the union and be able to use it against the Company.

Associate General Counsel Hudson explained that the information was for possible anticipated litigation but was not toward any specific litigation. Associate General Counsel Hudson testified regarding Registered Nurse Wagner's discharge that it really concerned a, "cover up," by

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Wagner of a medication error or errors and not the medication error or errors alone. Hudson did acknowledge that the incident report was one piece of information looked at by the Company, in its decision to terminate Wagner. Hudson indicated cover up was not mentioned in the incident report.

On Cross-Examination, Associate General Counsel Hudson testified written summaries of incident reports had, in the past, been provided to the union. She, also, acknowledged the Company had, on occasion, provided the union the identity of a person or persons filing an incident report and informed the union it could question the individual or individuals.

Associate General Counsel Hudson stated that, on occasion, incident reports had been provided to the union but that such was against the Company's policy. Hudson could recall at least one incident where an individual had been disciplined based upon an incident report without an independent investigation. Hudson explained normally there were independent investigations of incident reports and it was on the basis of the independent investigations that discipline was or was not administered. Hudson explained that the incident report served as more than notice. Hudson explained that incident reports and disciplinary investigations are two very separate and distinct things.

Chief Nurse Executive Janik explained that incident reports are used to identify trends, in how the Company is providing healthcare service and how it may improve its healthcare

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service.

In looking at the Case herein and applying the facts to pertinent law, it is helpful to quickly review some general law that is applicable, in this Case.

The principle has long been established that an Employer is under a duty to provide a union which represents the Employer's employees with information requested by the union, which is relevant and necessary for the proper performance of the union's duties in representing the unit employees, *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); *NLRB v. Truitt Manufacturing, Co.,* 351 U.S. 149 (1956). A failure to fulfill the obligation to furnish relevant information upon request conflicts with the statutory policy to facilitate effective collective bargaining.

Proctor & Gamble Mfg. Co. v. NLRB, 603 F.2d 1310 at 1315 (8th Cir., 1979). The duty to furnish information turns on the circumstance of the particular Case. *Emeryville Research Center v. NLRB*, 441 F.2d 880 at 883 (9th Cir., 1971). This duty extends, not just to information which is useful and relevant for the purposes of contract negotiations, but, also, to that which is necessary to informed administration of a collective bargaining agreement. *Safeway Stores*, 252 NLRB 1323 (1980); *Bacardi, Corp.,* 296 NLRB 1220 (1989). The key question in determining whether information must be produced is one of relevance. The

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standard for relevancy is a liberal discovery type standard and the sought after information need not necessarily be dispositive of the issue between the parties but rather only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities. *Bacardi Corp*.

It is well established, however, that information concerning the terms and conditions of employment of unit employees is presumptively relevant and must be furnished. *Madison Center*, 330 NLRB No. 72 (January 13, 2000). The duty to furnish or provide information is not absolute. As the Supreme Court held in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), there must be a balancing of the interests of each side; the Employer's, in retaining information and the union's in obtaining it.

Confidentiality claims may justify a refusal to provide relevant information. In making these determinations, the trier of fact must balance the union's need for the information sought against the legitimate and substantial confidentiality interests of the Employer. However, it is also well settled that as a 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. The party refusing to supply information on confidentiality grounds has an affirmative duty to seek an accommodation. *GTE California, Inc*., 324 NLRB

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424 at 427 (1997). Thus, confidentiality where adequately established has been held to be a valid basis for declining to fully produced union requested information. *Bacardi Corp*. Stated differently, the right to disclose is not without limits and an Employer's obligation to provide such information is not unlimited.

Under certain narrow circumstances, an Employer may be excused from providing requested information presumed or shown to be relevant when the Employer has a good faith claim of undue burden, legitimate business needs for confidentiality or justifiable fear of violence or harassment of employees disclosure, generally, will not be required.

In *Detroit Newspaper Agency*, 317 NLRB 1071 at 1073 (1995), the Board stated confidential information is limited to a few categories; that which would reveal contrary to promises or reasonable expectations, highly personal information such as individual medical records or psychological test results; that which would reveal substantial proprietary information such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses and that which is traditionally privileged, such as memorabilia prepared specifically for pending lawsuits.

Blanket claims of confidentiality, however, will not be upheld. Confidentiality claims must be timely raised. The reason a confidentiality claim must be timely raised is so that

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the parties can attempt to seek an accommodation of the Employer's asserted confidentiality concerns.

Is the information that the union sought in this Case relevant and necessary, under the Board's standards? Yes, for the following reasons: A bargaining unit employee, specifically, Registered Nurse Wagner was discharged and one item or factor of consideration by the Company was the incident report filed by Wagner's Supervisor on the medication error attributed to Wagner.

Additionally, the Government established sufficiently that the incident reports were necessary to see if others had filed incident reports on medication errors and then for the union to be able to cross-check those with other documents to see if employees were disciplined, as a result thereof.

Further, the relevant need for the information was established for possible impeachment purposes by the union, if the incident report preparer, such as Supervisor Hoffman, should be called to testify.

The Company's contention, in its closing argument, that the incident reports will not show, for example, a cover up but will show only what took place further underscores the necessity of the relevancy of the information; that is, what took place surrounding a bargaining unit employee. While, as the Company contends, the primary purpose of the incident reports are to improve patient care, other uses have been made of the reports.

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As noted earlier, discipline was administered relying on an incident report only without an investigation of an independent nature on that occasion.

I am fully persuaded that the Government has established that the information sought by the union is relevant and necessary. Having determined that the requested information is relevant and necessary, is the Company still under any measure, privileged to withhold the information in question? The Company advances a number of contentions with respect to its being privileged to withhold the requested information.

First, the Company argues and not necessarily in the order the Company argued in closing argument, that the Attorney/Client Privilege precludes it from providing the informa-

tion requested by the union. It is well established that the Attorney/Client Privilege protects disclosure of communications, not the facts underlying those communications.

The situation becomes a little more complicated, however, when the client is a Corporation, as opposed to an individual because it is under those circumstances that you must look at who the collected information who it is provided to and what use is made of it. I think the Attorney/Client Privilege, based on Case law, is more encompassing than just advice that an Attorney gives to a client. The Attorney/Client Privilege, in my opinion, encompasses the information provided to the Lawyer upon

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which he bases the advice, at least, in some circumstances. Is the Company herein privileged to withhold the requested information on an Attorney/Client Privilege basis? No, for the following reasons: the Company has taken one of its documents and simply labeled it as a confidential report in contemplation of litigation. However, the Company acknowledges that it is not with an eye toward any specific litigation but simply the potential for future litigation.

Secondly, the Company has made other uses of the document other than those contemplated with a view of potential litigation. Inextricably intertwined with the Attorney/Client Privilege argument is the work product argument. I find that the work product privilege is even less applicable in this Case than would the Attorney/Client Privilege be. There is simply no showing in this record of any work product on the part of the legal department on the documents here that would preclude their production as a work product measure.

The Company, also, argues that it is privileged to withhold the requested information because of the statutes that I Referred to earlier that are the law of the land in thesovereign state of Michigan. The sovereign state of Michigan has certain statutes that protect from disclosure documents that are utilized for peer review. The public policy behind that being that the state of Michigan is interested in providing the best and most competent healthcare that can be provided. In

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light of that, the state permits its hospitals to collect certain information, on which it may base a review without having that information be subjected to scrutiny other than by the hospital itself.

Again, I find that the Company is not privileged under the state statutes to withhold the information for a number of reasons. First, the Company has made or utilized the reports in manners other than in peer review. It has, for example, at least on one occasion, administered discipline against an employee based on an incident report without an independent investigation.

Even if it had not have done that, I would still find that the Federal labor law would preempt the state law, in this Case, where Section 7 and Section 8 rights as set forth in the National Labor Relations Act would preempt the state statute to the extent that it was necessary for the Section 7 and Section 8 rights to be protected.

In this Case, the Section 7 and 8 rights that are being protected that would remove the Company's privilege of withholding the information is that the individual has certain rights that have been afforded to him through the collective bargaining representative, through a collective bargaining agreement. The individual has the privilege to file a grievance and his representative is entitled to information that would be necessary and relevant in making a determination as to the

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validity or the feasibility of pursuing the employee's grievance.

The Company would also argue the confidential nature of the documents preclude their disclosure and in this argument, it is a much more difficult case to answer. I shall go through it step by step and give my conclusion.

First, did the Company timely raise its confidentiality concerns with the union? Yes, it is clear that it did. It did so as early as the April 19 oral communication and its April 25, 2001 written communication with the union regarding its refusal to provide the incident reports.

Second, did the Company meet its obligation regarding attempting to accommodate the union's request while protecting its confidentiality concerns? No, the Company did not come forward, as is its burden. It has an affirmative burden to come forward and attempt to accommodate its confidentiality concerns and the union's request for information.

In addressing the Company's overall confidentiality claim, I am instructed by the Supreme Court to apply a balancing test in determining whether the Company will be required to produce the requested information. What are the Company's needs in support of its confidentiality claim?

First, the hospital contends and demonstrates that it needs to protect the confidentiality of those providing information to it upon which it can base a review as to whether it needs to

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clarify, change or correct procedure.

Further, in support of its need for confidentiality, the Company points to the state's statute, which privileges it under state law to withhold the information. Further, the Company demonstrates that the state Supreme Court supports its position to withhold the information. The Company, also, argues that public policy of better healthcare dictates that it withhold the information. Additionally, the Company argues that if it is not able to provide confidentiality to those providing information or filling out the reports the source of information so valuably needed for better healthcare will dry up, if not become non-existent.

What are the union's needs for the information it requests? The union contends and demonstrates that the livelihood of one of its members may be placed at risk if it cannot have adequate information surrounding its member's discharge. The union argues that the loss of livelihood by one of its members is extremely important to the union and rock bottom to its purpose.

I am persuaded that relevant information may justifiably be withheld only under the most specific and narrow circumstances. In the instant Case, I find the balancing procedure comes down in favor of disclosure for the following reasons.

First, the information regarding the loss by a unit member of the unit member's employment is of an extremely critical con-

cern, not only to the employee but to the employee's

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collective bargaining representative and the bargaining representative's efforts and attempts to protect where appropriate employee rights.

Secondly, the Company has breached its confidentiality in the past in that it has provided summaries of incident reports. It has provided names of those providing incident reports. It has provided, at least, on one occasion and perhaps two, actual incident reports to the union. So, its claim of confidentiality loses some of its luster in the numerous manners in which it has been violated.

The balancing act comes down in the favor of the union, also, because the Company made no effort to negotiate an accommodation with the union regarding its information requests. To simply state that it was available to discuss or communicate regarding the request does not meet the affirmative duty that the Company has to come forward and advance some form of an accommodation or, at least, negotiate with respect to some form of accommodation.

Third or Fourth, whichever I am up to, there is no showing that the request was, in any way, unduly burdensome on the Company.

The Company, also, raises the defense that the matter is now moot, that the arbitration has already been had and that is correct. The Arbitrator's decision and award is part of this record. Registered Nurse Wagner's discharge was upheld by the

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Arbitrator but I think the Board law is quite clear that mootness is not available as a defense in the failure to provide information.

Accordingly, I shall order that the Company allow the union access to review its incident reports and in doing so, the Company may redact any patient's name or names and any information that would specifically identify the patient or patients.

I further direct that the union designate a person to do the review of the incident reports and that individual is hereby directed to keep the information confidential to the issue at hand and if any information is utilized in any proceeding, such as an arbitration or an unfair labor practice case, the union is hereby directed to move the presiding Judge or Arbitrator for a protective order of any incident reports and information utilized. I shall direct that the Company post an appropriate notice, which I will attach to the certification of this decision.

The Court Reporter is obligated to provide me a copy of the transcript within 10 days or there about and upon receipt of that transcript, I will review the transcript pages that constitute my decision. I will make, if necessary, corrections thereon and I will certify the pages of the transcript that constitute my decision, as corrected, to the Board as my decision. I will serve that on the parties, also.

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It is my understanding that the period for appeal runs from the certification of my decision. However, I would invite you to follow the Board's rules and regulations, in case I have wrongfully interpreted those rules and regulations.

I will, as reasonably soon after I receive the transcript as I can, certify the same to the Board.

Let me, again, state, thank you Madam Court Reporter for taking down this Proceeding. Thank the parties for appearing and presenting the evidence and with that, this Trial is closed.

Off the record.

(Off the record.)

(Whereupon, the hearing in the above-entitled matter was closed.)