Ohio Power Company *and* Utility Workers Union of America AFL–CIO. Case 8–CA–8333

March 12, 1975

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On September 30, 1974, Administrative Law Judge Charles W. Schneider issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Ohio Power Company, Canton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

[1] Member Jenkins does not subscribe to, or find it necessary to rely on that part of the Administrative Law Judge's discussion related to, *Collyer Insulated Wire*, 192 NLRB 837 (1971), or its progeny, in affirming the decision by the Administrative Law Judge.

DECISION

STATEMENT OF THE CASE

CHARLES W. SCHNEIDER, Administrative Law Judge: On April 25, 1974, Utility Workers Union of America, AFL–CIO, the Charging Party, filed a charge, and on June 4, 1974, an amended charge, against Ohio Power Company, the Respondent, alleging that the Respondent had engaged in unfair labor practices within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et. seq.*, by refusing to provide Locals 111 and 116 of the Charging Party with information relevant to their performance as bargaining agents of the Respondent's employees. On June 6, 1974, the Acting Regional Director of the Board issued a complaint and notice of hearing upon the charges, asserting that the Respondent's action constituted unfair labor practices violative of Section 8(a)(5) of the Act. Service of the charges, the complaint, and the notice of hearing were duly made on the Respondent. On June 13, 1974, the Respondent duly filed its answer in which it admitted certain allegations of the complaint, but denied the allegations of unfair labor practices.

Pursuant to notice a hearing was held before me in Canton, Ohio, on July 23, 1974. All parties were represented, and were afforded full opportunity to be heard, to introduce and to meet material evidence, to present oral argument, and to file briefs. A brief was filed by the Union on August 26, 1974, and by the Respondent on August 27, 1974.

Upon consideration of the record and the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is now, and has been at all times material herein, an Ohio corporation, with its principal office and place of business located in Canton, Ohio, where it is engaged in the business of producing, generating, transmitting, and furnishing electric power to residential and commercial consumers. Annually, in the course and conduct of its business, Respondent receives goods and services valued in excess of $50,000 directly from points located outside the State of Ohio. Respondent receives gross revenues in excess of $500,000 per annum.

The Respondent maintains administrative units known as Division 2 (Canton and Coshocton Area), Division 4 (Zanesville), Division 7 (Tiffin), Division 9 (Lima), which administrative units are the only facilities of the Respondent involved herein.

The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Utility Workers Union of America, AFL–CIO, and its Local Unions 111 and 116 are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

The Respondent is a public utility. At all material times Local 111 of the Utility Workers Union has been the collective-bargaining representative, pursuant to certification by the Board and by contract, of employees of the Respondent in Division 7 (Tiffin) and Division 9 (Lima), an appropriate bargaining unit. At all material times Local 116 of the Utility Workers Union has similarly been the collective-bargaining representative of employees of the Respondent in Division 2 (Canton and Coshocton Area) and Division 4 (Zanesville), also an appropriate bargaining unit.[1]

Commencing on July 1, 1973, economic strikes occurred

[1] The specific composition of the units, which is stated in the complaint and admitted in the answer, need not be detailed here.

in the two bargaining units over contract negotiations. Local 111 ended its strike on December 9, 1973, and signed a new labor contract, effective January 28, 1974, through June 30, 1975. Local 116 ended its strike on December 14, 1973, and signed a new labor contract effective December 14, 1973, to June 30, 1975.

During the strike a number of striking employees in the appropriate units were replaced by the Respondent.

At the end of the strike the unions asked that all strikers be reinstated to their positions. The Respondent replied that it could not do that as to strikers whose positions were occupied by replacements, but said that it would offer them other vacancies for which they were qualified. As to those for whom there were no such positions, the Respondent said that it would put them on a preferential hiring list. This was in accordance with the Respondent's understanding of its obligations under the law to replaced strikers. (See *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967)). Those replaced strikers who accepted other positions with the Respondent were known as displaced employees. Those for whom there were no positions were known as replaced employees.

The preferential hiring lists were then established. The lists were explained to and discussed with the unions prior to their promulgation and prior to signing the contracts, and presumably had the understanding, acquiescence, and agreement of the unions. However, the provisions were not included in the contracts or reduced to writing as an agreement or understanding between the Respondent and the Unions.

For a number of years, with the apparent acquiescence of the locals, the Respondent has, in accordance with the exigencies of operating requirements, subcontracted to private contractors from time to time the performance of work normally performed by line or maintenance workers within the appropriate units — without prejudice to the employment of employees then within the units.

Each of the bargaining contracts contains a provision to the effect that the Respondent will neither lay off nor discharge any employee covered by the contract due to work being contracted for with outside parties.[2] This provision, in the same or substantially similar form, has been in the contracts for many years.

The Respondent's uncontested and accepted evidence is that it has never laid off or discharged any employee in the appropriate units, in the sense of removing him from the job, due to contracting.

As more specifically set out hereinafter, beginning in February 1974 grievances were filed by employees on the preferential hiring lists asserting that the Respondent's failure to reinstate them constituted a violation of the subcontracting provisions of the contracts. The locals then made separate written requests to the Respondent to provide them with information as to the extent of subcontracting in their units. The Respondent denied the requests as irrelevant, for the stated reason that no employees had been "placed on layoff or discharged because of work being done by contractors."

The issue here is the legality of the Respondent's action in denying those requests for information. Concurrently the Respondent declined to consider the grievances filed on behalf of employees on the preferential hiring lists based on the subcontracting provisions of the contracts, contending that they were not proper subjects of grievance procedure. Union attempts to submit the issue to arbitration, provided by the contracts as the terminal point in the grievance procedure, were rejected by the Respondent, as not involving "a grievance under the contract" and thus not an "arbitrable matter."

The events, beginning with the establishment of the hiring lists, is best stated in chronological fashion, as summarized below.

B. *Chronology*

December 10, 1973: The list of preferential hirees in the Local 111 unit is established. It contained 15 names. By July 17, 1974, shortly before the hearing, the Local 111 list had been reduced by reinstatement, acceptance of other employment, or other reason, to seven names.

December 24, 1973: The list of preferential hirees in the Local 116 unit is established. It contained 21 names. By July 22, 1974, the list had been reduced to nine names.

February 6, 13, 1974: Thirteen of the employees in Local 111's unit (nine from the Tiffin Division and four from the Lima Division), who were on the December 10, 1973, preferential hiring list, signed and authorized a grievance stating as follows:

> We the (attached) employees state that the Company has violated Article 16 page 34, and any other related Articles by the Company's unfair action of not returning us to our original Positions with all rights and privileges.
>
> In settlement of this grievance we request that the Company return us to our original Positions with all rights and privileges and backpay to December 10, 1973.[3]

February 10, 1974: Gene A. Potter, national representative of the Utility Workers Union, sent a letter to the Respondent requesting information as to subcontracting in the Tiffin and Lima Divisions. Insofar as pertinent this letter stated the following:

> In order to properly perform and police our Agreement between Ohio Power Company, Division 7 Tiffin, Division 8,[4] and Division 9 Lima – and particularly its Article 16, we will need disclosure on the various contractors which the Company employs.
>
> 1. We will need the name of each individual contractor engaged in Physical, Operating or Trades work, or work, which in the absence of

[2] Art. 5.5 of the Local 116 contract; art. 16.1 of the Local 111 contract. The text of art. 16.1 is: "The Company agrees that during the life of this contract it will neither lay off nor discharge any employee covered by this agreement due to work being contracted for with outside parties." The language of art. 5.5 is substantially the same.

[3] I find no authorizations for two employees on the Tiffin Division hiring list: B. M. Fouts and L. J. Stanton. In the Lima Division one of the grievants was Kent Zimmerly. I do not find Zimmerly's name on the December 10, 1973, preferential hiring list in the Lima Division.

[4] Division 8 has been absorbed into the other divisions (art. 1.1 of the current Local 111 agreement).

such contractor, the bargaining unit employees would perform.

2. We will need to know the nature and location of work, the expected length of the stay or tenure of the contractor and his expected date of completion.

3. We have to know the contractor's work week, i.e. the amount of hours which his men work.

4. We need to know whether it is a "bid" or "time and material plus" job and if it is a bid, the nature of the bid, e.g. "out-and-out flat money" or "unit bid" or "footage."

5. We could discuss with you overall costs.

February 15–20, 1974: The Respondent, in a series of letters to Local 111, refused to consider the February 6 grievance. Each letter, so far as pertinent, stated:

> Please be advised we do not consider that this request involves a proper grievance under the contract dated January 28, 1974, and therefore is not subject to the provisions of that contract.
>
> The question over the placement of the returning employees was discussed before the contract was signed and you were informed this was the procedure that would be followed. With your agreement on this issue, the contract was signed and the Company returned the employees in accordance with the outlined procedure.

February 23 and 27, 1974: The bargaining committee of Local 111 wrote letters to Lima Division Manager Springer and Tiffin Division Manager Eley, stating that the responses to the February 6 grievances did not meet with their approval, and requesting a conference to adjust the grievances.

February 28 and March 6, 1974: Division Managers Springer and Eley, in letters to Local 111, rejected the requests for conference. Springer's letter, and Eley's in language to the same effect, said in part:

> . . . we do not consider that this request involves a proper grievance under the contract dated Jan. 28, 1974, and therefore not subject to provisions of that contract.

March 7, 1974: L. P. Scales, the Respondent's personnel director, in reply to National Representative Potter's letter of February 10, 1974, requesting information as to contractors, declined Potter's request. Scales' letter said in pertinent part:

> Though Article 16 has many sections, the only section that refers to contractors is 16.1, so we presume you refer to that section.
>
> * * * * *
>
> In Local 111, there has been no employee placed on layoff or discharged because of work being done by contractors. That being the case, your request has no relevancy to 16.1. We know of no other section of the contract which concerns contracting out.
>
> In view of the above, we choose not to comply with your request.

March 6 and 9, 1974: The bargaining committee of Local 111 wrote to M. E. Rice, the Respondent's labor relations supervisor, stating that it was not satisfied with the answers of Division Managers Springer and Eley, and that it wished to meet with Rice concerning the grievances.

March 11, 1974: Richard L. Borden, shop committeeman in the Local 116 unit filed a grievance on behalf of two employees "laid off" in the Coshocton area. In the grievance Borden alleged that the presence of Hoosier Construction Company employees on company property in the area was in violation of article 5 of Local 116's contract.[5]

March 15, 1974: Rice, in written reply to Local 111's bargaining committee's letters of March 6 and 9, rejected the request for a meeting. To the extent pertinent, Rice's reply was identical in language with the Respondent's letters of February 15–20, quoted above.

March 20, 1974: Local 111 by letter advised Labor Relations Supervisor Rice that it was submitting the Local 111 grievances for arbitration under the contract. In pertinent part the letter stated the following:

> This letter is to inform you that Grievances L 74-1, L 74-2, T 74-1, and T 74-2 concerning the replaced and displaced people is being submitted for arbitration under Article 17.2.1 of the bargaining agreement.

March 25, 1974: Labor Relations Supervisor Rice by letter replied to Local 111's March 20 letter as follows:

> This will acknowledge receipt of your letter of March 20, 1974. As we informed you by letter dated March 15, 1974, we do not consider this matter a grievance under the contract dated January 18, [sic] 1974. Since this is not a grievance under the Grievance Procedure, we do not consider it an arbitrable matter.

April 9, 1974: Sixteen members of Local 116 employed in the Canton Division signed a grievance stating the following:

> The above men were grieved under Articles 2 (sec. 2.1 & 2.3), 3, and 5 (sec. 5.5) and any other article or law pertaining to this grievance. This grievance pertains to contractors performing work at the East Wooster substation while there are substation and other employees laid off. We want this stopped and all work by contractors until all employees are back to work.[6]

[5] Presumably referring to art. 5.5 of that contract, quoted *supra*. The phrase "laid off" refers to two employees from the Coshocton area on the preferential hiring list.

[6] The Respondent's brief states that there is no dispute that these grievants were replaced strikers on the preferential hiring list. However, I do not find any of their names on that list. Labor Relations Supervisor Rice and Carl Householder, president of Local 116, testified that the signatories to this grievance (with one exception) were unreplaced strikers who were

(Continued)

Section 2.1 of the Local 116 contract is the recognition clause in which the Respondent recognized the union as the bargaining agent in the appropriate unit. In Section 2.3 the Respondent agreed not to discriminate against, coerce or intimidate union members. The Union, in turn, agreed not to solicit membership or collect dues among employees on duty or to interfere with, restrain, or coerce employees to influence them to be members of the Union. Article 3 is a management rights clause subject to the grievance procedure. It contains a proviso against use of management rights for the purpose of discriminating against union members.

April 16, 1974: Union National Representative Potter sent a letter to the Respondent asking for information with respect to contracting in the Local 116 unit. Insofar as pertinent, the April 16 letter is identical in language with Potter's letter of February 10, 1974, to the Respondent (quoted above) requesting contracting information as to the Local 111 unit and contract.

May 2, 1974: Labor Relations Supervisor Rice replied by letter to Potter's April 16 request for information. Rice rejected the request. To the extent pertinent, the language of Rice's letter is identical with that in Personnel Director Scales' March 7 letter, quoted above, refusing Potter's request of February 10.

At some undisclosed date after the filing of the March 11 Borden grievance and the April 9 grievance in the Local 116 unit, and in some undisclosed manner, the Respondent refused to accept both those grievances, as it had those of Local 111, and on the same grounds.[7]

C. *Contentions*

The General Counsel contends that the Union had a good-faith belief that the Respondent was expanding the use of subcontracting within the appropriate unit and that this belief is supported by observations of union agents. Both Unions, the General Counsel says, have filed grievances which the Respondent refuses to recognize. Thus, the General Counsel states, contract procedures have been exhausted, the Unions need the information in order to determine the merit of the grievances, and the Unions cannot secure the information themselves for geographical reasons and because of the nature of the work. The connection of the requested information to the contract is as to whether the unit is being eroded and the effect on promotions. Thus, the General Counsel states, the information is relevant to the Unions' obligation to police the contract and relevant to grievances which are on file. The merit of the grievances are not in issue here, the General Counsel says: the Unions' position is not patently frivolous and involves substantial questions of law related to the production of information as to employment conditions and relationships vis-a-vis the appropriate units, and of interpretation of the collective-bargaining contracts.

The Charging Party's position is essentially the same as the General Counsel's, with the exception that the Charging Party states that the final item in the requests for information, No. 5, relating to overall costs, was not "a demand," or "an imperative," but was merely "mentioned as a 'discussion' " (Charging Party brief). I infer from this statement that the Charging Party's requests for information are not to be interpreted as including information as to the costs of subcontracting. There is therefore no occasion to determine the relevance or securability of such information here. Cf. *Southwestern Bell Telephone Co.,* 173 NLRB 172 (1968).[8]

The Charging Party specifically asserts that the term "layoff" in the clauses of the collective-bargaining contracts relating to contracting is synonymous with "permanently replaced," insofar as job recall and protection are concerned.

The Respondent's contentions: The Respondent denies that it is obligated to furnish the requested material. Its stated reasons are that (1) neither the requests nor any related communications from the Unions prior to the hearing tied in the information requested to any pending grievance or dispute, (2) no relevance has been shown to any provision of the contract, (3) the information is not related to the contracting clauses of the contracts, because no employees had been laid off or discharged due to contracting, and (4) finally, that the Respondent could not reasonably be expected to connect the requests and the grievances.[9]

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reinstated to their former classifications at the end of the strike. I conclude that the statement in the Respondent's brief is inadvertent.

However, I do not regard the fact as of significant bearing on the issues.

[7] The record also contains evidence of a grievance filed by one James Linthicum on April 22, 1974.

Linthicum, a replaced striker from the Canton area who had accepted employment at Wooster, filed a grievance stating that he was being discriminated against by being kept in Wooster, after the person who had displaced him at his home area had allegedly left the Respondent's employ. In May and June 1974 Linthicum's grievance was processed through the second and third stage of the grievance procedure provided by the Local 116 contract, and rejected by the Respondent at each step on the ground that the Respondent had "not seen fit to open any job in the Canton area" since Linthicum's employment in Wooster. Linthicum was assured that if such a job opened up he would have "every right to bid on it."

Under date of June 12, 1974, Local 116 requested a meeting with the Respondent's executive vice president, as provided in step 4 of the contractual grievance procedure (art. 17.1.4) concerning Linthicum's grievance. The record contains no evidence as to the disposition of that request.

The relevance of the Linthicum incident to the issues here is not apparent or explained. Unlike the other grievances, the Respondent accepted Linthicum's and processed it through the first several steps of the grievance procedure. The record contains no indication that during the processing of Linthicum's grievance the Union specifically asked for contracting information bearing on his complaint. Indeed, there is no suggestion in the record that the Union made any reference to the contracting problem during the processing of Linthicum's grievance. The record will thus not support a finding that the Respondent either refused to process Linthicum's grievance or refused a specific request for information respecting it.

In these circumstances I find nothing in the Linthicum incident of significant bearing on the issues here.

Linthicum also signed the April 9 grievance.

[8] In view of this position of the Charging Party, it is unnecessary to consider the testimony of William A. Black, vice president of the Respondent involved in subcontracting determinations, to the effect that in deciding whether to subcontract, the Respondent does not consider the relative cost of subcontracting as compared to the cost of having projects done by unit employees.

[9] At the hearing the Respondent unsuccessfully objected to the introduction of testimony by union officials relating to their reasons for the requests for information, namely, relating the requests to the grievances previously filed. The Respondent's ground, in substance, is that the sufficiency of the requests must be determined from the communications themselves. This objection was overruled. The adequacy of the requests to apprise the Respondent of the relevancy of the information must be judged

Conclusions

There is a general obligation on an employer to provide information needed by the bargaining representative for the proper performance of its duties. This duty extends beyond the period of contract negotiations and applies to labor-management relations during the term of a collective-bargaining agreement. *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, (1967). As the Court there said at 435–436:

> 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. *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149. Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement. *N.L.R.B.* v. *C. & C. Plywood Corp., ante,* p. 421; *N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938.

The obligation is one created by the National Labor Relations Act, and not by agreement between employer and union.[10] However, its exercise may be affected by the provisions of collective-bargaining agreements. The test of relevancy is similar to that in discovery: "the probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Acme Industrial Co., supra* at 437.

Where the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required; but where the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower (as where the precipitating issue or conduct is the subcontracting of work performable by employees within the appropriate unit) and relevance is required to be somewhat more precise. See *Curtiss-Wright Corporation* v. *N.L.R.B.*, 347 F.2d 61 (C.A. 3, 1965). The obligation is not unlimited. Thus where the information is plainly irrelevant to any dispute there is no duty to provide it. *Southwestern Bell Telephone Company*, 173 NLRB 172 (1968).[11]

It is not required that there be grievances or that the information be such as would clearly dispose of them. The union is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed matter. As the Supreme Court said in *Acme Industrial* at 438:

> Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. . . . nothing in Federal Labor Law requires such a result.

In that case the Court further said, quoting *Fafnir Bearing Co.*, 362 F.2d 716, 721 (C.A. 2, 1968):

> By preventing the Union from conducting these studies [for an intelligent appraisal of its right to grieve], the Company was, in essence, requiring it to play a game of blind man's bluff.

In summary, as the Respondent suggests in its brief, the results of the decided cases have been mixed, but the basic principle remained quite consistent: a bargaining representative is entitled to information relevant to the performance of its obligations as such representative. The differences in results in the decided cases reflect, not difference over the applicable principle, but rather judgment as to the relevancy of the requested information to the performance of the representative obligation in the specific situation.[12]

As will be seen, the bargaining representative has a correlative obligation to exert reasonable effort to secure information relevant to and necessary for the performance of its function.

The issues here are thus (1) whether the information

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in the light of the entire pattern of facts available to the Respondent. In addition, the Unions' purposes in seeking the information are relevant to a determination of the legitimacy of the requests. Finally, the Respondent was apprised at the hearing of those purposes. The requests for information are still outstanding. The Respondent's continuing failure to accede to them can thus no longer be attributed to inadequacy of the communications.

[10] As the court of appeals said in the case of *The Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F.2d 746, 751 (C.A. 6, 1963):

> We agree with the Board that the Union's right to wage information it needed to administer the bargaining agreement was a right which it had under Section 8(d) of the National Labor Relations Act, Section 158(d), Title 29 United States Code, and the existence of this right was not dependent upon it being included in the bargaining agreement. It was not a right obtained by contract. . . . The failure to have the right recognized by the Company in the bargaining agreement, which would probably eliminate the necessity of possible litigation over it later, does not mean that it does not exist by virtue of the statute.
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> * * * * *
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> . . . we find no error in characterizing it as a statutory right.

[11] In the *Southwestern Bell Telephone* case the union made a demand for a variety of information concerning subcontracting of unit work, including a request for information as to the costs of the contracting. The employer voluntarily supplied the bulk of the material, but declined to provide information as to costs, accompanying his declination with the statement that costs were not a factor in the subcontracting. The Board consequently held that since the information had no relevance to the dispute, there was no obligation to supply it.

[12] For illustrative cases, in addition to those cited above, see: *Northwest Publications Inc.*, 211 NLRB 464 (1974); *Trustees of Boston University*, 210 NLRB 330 (1974); *Fawcett Printing Corp.*, 201 NLRB 964 (1973); *General Electric Company*, 199 NLRB 286 (1972); *Herk Elevator Maintenance, Inc.*, 197 NLRB 96 (1972); *Ohio Medical Products*, 194 NLRB 1 (1971); *United Aircraft Corporation*, 192 NLRB 382, 423 (1971); *Vertol Division, Boeing Company*, 182 NLRB 421 (1970); *Gulf States Asphalt Company*, 178 NLRB 405 (1969); *Southwestern Bell Telephone Company*, 173 NLRB 172 (1968); *King Radio Corporation, Inc.*, 172 NLRB 1051 (1968); *The American Oil Company*, 164 NLRB 29 (1967); *Hughes Tool Company*, 100 NLRB 208 (1952).

requested is relevant to the performance of the unions' representative obligations, and (2) if so, whether the relationship between the two was sufficiently clear as to impose a duty on the Respondent to comply with the requests.

The Relevance of the Information

The unions' obligations to the employees as bargaining representatives stem directly from two independent sources: the first from the statute and the second from the collective-bargaining contracts. The direct statutory obligation flows from the decision of the U. S. Supreme Court in *Fleetwood Trailer Co.* In that case the Supreme Court held, in sum, that an employee who is on strike retains his status as an employee until he has obtained other regular and substantially equivalent employment, even though his position has been validly and permanently filled by a replacement hired during the strike. Once the striker terminates the strike and offers to return to work he is entitled to employment whenever a job becomes available for which he is qualified, unless the employer can show legitimate and substantial business justifications for not offering him the position. That there may be no such jobs available at the time of the request for reinstatement is not controlling. The striker is entitled to an offer of reinstatement when such a vacancy occurs. See also *The Laidlaw Corporation,* 414 F.2d 99 (C.A. 7, 1969). In the instant case the Respondent has recognized this obligation. The preferential hiring lists here were established by the Respondent in order to comply with the *Fleetwood Trailer* decision. As the bargaining representative of the employees on the preferential lists, the unions are obligated to police the performance of the Respondent in that regard and to protect the rights of the strikers to reemployment in accordance with the principles enunciated by the Supreme Court. The unions are therefore entitled to information in the possession of the Respondent as to practices by the Respondent concerning work performable in the appropriate units, where the practices might conceivably affect the strikers' possibilities of employment within the appropriate unit.

In addition, as the employees' surrogate, the unions are obliged to police the Respondent's actions to assure that employment opportunities, including promotional opportunities, within the appropriate units are not foreshortened or curtailed by actions of the Respondent. Thus, however legitimate the Respondent's motives, it is conceivable that the subcontracting of work performable within the unit might constrict the possibilities of employment within the unit, including the possibilities of promotion of unit employees. As the Board said in *Northwest Publications, supra:* "All possible ways in which the information may become important cannot be foreseen in advance of negotiations. A real probability feared by the Union is encroachment on bargaining unit work." The unions' obligations in this regard, also, are thus duties flowing directly from the statute and not initially founded in the contract.

The third manner in which the unions are obligated is to police and administer the contract. Unlike the others, this obligation flows directly from agreement. The scope of the obligation therefore is measured by the language of the contract. Here there is disagreement between the parties as to the extent of the Respondent's commitments under the contract.

Insofar as the unions' performance of their obligations in the first two instances are concerned, namely, to police the enforcement of employee rights under the principle of *Fleetwood Trailer,* and their general obligations as bargaining representatives to preserve employment standards and opportunities within the collective-bargaining units are concerned, I find that the information requested by the Charging Party was relevant and essential to the discharge of those duties. Whether specific notice of that intent or purpose was required to constitute an adequate request by the unions, and if so to what extent, and whether the requirements were met here, are questions discussed at a later point. Suffice to say now that the information requested was relevant and essential to the performance of the unions' representative obligations and was thus securable upon proper request.

The next question is whether the requested information was relevant for purposes of administration of the bargaining contracts.

A representative union has legal obligations to the employees it represents to do so fairly and with due diligence and care.

For breach of its obligations in that regard a bargaining representative may be guilty of unfair labor practices (*Miranda Fuel Co.,* 140 NLRB 181, enforcement denied 326 F.2d 172 (C.A. 2, 1963)), liable in a suit for damages (*Vaca* v. *Sipes,* 386 U.S. 171 (1967)), subject to injunction (*Steele* v. *L&N RR.,* 323 U.S. 192 (1944)), or have its certification as representative revoked (*Hughes Tool Company,* 104 NLRB 318 (1953)).

As the Supreme Court said in *Vaca* v. *Sipes:*

> In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a non-arbitrary manner, make decisions as to the merits of particular grievances. [Citing cases] In a case such as this, when Owens [the grievant] supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored Owens' complaint or had it processed the grievance in a perfunctory manner.

While the representative is invested with a substantial amount of discretion in seeking in good faith to accommodate conflicting interests within the appropriate unit and to determine whether particular grievances warrant attention (*Ford Motor Company* v. *Huffman,* 345 U.S. 330 (1953)), that discretion is not unbridled. A union must therefore, as the quoted language from *Vaca* suggests, exercise a reasonable amount of due care in determining its position with respect to particular grievances. As a minimum that standard of care would seem to include reasonable effort to secure information relevant to the grievance.

The Respondent's position, as we have seen, is that neither the grievances nor the request for information relate to any relevant and applicable portion of the contract. Thus the Respondent points out that the Charging Party's letters requesting the information stated

that the information was needed "to properly perform and police our agreement," in the application of the contract clauses binding the Respondent not to lay off or discharge employees covered by the agreement due to contracting with outside parties. (Art. 16.1 of the contract with Local 111 and art. 5.5 of the contract with Local 116.)

The Respondent's position is thus that, there being no employees in a laid-off or discharged category, and the employees on the preferential lists not being so classifiable, there is no showing of relevance. The Charging Party, however, asserts that the contract term "lay off" is synonymous with "permanently replaced" insofar as job recall and protection are concerned.

This difference of view plainly poses a problem of construction of the contract language. The contract provides a procedure whereby such differences in interpretation may be resolved, ultimately through final and binding arbitration.

The Board, in the case of *Collyer Insulated Wire,* 192 NLRB 837 (1971), established the principle that where parties to an unfair labor practice proceeding before the Board have established a contractual procedure for final and binding resolution of controversies by arbitration, the parties shall first attempt disposition through those procedures — reserving jurisdiction to the Board to review the result of the arbitration for its consonance with the policies of the National Labor Relations Act, in accordance with principles established in the case of *Spielberg Manufacturing Company,* 112 NLRB 1080 (1955).

The Board has further held that a dispute between the parties to a contract as to the arbitrability of an issue under the contract should itself be submitted to the contract procedures in accordance with *Collyer. Norfolk, Portsmouth Wholesale Beer Distributors Association,* 196 NLRB 1150 (1972). In that case a collective-bargaining contract between the respondent employer association and the charging party union contained a clause for the checkoff of union dues pursuant to proper individual authorization by employees. In addition there was a provision for grievance procedure terminating in arbitration. The Association, questioning the validity of the authorizations submitted by the union, refused to deduct dues. When the union sought to institute grievances under the contract the Association declined to accept them, on the ground that the matter was not arbitrable. A hearing was held before a Trial Examiner upon a complaint asserting that the Association's refusal constituted a violation of Section 8(a)(5) of the Act. In the hearing upon the complaint the Trial Examiner considered the question of the validity of the authorizations, found them to be invalid, and recommended dismissal of the complaint. With respect to the contention that the matter should have been submitted to the grievance procedure and arbitration in accordance with *Collyer,* the Trial Examiner found *Collyer* not controlling for the reason that the question of the validity of the authorizations was "essentially a legal question and not one best resolved by an arbitrator." The Board reversed the Trial Examiner and found *Collyer* controlling. In so doing the Board said:

> . . . the [contract] clause requires deductions only if pursuant to individual authorizations, and whether the authorizations were valid will determine in this case the ultimate question of whether Respondents did or did not violate the agreement by refusing to make the deductions. That is clearly a contract issue fully capable of resolution under the contractual procedures for resolving such disputes. Although Respondent Association has asserted that the validity of the cards is not arbitrable, this issue of arbitrability should itself be submitted to the arbitrator, as has become the near universal practice under collective bargaining agreements.

In *Radioear Corporation,* 199 NLRB 1161 (1972), the union and the respondent employer were in disagreement as to whether a "zipper" or "wrap-up" clause in their collective-bargaining agreement indicated an intent to continue a "turkey money" bonus. The contract provided an arbitration procedure for the determination of contractual disputes. After hearing upon a complaint alleging that unilateral discontinuance of the turkey money bonus by the employer was a violation of Section 8(a)(5), the Trial Examiner construed the contract and found that it did not authorize discontinuance of the bonus. The Board, reversing the Trial Examiner, found that the interpretation of the contract was a matter to be first considered by the arbitrator. The Board said:

> Since the collective-bargaining agreement, and the events surrounding its execution, are at the heart of the disagreement, we would, as we did in *Collyer Insulated Wire,* 192 NLRB 837, defer our decision to the parties' contractual settlement procedures.

In the case of *Great Coastal Express, Inc.,* 196 NLRB 871 (1972), the respondent employer unilaterally revoked certain parking privileges of employees. The contract contained an arbitration clause, along with a provision to the effect that working conditions should be maintained at not less than the highest standards in effect at the time of signing the agreement, and further that any disagreements between the union and the employer with respect to the clause should be subject to the grievance procedure. On the authority of *Collyer,* the Board found it appropriate that "an arbitrator interpret the contractual Maintenance of Standards section and decide whether employee parking privileges are within the meaning of conditions of employment" under the contract.

Bethlehem Steel Corporation, 197 NLRB 837 (1972), involved the validity of unilateral subcontracting by the employer. The collective-bargaining contract, which contained a provision for arbitration of disputes, was silent on the subject of subcontracting. The Trial Examiner held that the matter was initially one of interpretation of the collective-bargaining contract and that that issue should be resolved through the contractual grievance and arbitration procedures of the contract. The Trial Examiner stated at 841:

> It is the substance of Respondent's motion to dismiss that this case is more properly an interpretation of the terms of an outstanding contract . . . . The provisions of the contract set forth herein (*supra*), clearly outline the agreed-upon method of settling such disputes . . . .

* * * * *

> . . . Nothing in the contract itself precluded the Respondent from subcontracting its work, hence we would reach the consideration of such act . . . in the posture of an unfair labor practice . . . only after we have explored what the contract did or did not provide, and had examined what Respondent's working capabilities were in its day-to-day application of the terms of the contract.
>
> Such an interpretation of the contract, it would seem, is the first order of business. . . . It would appear to be a determination properly to be submitted to arbitration . . . .

The Board, on the authority of *Collyer,* affirmed.

The issue here, of course, is not whether the Respondent's subcontracting was lawful or unlawful, permitted by the contracts or forbidden by them, but only whether the unions were entitled to information pertaining to the subject. However the Board's declaration of broad policy in the *Collyer* and subsequent cases, to the effect that issues resolvable under a collective-bargaining contract and its arbitration procedures should be first resolved there, before resort to the Board, is of relevance in the disposition of the present matter.

Article 17.1 of both collective-bargaining agreements here provide that "any dispute or disagreement" between an employee and the Company "as to the meaning or application of the terms of this Agreement . . . shall constitute a grievance," and be disposed of in accordance with the grievance procedure outlined. Article 17.2 of the agreements provide that if the grievance is not satisfactorily adjusted and settled in the various steps of the grievance procedure, the matter shall, upon notice by either party to the agreement, be submitted to an arbitrator, whose findings shall be binding on both parties.

There is dispute between employees and the Respondent as to the interpretation of the contract, as reflected in the grievances filed by the employees and the refusal of the Respondent to consider the grievances. Such disagreement is resolvable under the grievance and arbitration procedures of the contracts. The information requested by the Charging Party appears to be relevant to a determination of that issue. In the light of these facts, contrary to the contention of the Respondent, the information would appear to be related to a contractual provision, necessary for an informed interpretation of the contract, and essential to a decision as to whether to process the grievances further.

In any event, as *Collyer* and its analogs demonstrate, Board policy is that in circumstances of this nature the Administrative Law Judge should not, at this point in the proceedings, interpret the contract and decide the substantive rights of the parties thereunder.

In summary, in accordance with Board policy the unions here have consistently, but unsuccessfully, sought determination under the grievance procedure of the question as to whether the grievances are subject to, and consonant with, the contracting provisions of the agreements. The Respondent's resistance has prevented such a determination.

It is true, of course, that the Respondent is not charged here with refusal to process the grievances, but with refusing to provide information concerning them. That, however, is not a dispositive distinction. The significant factors are that Board policy is to encourage the parties to utilize their own mechanisms for resolving controversies, and that the information requested is essential here for resolution of the controversy in that mechanism. It is therefore necessary for performance of the locals' contractual responsibilities.

It is consequently concluded that the information requested by the Charging Party in its letters to the Respondent of February 10 and April 16, 1974, is relevant and essential to the locals' performance of their obligations as bargaining representatives in three respects: (1) Protection of and effectuation of the rights of employees on the preferential hiring list in accordance with the principles of *Fleetwood Trailer,* (2) protection and maintenance of work opportunities and promotion possibilities within the appropriate unit, (3) determination as to the merit, under the contract, of the grievances filed by employees in February, March, and April relating to employees replaced or displaced as a consequence of the strike.

The grievances and the requests for information, of course, adverted only to the contracts as the basis for their claim, and not to factors (1) and (2). That fact, however, does not affect the question of relevance. It is material only to the question as to whether, and to what extent, a statement of purpose is required. That question is determined in the following discussion.

Whether the Requests Were Adequately Stated

The Respondent asserts that the Charging Party's written requests were deficient in that they failed to allege their relevance to the pending grievances, and that there was no reasonable way that the Respondent could be expected to make such connection from the mere filing of the grievances. There is, however, no testimony supporting that contention; that is to say, no witness on behalf of the Respondent has testified that the Respondent's responsible officials were not aware that the requests were related to the grievances. If the Respondent's contention is supported, the support must be inferred from the circumstances of the events. We turn then to the occurrences and to their chronology.

All the material events occurred over a period of 4 months. On December 10, 1973, the preferential hiring list in the Local 111 unit was established, and on December 24, 1973, that of Local 116. Approximately 8 weeks later, on February 6, 1974, employees on the preferential hiring list in the Local 111 unit filed the grievance stating that the Company had violated article 16, page 34 and other related articles by not returning them to their original positions, and requesting restoration of rights, privileges, and backpay retroactive to December 10. Two weeks later the grievance was rejected on the ground that it was "not subject to the provisions" of the contract, that the procedure for the placement of returning employees had been agreed upon before the signing of the new contract.

On February 10, 1974, 4 days after the date of the grievance, the Charging Party sent its letter requesting information as to contracting in the Local 111 unit in order

to "perform" and "police" the Local 111 agreement "and particularly its Article 16." From that date until March 25, 1974, there was a series of communications between the Unions and the Respondent in which the Unions sought to pursue the grievance through the various stages of the grievance procedure and to arbitration, each of which attempts was successively denied by the Respondent.

In the meantime on March 11, 1974, a grievance was filed in the Local 116 unit concerning the presence of Hoosier Construction Company employees on the Respondent's property, and alleging that this action, occurring while employees were in layoff status, was in violation of article 5 of the Local 116 contract and other articles, and on April 9, 1974, other employees in the Local 116 unit filed a grievance concerning "contractors performing work at the East Wooster substation while there are substation and other employees laid off." Specifically the grievance requested that all work by contractors be stopped until all employees were back to work. "Layoff" referred to employees on the preferential list.

On April 16, 1974, the Charging Party wrote to the Respondent requesting the same information concerning contracting within Local 116's area as had been requested with respect to Local 111. Again the reason given for the request was in order that the union could "perform" and "police" the contract. The letter further stated that the information was required in the application of article 5 of the contract.

Though neither letter of the Charging Party specifically stated the subsection of the article of the contract referred to, the Respondent in its reply in each case indicated that it understood the reference to be the contracting clause. In each instance the Respondent's reply was that no employee had been placed on layoff or discharged because of work by contractors, that the request had therefore no relevance to the contract, and that the Respondent therefore chose not to comply with the requests.

In the light of the content and continuity of the communications between the Respondent and the unions during the period of time involved, I am of the opinion that the relationship between the grievances and the requests for information is quite clear.

Thus the first grievance was filed on February 6, 1974. It was signed by employees on the Local 111 preferential hiring list, and stated *inter alia* that the Respondent had violated article 16 of the Local 111 contract in not returning the employees to their original positions. Four days later National Representative Potter asked the Respondent for information as to contracting, particularly in connection with article 16 of the Local 111 contract. This request for information as to article 16, following immediately on the filing of the grievance alleging violation of article 16, could scarcely have left the Respondent in doubt as to the relationship between the grievance and the request. I think it of significance that there is no testimony that the Respondent was in doubt, and no indication that the Respondent inquired as to the reason for the request. I infer that the Respondent knew the reason.

In any event, I believe that the communications between the Respondent and the Unions in connection with the grievances would have apprised reasonably perceptive persons as to the relationship between the grievances and the requests for information. From my observation of the Respondent's official personnel who testified, I deem them above average in perceptive capacity.

I therefore find, contrary to the contentions of the Respondent, that the circumstances were such as to inform the Respondent fully as to the relevance of the requested information to the grievances.

As a further reason for not being required to produce the information requested, the Respondent says that the information would not be useful or helpful in processing the grievances. That proposition however, is one for presentation in the grievance procedure. But even if not helpful in prosecuting the grievances, the Union deems the information useful in determining whether to prosecute them. That view, not patently unreasonable, contributes to the relevancy of the information. As the Court of Appeals for the Third Circuit said of a similar contention by an employer in *Curtiss-Wright Corporation*, 347 F.2d 61, 70:

> Be this as it may, it does not detract from the potential value of such material as pertinent data with which the Union should be supplied in order to assist it in its task of deciding whether to institute grievance proceedings or use other policing tools under the existing bargaining agreement . . . .

The Respondent introduced evidence to establish that the work performed by the contractors, though of the same kind as that performed by members of the appropriate units, is not of such nature, because of its duration, and staffing and supervision problems, that it can as a practical matter be assigned to employees in the units. That contention is also one to be advanced and established in the grievance procedure. I make no finding on that evidence.

In view of the disposition reached here it is unnecessary to consider other contentions advanced by the parties.

On the basis of the foregoing findings of fact I conclude that the information requested by the Charging Party of the Respondent in the Charging Party's letters of February 10, 1974, and of April 16, 1974, is relevant and essential to the performance of the obligations of Local 111 and Local 116 as bargaining representatives of employees of the Respondent, and to enable them to administer their collective-bargaining contracts with the Respondent. It is further found that by failing and refusing to provide such information the Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and refused to bargain collectively with representatives of its employees, and that by such conduct the Respondent violated Section 8(a)(1) and (5) of the Act.

IV. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that the Respondent supply

Local 111 and Local 116 with the information requested in the Charging Party's letters of February 10, 1974, and April 16, 1974, set out above, with the exception of paragraph 5 thereof.

It will also be recommended that the Respondent cease and desist from failing and refusing to supply Locals 111 and 116 with information relevant and necessary to the performance of the obligations of a collective-bargaining representative, including information affecting employees on the preferential hiring lists.

The posting of an appropriate notice will also be recommended.

Upon the foregoing findings and conclusions, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[13]

Respondent, Ohio Power Company, Canton, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to supply Local 111 and Local 116 of the Utility Workers Union of America, AFL–CIO, with information relevant and necessary to the performance by such Locals of their obligations as bargaining representatives of employees of the Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their bargaining rights through the above-named unions.

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

(a) Upon request by them, furnish to the above-named unions the following information:

1. The name of each individual contractor engaged in Physical, Operating or Trades work, or work, which in the absence of such contractor, the bargaining unit employees would perform; the nature and location of work, the expected length of the stay or tenure of the contractor, and his expected date of completion; the contractor's work week, i.e., the amount of hours which his men work; and whether it is a "bid" or "time and material plus" job and if it is a bid, the nature of the bid, e.g. "out-and-out flat money" or "unit bid" or "footage."

2. All information concerning or affecting employees on the preferential hiring lists which is relevant and reasonably necessary to the performance of the locals' obligations as bargaining representatives of those employees.

3. All other information relevant and reasonably necessary to the performance of their obligations as bargaining representatives.

(b) Post at its places of business copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[14] In the event that the Board's 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

WE WILL, upon request by Local Union 111 and Local Union 116, of the Utility Workers Union of America, AFL–CIO, provide each of those Locals with the following information previously requested by them related to the bargaining unit in which the respective Locals are the bargaining representatives. (Divisions 7 and 9 in the case of Local 111, and Divisions 2 and 4 in the case of Local 116.)

1. The name of each individual contractor engaged in Physical, Operating or Trades work, or work, which in the absence of such contractor, the bargaining unit employees would perform; the nature and location of work, the expected length of the stay or tenure of the contractor, and his expected date of completion; the contractor's work week, i.e., the amount of hours which his men work; and whether it is a "bid" or "time and material plus" job and if it is a bid, the nature of the bid, e.g. "out-and-out flat money" or "unit bid" or "footage."

2. All information concerning or affecting employees on the preferential hiring lists which is relevant and reasonably necessary to the performance of the Locals' obligations as bargaining representatives of those employees.

3. All other information relevant and reasonably necessary to perform their obligations as bargaining representatives.

OHIO POWER COMPANY