Metropolitan Edison Company *and* Electrical Workers System Council U-9, Local 563, AFL–CIO. Case 4–CA–21398–1

November 26, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On January 26, 1995, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision and an answering brief. The Charging Party filed a brief in opposition to the exceptions. The Respondent filed a reply 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, and conclusions, as modified below, and to adopt the recommended Order, as modified.

This case raises an issue concerning the extent of the Respondent's obligation to disclose relevant, but assertedly confidential, information requested by the Union in order to carry out its duties as a collective-bargaining representative. The judge found that the Respondent violated Section 8(a)(5) of the Act by refusing the Union's request for the names of two informants who provided information to the Respondent that ultimately led to the discharge of employee Ned Eppinger. We agree with the judge that the Respondent violated Section 8(a)(5), but only for the following reasons.

Ned Eppinger was an employee of the Respondent and served as chairman of the Union's safety committee. On December 11, 1992, the Respondent received a tip from one informant ("John Doe I") that another informant ("John Doe II") had alleged that Eppinger was stealing food from the plant cafeteria. The Respondent placed Eppinger under surveillance. It subsequently discharged him after confirming the substance of the informants' tip. The Union grieved Eppinger's discharge. In processing the grievance, the Union requested the real names of both John Does. The Respondent refused the request on grounds of confidentiality, claiming that the information "could only result in retaliation, coercion and intimidation of individuals who have been willing to come forward." The Respondent provided other requested information relevant to Eppinger's grievance, but did not offer any alternatives to satisfy the Union's request for the informants' names.

The judge found that the informants' names were relevant and necessary to the Union's processing of Eppinger's grievance. He further found that the Respondent had failed to prove a sufficient confidentiality defense to justify declining to provide the informants' names under the balancing-of-interests test set forth in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In this regard, the judge reasoned that the asserted confidentiality interest here was distinguishable from the confidentiality interest at issue in *Pennsylvania Power*, 301 NLRB 1104 (1991). The Board there found that the respondent employer (as here, an operator of a nuclear power generating plant) proved a legitimate and substantial confidentiality defense justifying its refusal to provide the names of informants who provided information about suspected employee drug use. The judge found that the serious public and employee safety considerations involved in *Pennsylvania Power* were not involved in this case, which involves theft rather than drug use. Accordingly, the judge found that the Respondent violated Section 8(a)(5) by failing to provide the Union with the names of the informants.

We agree with the judge that the identities of the informants were relevant and necessary for processing Eppinger's grievance.[1] However, we do not agree with the judge that a confidentiality claim is not legitimate or substantial when it involves informants about workplace theft rather than drug use or other conduct impacting public or employee safety. Nevertheless, assuming that the Respondent has asserted a legitimate and substantial confidentiality interest here, we find that the confidentiality interest was not so substantial as to justify the Respondent's blanket refusal to provide any information in response to the request for informants' names. In the circumstances here, we find that the Respondent had an obligation to come forward with some offer to accommodate both its concerns and the Union's legitimate needs for relevant information. In this regard,

> it has long been established that an employer has the burden of seeking to accommodate the union's request for relevant information consistent with other interests rightfully to be protected. An employer is not relieved of its obligation to turn over relevant information simply by invoking concerns about confidentiality, but must offer to accommodate both its concerns and its bargaining obligations, as is often done by making an offer to release information conditionally or by placing restrictions on the use of that information. [Citations omitted.]

U.S. Testing Co. v. NLRB, 160 F.3d 14, 20–21 (D.C. Cir. 1998). The "rationale for this placement of the burden derives from the interest in allowing the parties to work out through an informal process how their corresponding duties and responsibilities can be met." Id. at 20.

[1] In affirming the judge's finding that the requested information was relevant to the Union's representative duties, we rely solely on evidence that the Union had reason to believe that the Respondent selectively targeted Eppinger for investigation because of his protected union activities.

Here, the Respondent made no effort to bargain to accommodate the Union's interest in seeking relevant information. Instead, it flatly rejected the request for the informants' names. It thereby violated Section 8(a)(5).

Our dissenting colleague contends that the finding of a violation here conflicts with the Board's reasoning in *Pennsylvania Power,* supra*,* and *Mobil Oil Corp.*, 303 NLRB 780 (1991). We disagree. In both of those cases, the unions requested the names and addresses of informants while pursuing grievances of discipline imposed as the result of drug-testing. The employers had relied on the informants' reports as the "reasonable cause" for mandating the drug tests. The Board held that the employers did not violate Section 8(a)(5) by refusing to provide the names and addresses of informants, but they did violate Section 8(a)(5) by failing to provide any information in response to the unions' legitimate need. In each instance, the Board directed the employer to provide a summary of the statements provided by the informants.

Initially, it is important to emphasize that neither of the cases cited by the dissent support our colleague's position that there should be a blanket exemption from bargaining about the disclosure of the names and addresses of informants. The dissent's position conflicts directly with the *Detroit Edison* case-by-case balancing test that the Board applied in *Pennsylvania Power* and *Mobil Oil*. After balancing the respective interests, the Board found that *the particular circumstances* of those two cases warranted giving "unusually great weight"[2] to the employers' interests in protecting the identities of the informants. The Board expressed specific concern that its implementation of national labor policy not conflict either with employer efforts to control possible drug-related impairment of employee job performance or with a national policy seeking to curb drug use in the workplace and in society at large. In neither case did the Board create a blanket exemption from bargaining over an accommodation.

As we have found above, an employer can assert a legitimate and substantial confidentiality interest in protecting the identities of informants about workplace theft. This does not mean that the interest asserted automatically carries the same "unusually great weight" as the interest asserted in *Pennsylvania Power* and *Mobil Oil*. "The confidentiality interest of the employer . . . is not fixed; it may vary with the nature of the industry or the circumstances of a particular case." *Resorts International v. NLRB*, 966 F.2d 1553, 1556 (3d Cir. 1993). In our view, concerns about petty cafeteria theft, which poses no apparent threat to employee or public safety, do not carry the same "unusually great weight" as the interests that were found to be present in *Pennsylvania Power* and *Mobil Oil*. This does not mean that an employer must countenance this or any other kind of criminal activity on its premises, but it does mean that the Board may insist on greater accommodation of employee rights and the collective-bargaining process when balancing the employer's interests against the union's legitimate interests in obtaining the requested information.

Here, unlike the unions in either *Pennsylvania Power* or *Mobil Oil*, the Union has a specific concern about discrimination against a union steward. The dissent correctly states that the Union already knows what the informants said, and what the investigation triggered by those statements revealed, but there remains a question about *why* they said anything. Were they acting pursuant to a genuine concern (whether theirs or the Respondent's) about criminal activity or, as the Union had cause to suspect, were they on the lookout for any incident that might give the Respondent cause to rid itself of a union steward? In this regard, the Union's legitimate representational interests implicate both contractual[3] and national labor policy concerns about antiunion discrimination. Thus, the record indicates that the Union has a legitimate and substantial need for the requested information.

There remains the Respondent's expressed concern that disclosure of informants' names would expose them to harassment or physical retaliation. Like our dissenting colleague, we find acts of physical violence committed in professed support of either party in a labor dispute to be inexcusable. Further, we would be naïve to deny any latent possibility of retaliation against informants whose information leads to an investigation and discharge of an employee, whether for petty theft or other conduct. But this case presents no more than just that—a possibility. There is nothing in this record to indicate a likelihood or real risk of retaliation or violence. There is no evidence of past violence and no reason to believe that the Union sought the informants' names in order to harass or physically retaliate against them.[4] Thus, any possibility of retaliation is purely speculative in this case.[5]

[2] *Pennsylvania Power*, 301 NLRB at 1107.

[3] Art. 2.2 of the parties' collective-bargaining agreement provides that the Respondent and its agents will not discriminate in any manner whatsoever against any member of the Union because of membership and activity in the Union.

[4] As set forth by the judge, Union President O'Donnell testified that the Union was concerned that Eppinger had been singled out for being a staunch safety man and union officer, that it wanted to question the informants about whether Eppinger had been singled out because of his safety and union activities, and that it wanted to "clear people's names" and "get to who the informants were, and get back to work and work safely, instead of worrying about who the informants were." The judge did not find, nor do we, anything in this testimony that indicates an intention by the Union to harass or otherwise physically retaliate against the informants. While it appears from the testimony that the Union's members were concerned about who the informants were, this is far from a desire to harass or retaliate against the informants.

[5] Cf. *Transport of New Jersey*, 233 NLRB 694 (1977) (Board ordered employer to provide union with names of witnesses to bus accident, finding "speculative" the employer's stated concern that disclosure would expose them to unnecessary harassment); and *Page Litho, Inc*., 311 NLRB 881, 882–883 (1993) (Board ordered employer to provide union with names and payroll information of striker replace-

In sum, we find that the Respondent's asserted confidentiality claim, although presumed legitimate, is not entitled to the same "unusually great weight" as the claims asserted in *Pennsylvania Power* and *Mobil Oil*. We have further found that the Union has a legitimate and substantial need for the requested information. Finally, we have found that while a possibility of retaliation against informants exists, the likelihood of such retaliation in this case is purely speculative. In these circumstances, we find that the Respondent was not privileged to flatly reject the Union's request for the informants' names, but was obligated to bargain with the Union to seek an accommodation. By failing to do so, the Respondent violated Section 8(a)(5).[6]

We emphasize that the violation found is the *failure to bargain* over an accommodation (i.e., an alternative means of satisfying the Union's need), not the failure to provide the names themselves. We recognize merit both in the Union's asserted interest and in the Respondent's confidentiality concerns. The appropriate remedy in these circumstances is to give the parties an opportunity to bargain regarding the conditions under which the Union's need for relevant information could be satisfied with appropriate safeguards protective of the Respondent's confidentiality concerns.[7] We do not now decide the particular content of accommodation bargaining that must occur, except to direct that the parties should thoroughly explore any and all reasonable alternatives to direct disclosure of the informants' names.

The Board's cumulative experience has shown that "there should be, and almost always is, a way that the parties can effectively bargain" for an accommodation that will satisfy both the union's needs and the employer's protective concerns. *Exxon Co. USA*, 321 NLRB 896, 899 (1996). See, for example, *GTE California, Inc.*, 324 NLRB 424, 427 (1997), where "GTE proposed, the parties bargained over, and the Union ultimately accepted an accommodation between the Union's information interests and GTE's confidentiality interests that succeeded in furthering both parties' interests." Indeed, to our knowledge, none of the cases in which the Board has employed this approach have ever returned to the Board, because the parties were unable or unwilling to arrive at a mutually acceptable accommodation of their respective interests.

Our dissenting colleague's position is that subjecting a dispute over the identity of informers to the collective-bargaining process will likely lead to violence. Our dissenting colleague's argument is inconsistent with the Act's basic premise that promoting the practice and procedure of collective bargaining will tend to eliminate industrial strife.[8] In any event, we have more confidence than he that the Respondent will take all steps necessary to ensure that any accommodation reached as a result of bargaining will not place the informants at risk of retaliation and harassment.[9]

Finally, we recognize that if the Respondent and the Union are unable to reach an agreement on a method whereby their respective interests would be satisfactorily protected, they may be before us again. If the issue of whether the parties have bargained in good faith is presented to us, we shall decide that question then. If necessary, we shall also undertake the task of balancing the

ments, finding no clear and present danger that the Union would use the names to harass the replacements).

[6] Notwithstanding settlement of the particular grievance that gave rise to the information request, we agree with the judge that the request for informants' names or alternatives thereto remain potentially relevant to the Union's administration of the nondiscrimination provision of the parties' contract and that the issue, therefore, is not moot.

[7] See, e.g., *Minnesota Mining & Mfg.*, 261 NLRB 27, 32 (1982), enfd. sub nom. *Oil Workers v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983); and *General Dynamics Corp.*, 268 NLRB 1432, 1433 (1984). Although the Board in *Pennsylvania Power* found it appropriate to make the accommodation itself because of "the peculiar circumstances of this case and the strong interest in fostering efforts to create safe and drug-free workplaces," it recognized that it was deviating from the usual remedy employed here. 301 NLRB at 1108 fn. 18.

[8] See Sec. 1 of the Act, as amended. "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB v. Jones & Laughlin Steel Co*., 301 U.S. 1, 45 (1937). Over the many years since *Jones & Laughlin*, experience has shown that candid discussion of complex problems by labor and management frequently results in their peaceful resolution with attendant benefits to both sides. E.g., *NLRB v. Longshoremen*, 473 U.S. 61 (1985). As Professor Archibald Cox stated in his classic article, *The Duty to Bargain in Good Faith*: "Participation in [collective bargaining] often produces changes in a seemingly fixed position either because new facts are brought to light or because the strengths and weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions." 71 Harv. L. Rev. 1401, 1402 (1958).

Our dissenting colleague's position thus fails to recognize the risk of violence in *failing* to submit disputes between employers and unions to the collective-bargaining process. See Philip Taft and Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome,* in The History of Violence in America, a Report to the National Commission on the Causes and Prevention of Violence 281 (1969). This study found that historically acts of labor violence were caused by the "attitudes taken by labor and management in response to unresolved disputes" (id. at 380–381), but that the incidence and severity of violence had been sharply reduced as a result of the passage of the National Labor Relations Act. "A fundamental purpose of the national labor policy, first enunciated by the Wagner Act and confirmed by its subsequent amendments in the Taft-Hartley and Landrum-Griffin Acts, was the substitution of orderly procedures for trials of combat. . . . Because employer refusal to meet and deal with unions was the major cause of past violent labor strikes, the effective enforcement of the Wagner Act reduced sharply the number of such encounters. This diminution of labor violence was not a temporary phenomenon but endured the strains of major and minor wars, a number of business cycles, and substantial changes in national and local political administrations." Id. at 378–379. The authors concluded that, "the sharp decline in the level of industrial violence is one of the great achievements of the National Labor Relations Board." Id. at 385.

[9] We also have no basis for assuming that the Union would do otherwise.

Union's right to the information it requested with the Respondent's expressed confidentiality concerns in accord with the *Detroit Edison* test and in light of proposals made during bargaining, and we shall make a final determination whether the Respondent has fulfilled its statutory obligation. We believe, however, that first allowing the parties an opportunity to adjust their differences best effectuates the Act's policy of encouraging the resolution of disputes between employees and employers through collective bargaining.

ORDER

The National Labor Relations Board orders that the Respondent, Metropolitan Edison Company, Middletown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that the Respondent considers confidential.

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

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

(a) Bargain in good faith with the Union regarding its request for the names of informants, which information is relevant to the Union's administration of the nondiscrimination provision of the parties' contract, and thereafter comply with any agreement reached through such bargaining.

(b) Within 14 days after service by the Region, post at its facility at the Three Mile Island Nuclear Generating Station in Middletown, Pennsylvania, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent 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 Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 28, 1993.

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

MEMBER BRAME, dissenting.

Today the Board sets a new and unfortunate precedent by requiring an employer to bargain with a union to achieve an "accommodation" over its refusal to reveal the names of informants who provided information about employee misconduct under a pledge of confidentiality. My colleagues do this even though the employer did not rely on the information supplied in discharging an employee for theft, but instead used independent evidence gathered during a subsequent investigation. They do this even though the Respondent furnished the Union both all the information assembled in its security investigation resulting in the discharge, and the statement given by its only direct informant, withholding as promised only his or her identity.[1] More important, they do this even though, when an employer has previously refused to turn over informants' names to a union, the Board has found a violation of Section 8(a)(5) and (1) only to the extent the employer failed to provide a "summary" of the informants' report without revealing anything that would betray informants' identities.[2] By today's ill-considered decision, the majority has upset another settled area of law, forcing employers to guess at required accommodation and to choose between employee safety and accepting leads regarding illegal in-plant activity. I dissent.

I.

The Respondent operates the Three-Mile Island Nuclear Generating Station where the Union represents about 385 production, maintenance, and distribution employees. On or about December 11, 1992, an employee, "John Doe I," told one of the Respondent's security agents that another individual, "John Doe II," had alleged that employee Ned Eppinger was removing food from the Respondent's cafeteria without paying for it. John Doe I asked the agent to conceal the identity of both John Does and the agent replied that he would do so "if at all possible."[3]

In response to this tip, the Respondent's security agents conducted surveillance of Eppinger for 8 days in

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

[1] In addition, the Respondent provided, at the Union's request, copies of all records relating to discipline for theft both by employees in the bargaining unit and by those outside. The record thus utterly belies the majority's statement that, "the Respondent made no effort to bargain to accommodate the Union's interest in seeking relevant information."

[2] See *Pennsylvania Power Co.*, 301 NLRB 1104, 1107–1108 (1991); *Mobil Oil Corp.*, 303 NLRB 780, 781 (1991).

[3] The Respondent's security agent in charge of the Eppinger investigation, Brian Frantz, credibly testified that the Company's practice is to grant requests for anonymity by informants unless they are to be called as witnesses.

December. During this time, as reflected in the company's investigation report, the Respondent's agent or agents observed Eppinger taking food from the cafeteria without paying for it. As a result of these observations, the Respondent suspended Eppinger on December 29, 1992, and terminated him on January 4, 1993.[4] At the time of his discharge, Eppinger was a member of the union executive board and chairman of the union safety committee.

On about January 5, the Union filed a grievance over Eppinger's discharge. The grievance stated that the Respondent was in violation of article 9 of the collective-bargaining agreement and "any other [article] pertinent to this grievance." Article 9 provides for a grievance procedure and arbitration. It defines a grievance as "a violation of the law governing [the] employer-employee relationship, or a violation of the terms of this agreement, or any type of supervisory conduct which unjustly causes any employee to lose his/her job or any benefits arising out of his/her job." Article 2, entitled "Employer-Employee Relationship," provides that the Respondent will not discriminate against union members, and that the Respondent may discipline and discharge employees for "proper cause."

Union President John O'Donnell made written and oral requests to Richard Kulp, Respondent's administrator of human resources, for a copy of the security investigation report used to terminate Eppinger, and subsequently made an oral request for the names of the informants. The written request stated that the Union required the report in order to determine whether or not to pursue the grievance under article 9 and "to further police" the agreement. In reply, the Respondent provided the Union with a copy of the investigation report, which did not reveal the identities of the informants but contained all of the information submitted by John Doe I, as well as the observations of the Respondent's security agents who conducted the surveillance and the transcript of an interview of Eppinger by management representatives. On May 21, the Union made an additional request for information relating to the Eppinger grievance, including copies of all records involving disciplinary actions for theft by bargaining unit and nonbargaining unit employees. The Respondent provided the Union with this information.

In the third-step grievance meeting, O'Donnell repeated his request for the names of the informants and stated that "innocent people are being blamed for turning [the information] in."[5] Employee Relations Manager Edmund Zubey replied that the Respondent does not release the names of informants. O'Donnell asserted that theft of food was widespread in the Company, that Eppinger should have received graduated discipline, and that he had been "set up." O'Donnell added that a management representative had told him that the Respondent fully intended to watch Eppinger in an attempt to get something on him.[6] The parties settled the grievance prior to arbitration and converted Eppinger's termination to a resignation.

At the unfair labor practice hearing, O'Donnell testified that he needed the names of the informants, because the Union believed that Eppinger was singled out for his union activities and, on cross-examination, added that he asked for the information to "clear people's names" and that employees were distracted from work because of the issue. O'Donnell stated:

> Our need was to clear individuals and get to who the informants were, and get back to work and work safely, instead of worrying about who the informants were.
>
> My mind was on safety and employee safety and not on running around and blaming each other for turning this individual in.

II.

The judge found that the informants' names could be relevant to the Union's concern that the Respondent may have discriminatorily engaged in surveillance of Eppinger because of his union activity. The judge noted, however, that in *Pennsylvania Power & Light Co.*, supra, the Board found that the Employer's claim of confidentiality outweighed the union's interest in the names of informants. In that case, which I discuss in detail below, informants provided information that prompted the employer to conduct drug tests of some employees and to discharge some of those who tested positive. The judge found that, under *Pennsylvania Power*, the identity of informants, even though relevant, may be kept secret when the matter about which they are informing poses a threat to safety in the workplace or to the public, and revealing their identity would deter them from informing and potentially subject them to harassment. But he reasoned that releasing the names of informants providing tips about workplace theft does not involve the same serious public and employee safety considerations as releasing the names of informants providing tips about illegal drug use.

The judge further observed that the Board has held that an employer has the duty to disclose the identity of witnesses to an incident for which an employee was disciplined, and that it may be required to reveal their identities prior to a grievance hearing, when "the potential to

[4] All dates hereafter are in 1993 unless otherwise noted.

[5] According to the Union's minutes of the meeting, O'Donnell declared he wanted the informants' names because "[p]eople all over the Island are being blamed for turning Ned in."

[6] O'Donnell also asserted that several years before, two senior company officials had assured him that surveillance or investigations would not be conducted based on tips provided by informants without establishing the informant's credibility beforehand.

sabotage the process is then at its zenith."[7] He reasoned that, as an employer is required to provide the names of such witnesses to an event prior to a grievance hearing despite the possibility of intimidation, then a union should have access to the names of informants whose testimony the employer will not need but "whose identity may prove useful to the union for other purposes." Accordingly, the judge found unlawful the Respondent's refusal to furnish the names of its informants to the Union, and ordered it to do so.

III.

My colleagues agree with the judge that the identities of the informants were relevant and necessary for processing Eppinger's grievance. The majority, however, explicitly disavows the judge's finding that the Respondent's confidentiality claim is not legitimate or substantial, because, rather than drug use or other conduct impacting public or employee safety, this case involves furnishing of information about workplace theft. Indeed, they assume that, "the Respondent has asserted a legitimate and substantial confidentiality interest here." Nevertheless, they further find that, "the confidentiality interest was not so substantial as to justify the Respondent's blanket refusal to provide any information in response to the request for informants' names." They conclude that, under the circumstances of this case, the Respondent has "an obligation to come forward with some offer to accommodate both its concerns and the Union's legitimate needs for relevant information," citing *U.S. Testing Co., Inc. v. NLRB*, 160 F.3d 14, 20–21 (D.C. Cir. 1998).

More particularly, my colleagues reason that there neither is nor should be a "blanket exemption from bargaining over an accommodation" to protect informants' names from disclosure; that, although the employer has a "legitimate and substantial confidentiality interest in protecting the identities of informants about workplace theft," the interest does not carry "the same 'unusually great weight' as the interests that were found to be present in *Pennsylvania Power* and *Mobil Oil*," and thus that a greater accommodation of employer and employee rights is dictated here; that there is a "latent possibility of retaliation against informants whose information leads to the investigation and discharge of an employee," but that this is indeed only a "possibility," unsupported by the record, and that there is "a specific concern about discrimination against a union steward."[8]

IV.

As part of the duty to bargain in good faith imposed by Section 8(a)(5), an employer must, on request, provide a union with information that is potentially relevant to its duty of representation, including information related to grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).[9] A union's right to relevant information, however, is not unlimited and must be balanced against competing employer interests, including legitimate confidentiality interests. In *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315 (1979), remanded and enf. denied in relevant part 595 F.2d 365 (6th Cir. 1979), a union sought information to support a grievance challenging personnel decisions based on employment aptitude tests. The Court held that an employer did not violate the duty to bargain in good faith by refusing to disclose to the union the identities of individual employees matched with scores received on the tests. In so finding, the Court noted that "[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice."[10] Id. at 318.

The Board also has specifically found that confidentiality concerns may prevail and recognized that the release of the names and addresses of informants, though relevant, may lead to their harassment and have a chilling effect on future informants. In *Pennsylvania Power*, supra, the employer implemented a rule providing that an employee could be sent to a physician for blood and urine testing if there was a "suspicion" of illegal drug use. Prompted by informants' tips, the employer ordered tests for 16 employees and discharged 5 who tested positive. In connection with grievance proceedings on behalf of the dischargees, the union requested the informants' names and addresses to discover whether there was a legitimate basis for the suspicion that triggered the tests and the discharges. The employer responded that it had promised the informants that it would keep their names confidential. The Board found the information relevant, as tests might have been ordered based on tips motivated by "personal animus" or other "specious motivation." Id. at 1106. Nevertheless, the Board held that

> in investigations of this kind of criminal activity, a potential for harassment of informants, with a concomi-

[7] See fn. 19, infra, distinguishing cases the judge relied on.

[8] In this connection, the majority argues that, unlike in *Pennsylvania Power* or *Mobil*, the issue is not so much the substance of the informers' statements but the reason "why" they offered information at all, suggesting pretext for discrimination may be the real issue.

[9] The standard for relevancy is a liberal "discovery-type" standard. Id. An employer must provide information relevant to the "evaluation or processing of a grievance," *NLRB v. U.S. Postal Service*, 888 F.2d 1568, 1570 (11th Cir. 1989), and "requested information should be deemed relevant if it is likely to be of material assistance in evaluating strategies that may be open to the union as part of its struggle to minimize the adverse effects of the employer's decisionmaking process on persons within the bargaining unit." *Providence Hospital v. NLRB*, 93 F.3d 1012, 1017 (1st Cir. 1996). Information concerning employees within the bargaining unit is presumptively relevant. *NLRB v. U.S. Postal Service*, supra at 1570 (citing *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953 (6th Cir. 1969).

[10] The Court also found that the employer was not required to provide copies of the test battery and answer sheets. It found that the strong public policy against disclosure of employment aptitude tests and the employer's interest in preserving employee confidence in the testing program outweighed the union's interest in the information. Id. at 312–317.

> tant chilling effect on future informants, it is sufficiently likely that the Respondent has a legitimate interest in keeping the informants' identities confidential and that this confidentiality interest outweighs the Union's need for the informants' names and addresses.

Id. at 1107.[11] Accordingly, the Board ordered that the Respondent provide summaries of the informants' statements but not the statements themselves or the informants' names and addresses.

Likewise, in *Mobil Oil Corp.*, 303 NLRB 780, supra, the Board found that the employer's confidentiality interest prevailed in similar circumstances. There, the Board considered whether, in the context of a grievance proceeding, the employer unlawfully refused the union's request for the identity of the person who provided information that led to the mandatory drug screening of three employees. The Union asserted that the informant's name was necessary to determine whether "reasonable cause" existed to institute the screening procedure, and the Board acknowledged the relevance of the request. As in *Pennsylvania Power*, however, the Board found that the employer lawfully refused to disclose the name of the person who reported drug use by the employees but unlawfully failed to provide a summary of the informant's report. The Board found that the employer was not required to show evidence of past retaliation against employees who reported misconduct and that the employer's pledge of confidentiality to its informant was "reasonable in light of the general potential for retaliation against informants in the investigation of criminal drug use."[12]

Consistent with *Pennsylvania Power* and *Mobil Oil*, I would find that the Union's request for the informants' names satisfies the test for determining potential relevance, as one reason offered to support the request was that Eppinger had been "set up" or "singled out," based on union activity.[13] But I also find that the Respondent has advanced a legitimate and substantial interest in maintaining the confidentiality of the informants' names. I disagree with my colleagues that, unlike in *Pennsylvania Power*, the Respondent's confidentiality interest in the names of informants providing tips is not so substantial as to justify a blanket refusal to provide the information. I conclude that the Court's decision in *Detroit Edison* and the Board's decisions in *Pennsylvania Power* and *Mobil Oil* support a finding that an employer's interest in preventing theft in the workplace and in maintaining confidentiality to avoid the potential for retaliation against or harassment of informants outweighs a union's interest in obtaining their identities, or in forcing an employer to bargain over an "accommodation" that may have the effect of disclosure.

The confidentiality interest here is at least as strong, if not stronger, than that found in *Detroit Edison*. In that case, the confidentiality interest concerned the protection of employees from "embarrassment" resulting from the release of individual aptitude test scores[14] and the protection of the integrity of the employer's aptitude testing program from compromise that might ensue from releasing test battery and answer sheets. In this case, the confidentiality interest is to protect the identity and safety of the informants, as well as the employer's access to information about employees' unlawful workplace conduct and his right to investigate and, if necessary, discipline or discharge an employee for subsequent misbehavior.

Protecting the confidentiality of the informants' names conforms to Board precedent, as exemplified in *Pennsylvania Power* and *Mobil Oil*. In both cases, the Board found that confidentiality concerns prevailed and that the employers were not required to provide the names of informants. In both cases, the Board ordered that the Respondent provide summaries of the informants' statements. Here, the Respondent provided the Union with a copy of the security agents' report, which included all the information submitted by John Doe I and the security agents' subsequent observations of lunchroom conduct, and the transcript of an interview with Eppinger. It also supplied copies of all records involving disciplinary actions for theft by bargaining unit and nonbargaining unit employees. Thus, the Respondent has provided as much or more information than the Board required the employers to provide in *Pennsylvania Power* and *Mobil Oil*.[15]

[11] See also *Roger J. Au & Son v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976) (in labor litigation, informants "are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment"), cited favorably by the Board in *Pennsylvania Power*, 301 NLRB at 1107.

[12] Id. at 781. See also *U.S. Postal Service*, 305 NLRB 997 (1991) (employer lawfully refused to provide noneyewitness opinions, comments, and recommendations contained in investigatory file, notwithstanding union request for information for use in connection with employee surveillance).

[13] I note, however, that the Union failed to file an NLRB charge on this basis.

[14] The Court also noted that, "the Company presented evidence that disclosure of individual scores had in the past resulted in the harassment of some lower scoring employees who had, as a result, left the Company." 440 U.S. at 319.

[15] Moreover, the request for information apparently is moot because the parties settled Eppinger's grievance, which appeared to encompass the allegation that the Respondent retaliated against Eppinger because of his union activity as well as the allegation that it discharged him without cause. The grievance alleged that the Respondent violated art. 9 and "any other" article of the collective-bargaining agreement. Art. 2 provides that the Respondent will not discriminate against union members but may discipline and discharge them for proper cause. Thus, the settlement appears to have covered both allegations. Contrary to the judge, I find that *Westinghouse Electric Corp.*, 304 NLRB 703, 708–709 (1991), and *U.S. Postal Service*, 307 NLRB 429 fn. 2 (1992), do not support the conclusion that the request for the informants' names in this case should not be considered moot. In *Westinghouse Electric Corp.*, the judge did not include in the remedy an order that the employer provide the information requested because the information had "no current relevancy" to the purpose motivating the union's request, i.e., processing the grievance. The judge noted that an arbitrator had

To order further accommodation would serve no purpose other than to risk compromise of the informants' identities.

That those cases involved drug use should not change the result in this case. In both drug cases and nondrug cases, the employer has disciplined or discharged an employee for illegal workplace conduct at issue and, thus, in both, the informant faces the danger of retaliation and harassment. My colleagues state that they "do not agree with the judge that a confidentiality claim is not legitimate or substantial when it involves informants about workplace theft rather than drug use or other conduct impacting public or employee safety." Rather, they assume that the Respondent "has asserted a legitimate and substantial confidentiality interest here."

Nonetheless, my colleagues aver that accommodation bargaining is necessary because "concerns about petty cafeteria theft" do not "pose[] [an] apparent threat to employee or public safety" and do not implicate national drug control policy. The fact is that engaging in any activity that is contrary to law, such as theft, bears on an employee's character and fitness for continued service. It would take the wisdom of Solomon and the time of the ages for the Board, on a case-by-case basis, to attempt to grade and classify all potential forms of employee misconduct and to determine how the gravity of the offense ranks in the majority's subjective scale of various legitimate interests. Moreover, there is no correlation between the majority's perceptions of the nature of the misconduct and the potential peril to an informer. When the informant gives up information that results in an employee's dismissal, it does not matter if the discharge is because of workplace theft or drug use. The employee's job is lost just the same and the resentment of fellow employees toward the informer is likely to be just as great. Yet my colleagues insist that retaliation is a mere "possibility," and that the record is not strong enough to suggest its likelihood. Not only is it reasonable to take administrative or judicial notice of the serious potential for harassment, intimidation, and retaliation,[16] as the *Detroit Edison* Court did with regard to the likelihood of employees' embarrassment if job aptitude test results were made known, but the record here contains ample affirmative evidence of such danger.

In the third-step grievance meeting, Union President O'Donnell stated that "innocent people are being blamed for turning [the information] in." At the hearing, O'Donnell testified that he asked for the informants' names to "clear people's names," and because employees were distracted from work because of the issue. O'Donnell further testified of the Union's "need" to "*get to who the informants were*" so that employees could resume safe work practices and stop "*running around and blaming each other for turning this individual in*." [Emphasis added.] If feelings were running so high in the facility against the informants that, according to the Union, work was disrupted and work safety jeopardized, the peril to the informants if their identities became known is palpable.

An incident at the James River papermill in Green Bay, Wisconsin, in November 1992[17] discloses the potential danger with which employers must deal, given the new and unnecessary uncertainty injected by the majority. There an informer reported to the local police a pattern of industrial theft of extension cords. The police passed the tip to the employer, who, thus armed, apprehended the thief in a subsequent event. A freedom-of-information request to the police obtained the tape of the telephone call, a fellow worker identified the caller from his voice, and the caller's body was later found in the plant's pulping vat, bound with weights. Members of the union plant committee were indicted and convicted of murdering the informant.[18]

Even without record evidence of risk to informers' safety, such as that present here, it makes no sense to adopt a rule that requires litigating how "likely" retaliation may be on the plant floor. Obviously, individuals and organizations planning to commit harassment or violence will often be close-mouthed about their intentions, and actions taken pursuant to such intentions may become known only too late—when the informer's body is found. Instead, as stated, resentment against an informer and the likelihood of harassment or reprisal is a fit subject for administrative notice based on common sense.

The interest in maintaining the confidentiality of informants' names is a strong one, and the danger of re-

---

issued a grievance award and that the arbitrator was without the power to reopen the grievance. In *U.S. Postal Service*, the Board found that, unlike in *Westinghouse Electric Corp.*, the employer had not shown that the "only possible relevance of the information was in connection with a proceeding to reopen the arbitration, and the arbitrator then was completely without authority to reopen such record." Id. at fn. 2. I agree with the judge in *Westinghouse Electric Corp.* that the Board should not order a party to provide information that has no current relevancy to the purpose of the information request. The Board's decision in *U.S. Postal Service* may be distinguished because there is sufficient evidence in this case to support the conclusion that the information requested is not currently relevant based on the grievance settlement.

[16] Unfortunately, labor violence is a fact of life. A recent study documents this fact. Armand J. Thieblot, et al., Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB (1999). The study largely focuses on violence occurring in the context of strike situations. The parallel, however, is obvious, since much strike and picket line misconduct stems from the resentment that workers will be deprived of employment by replacements. Similar resentment may arise where the conduct of one employee leads to another's loss of his livelihood.

[17] Anne Klemm, *2 Convicted Claim Wiener Killed Monfils*, Green Bay Press Gazette, Feb. 8, 1997; *Mill Workers Sentenced in Green Bay Murder*, Papermaker, March 1996.

[18] It is little less than ludicrous for my colleagues to suggest that this testimony shows "the Union's members were concerned about who the informants were," but that "this is far from a desire to harass or retaliate against the informants."

taliation and harassment substantial. The Board should properly hold that the duty to provide information does not include a duty to provide the names of informants when the employer does not rely on their information in imposing discipline, and that no further accommodation is required when the employer furnishes at least a summary of the information provided.[19] This conclusion is consistent with *Pennsylvania Power* and *Mobil Oil*, in which the Board found that the employers had the duty to provide summaries of informants' statements but not informants' names and addresses.[20]

By holding that an employer must negotiate with the union regarding the identity of an informer, whom the employer both promised to protect from disclosure and did in fact attempt to do so by declining to use the reported incident as grounds for discipline, the majority risks putting the cautious employer in the position of ignoring confidential reports of even criminal activity as the cost of protecting the identity and safety of the informant. My colleagues also claim that an accommodation is necessary here, unlike in *Pennsylvania Power* and *Mobil Oil*, because "the Union has a specific concern about discrimination against a union steward," an interest implicating the contract and national labor policy. In *Pennsylvania Power*, however, as noted, the Board acknowledged that informants' tips relating to individual employees behavior could be based on "personal animus or other specious motivation," but refused to order disclosure of the informants' identities or "accommodation bargaining." Moreover, as a factual matter, the best evidence of the truth of the Union's assertion lay within its own grasp. Since O'Donnell stated that a "management representative" had told him the company was going to watch Eppinger to get something on him, O'Donnell could have testified to that as fact in an arbitration proceeding and the Union could have subpoenaed the individual in question.

An employee contemplating whether to provide confidential information should not be required to attempt to predict how the Board will apply its subjective balancing test relating to disclosure of information, under which the party advancing a confidentiality defense bears the burden of proof,[21] nor what result negotiations over "accommodation" will deliver. Such a rule will have a chilling effect on informants and employees. An employer, recognizing that informants generally will want assurances of confidentiality and protection, should be able to protect the names of informants who will not be called to testify regarding the misconduct for which discipline has been imposed. It cannot do so if the Board determines after the fact that unspecified further accommodation is required,[22] accommodation that may inadvertently provide clues that could reveal the informant's identity and jeopardize his or her safety. Similarly, a union should not be required to provide the employer with information that could lead to the identification of informants against an employer. Accordingly, I strongly dissent.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with the Electrical Workers System Council U-9, Local 563, AFL–CIO, in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that we consider confidential.

[19] Witnesses to the event for which discipline is imposed can reasonably expect to be called on to tell what they observed and to have their identities made known. Informants, on the other hand, do not have the same expectation, because they merely provide information that will serve as the basis for an investigation. Any action taken will depend on facts arising thereafter and witnessed by others. Thus, the judge here erroneously relied on cases that are distinguishable because they involved witnesses to the events for which discipline was imposed. See *New England Telephone Co.*, 309 NLRB 196 (1992) (names of witnesses to incident for which employee was discharged); *Resorts International Hotel*, 307 NLRB 1437, 1438 (1992), enfd. 996 F.2d 1553 (3d Cir. 1993) (names of guests whose complaints served as basis of discharge); *Anheuser-Busch, Inc.*, 237 NLRB 982, 984 fn. 2 (1978) (holding that witness statements need not be provided but noting that witness names must be); and *Transport of New Jersey*, 233 NLRB 694, 695 (1977) (names of witnesses to accident).

[20] Contrary to the majority, a blanket protection for informers is not inconsistent with the principle that the presence of a duty to supply information pivots on "'the circumstances of the particular case,'" *Detroit Edison*, supra, 440 U.S. at 314, quoting *NLRB v. Truitt Mfg. Co.*, 351 U.S.149, 153 (1956). Rather, it is a recognition of a recurring factual pattern that should give rise to the same result in each case in which it appears. It is no different from holding in a future case that, under *Detroit Edison*, the names and associated scores of employment aptitude test takers should not be released where a test is involved that is different from that at issue in *Detroit Edison* itself.

[21] E.g., *Mary Thompson Hospital v. NLRB*, 943 F.2d 741, 747 (7th Cir. 1991) (burden on party asserting confidentiality defense).

[22] My colleagues state that they have more confidence than I that "the Respondent will take all steps necessary to ensure that any accommodation reached as a result of bargaining will not place the informants at risk of retaliation and harassment." The fact is the majority has already deprived the Respondent of the unilateral ability to take such steps, and left it without guidance as to how much further it must go to satisfy the Union and the Board.

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

WE WILL bargain in good faith with the Union regarding its request for the names of informants, which information is relevant to the Union's administration of the nondiscrimination provision of the parties' contract, and WE WILL comply with any agreement reached through such bargaining.

METROPOLITAN EDISON COMPANY

Linda Carlozzi, Esq., for the General Counsel.
Larry J. Rappoport, Esq. (Stevens & Lee), of Wayne, Pennsylvania, for the Respondent.
Charles T. Joyce, Esq. (Spear, Wilderman, Borish, Endy, Spear & Runckel), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This case was tried on July 13, 1994, in Philadelphia, Pennsylvania. The issue presented is whether Respondent violated Section 8(a)(5) of the Act by refusing to identify the informants whose information ultimately led to the discharge of an employee. Respondent's answer to the complaint denies the material allegations, but does not question the assertion of Board jurisdiction in this case or the claim that the Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

Briefs were filed by the General Counsel, the Charging Party, and the Respondent on or about September 20, 1994.[1] Having reviewed the record and the briefs, and taking into account my recollection of the demeanor of the witnesses, I make the following findings of fact,[2] conclusions of law, and recommendations.

I. THE RELEVANT FACTS

The Union represents some 385 Metropolitan Edison employees who work at the Three Mile Island Nuclear Generating Station in Middletown, Pennsylvania. At the hearing, the parties entered into the following stipulation:

> 1. On or about December 11, 1992, an employee identified as "John Doe I" told officials of the Respondent's Security Department that another informant, known as "John Doe II," had alleged that employee Ned Eppinger was removing food items from the Respondent's Three Mile Island North Office Building Cafeteria without paying for them.
>
> 2. On the afternoon of December 11, 1992, in response to this tip, two security investigators of the Respondent established a surveillance of Eppinger in the Cafeteria.
>
> 3. The Employer conducted its surveillance during 8 days in December 1992, during which time, according to the Respondent's Investigation Report, Eppinger was observed taking approximately $5.00 worth of food items from the fast food service line without paying for them. On December 29, 1992, as a result of these observations, Respondent suspended Ned Eppinger and on January 4, 1993, Eppinger was terminated by Respondent. The Respondent established this surveillance based upon the information received from the informant(s).
>
> 4. On or about January 5, 1993, the Union filed a grievance regarding Eppinger's discharge. Union President John O'Donnell made a written and oral request to Richard Kulp, Administrator of Human Resources, for a copy of the "complete unexpurgated security investigation report" used to terminate Eppinger, and subsequently made an oral request for the names of informants relied upon by the Respondent to conduct the surveillance investigation of Eppinger.
>
> 5. The Company provided the Union with a copy of the security investigation report that did not reveal the identities of either informant John Doe I or John Doe II. The security investigation report contains the observations of Respondent's Security Agents who conducted the surveillance of Eppinger and the transcript of an interview conducted with Eppinger by Security Agent Brian Frantz, Site Protection Supervisor Richard Richard [sic] Goodrich, Plant Material Director Richard Harper and Human Resources Administrator Richard Kulp.
>
> 6. The Union does not independently know the identity of John Doe I or John Doe II.
>
> 7. On May 21, 1993, the Union through the Chairman of its System Council, Joseph W. Parks, made an additional request for information relating to the Eppinger grievance and specifically copies of all records of disciplinary action for theft by bargaining unit and non-bargaining unit employees. The information requested was furnished by the Respondent.
>
> 8. The collective bargaining agreement between the parties relevant to the instant case was effective from May 1, 1991, until April 30, 1994, pursuant to which Respondent has recognized the Union as the exclusive bargaining representative of the Respondent's production and maintenance employees employed at the Three Mile Island Nuclear Generating Station, the facility involved in this case.
>
> 9. The Agreement provides at Article 9.2 for final and binding arbitration. A grievance is defined as a violation of the law governing employer-employee relationship [sic], or a violation of the terms of this agreement, or any type of supervisory conduct which unjustly causes any employee to lose his/her job or benefits arising out of his/her job.
>
> 10. The Agreement provides at Article 2.1 that the Respondent can discipline and discharge employees for "proper cause." Article 2.2 of the Agreement provides that Respondent and its agents will not discriminate in any manner whatsoever against any member of the Union because of membership and activity in the Union.
>
> 11. Nothing in this stipulation shall preclude the parties from adding to or supplementing the evidence presented herein.

Having grieved Eppinger's termination, the Union processed the grievance to arbitration, which was scheduled for December 7, 1993. According to the Union, however, because Eppinger

[1] At the same time, Respondent filed a motion to reopen the record, and the General Counsel and the Charging Party filed oppositions thereto. On September 29, I issued an order denying the motion.

[2] By motion dated September 20, 1994, the parties jointly moved to correct the transcript in certain respects. The motion is granted, and certain errors in the transcript are noted and corrected.

had been unable to secure employment after his termination, a settlement of the grievance was reached in October which converted Eppinger's termination to a resignation.

Eppinger served as a member of the union executive board and also was chairman of the union safety committee, both for a 4-year period probably preceding his termination. His safety committee role was to see that violations were corrected. In doing so, Union President O'Donnell testified, Eppinger would speak to supervisors and the safety director about questionable situations, and once told a foreman to "stop a job" in inclement weather. O'Donnell further testified that "approximately within one year" of Eppinger's termination, Supervisor Natale asked O'Donnell to talk to Eppinger "about how he conducted himself as Safety Chairman."

At the instant hearing, Union President O'Donnell first testified that he needed the names of the Eppinger informants because the Union believed from the beginning that Eppinger "was singled out for his Union activities, and that the names of the individuals John Doe I and John Doe II were very relevant in order for us to prove our case that he was singled out for being a staunch safety man and a union officer." He said that he envisioned questioning the informants about the circumstances leading to the surveillance of Eppinger, and about whether they had identified to management other alleged thieves who, unlike Eppinger, were not made the subject of surveillance.[3]

On cross-examination, however, O'Donnell testified that he had asked for the information "to clear people's names," mentioning that workers' safety and public safety were "a major concern" (the employees' minds "were turned to who turned in Eppinger"). "Our need," he stated, "was to clear individuals and get to who the informants were, and get back to work and work safely, instead of worrying about who the informants were." Four transcript pages later, however, O'Donnell reverted to saying that "part of the reason" for wanting the information was to determine whether Eppinger had been singled out because of his union activities.

The record contains copies of notes made by a company representative (G.C. Exh. 10) and a union representative (G.C. Exh. 11) at the third-step grievance meeting. The General Counsel Exhibit 10, a more comprehensive set of notes than General Counsel 11, shows that O'Donnell, in adverting to his outstanding request for the names of the informants, had the following exchange with Employee Relations Manager Zubey:

> O'DONNELL: I asked you for a copy of the names associated referred to [sic] in the report as John Doe I and John Doe II, and you did not produce that. We are in the process of following up on that request. What is occurring because you will not release those names is innocent people are being blamed for turning that [sic] in.
>
> ZUBEY: How can people come to you to clear their names? O'Donnell: Accusations are being made. Since I don't know the identity of John Doe I and John Doe II, I can't clear their names.
>
> ZUBEY: This Company has never released the names of informants, and we are not about to start doing so.
>
> O'DONNELL: We will see about that. The severity of this discipline is much too severe. I understand the need to do something. I told you before I have seen people eat french fries while they are waiting in line.

Subsequently, O'Donnell said at the meeting that Respondent had "set [Eppinger] up," and Union Representative Leahy argued, "By not stopping him after that first time, you were really condoning this. You knew he was stealing, but you did nothing to stop him. That doesn't make any sense." O'Donnell thereafter went on to say that the Company had a long history of "not terminating people with clean records for minor theft." The parties disputed two such cases mentioned by O'Donnell. O'Donnell then asserted that the theft of food was widespread in the Company and that Eppinger should have received graduated discipline; further, "Ned was set up. Ned made a mistake. I never said that he did not deserve discipline. . . . A management person came to me and said that the Company fully intended to watch Mr. Eppinger in an attempt to get something on him. I think I know who John Doe I and John Doe II are. It could be a bargaining unit person and a supervisor who are related. It could be the same person who told the management person I spoke to to try and get something on Ned." Additional colloquy followed.

O'Donnell testified that in 1986, he had a conversation with Hukill (then a "Vice President Director" at Three-Mile Island; now retired) in which Hukill assured him that "based on informants, or anonymous tips alone, that the Company would not conduct surveillances or investigations, and that the informant itself [sic] would have to be credible before an investigation or a surveillance would be made." O'Donnell also said that several months later, he had a similar conversation with then-Labor Relations Manager Charles Rippon.

Brian Frantz, the security agent who oversaw the investigation of Eppinger, testified that the Company has a practice of honoring requests for anonymity by informants unless the informant is needed as a witness. When John Doe I asked him to conceal the identify of both John Does, Frantz said that he would so "if at all possible." John Doe I told him about Eppinger's thefts *before* requesting, and being granted, anonymity.

O'Donnell testified as to two informants who had been identified to him is the past by Respondent. He said that in the case of the 1991 termination of employee Nyes, there were two secretaries who might have informed on Nyes, and he had asked Human Resources Staff Administrator Richard Kulp to name the guilty one. Kulp allegedly told him it was Becky Siebler. In subsequent testimony, however, O'Donnell could not "recall" whether he had specifically requested this information, but said that he had been given Siebler's name by Kulp. Kulp testified that he did not tell O'Donnell that Siebler had reported on Nyes, and he believed that the Respondent's information about Nyes had come from management or from a supply clerk who asked management why Nyes was ordering certain goods.[4]

As for the case of Bob Stone, O'Donnell first said that Respondent had given him the name of the informant upon re-

[3] The Union did not file an unfair labor practice charge regarding Eppinger's discharge.

[4] Kulp struck me as a more reliable witness than O'Donnell, and I would credit him on this conflict. I note that when O'Donnell was asked at the hearing why he did not refer to the Nyes case when, at the third step meeting, Zubey stated flatly that the Respondent had never named informants, O'Donnell was unable to explain his failure to do so; he also did not mention the alleged precedent in his pretrial affidavit.

quest, but ultimately conceded that Respondent had done so only by mistake.[5]

II. ANALYSIS OF THE 8(a)(5) ALLEGATION

Included within an employer's 8(a)(5) bargaining obligation is the requirement to furnish potentially relevant and useful information to a collective-bargaining representative; that requirement encompasses supplying information which may be of use to the union in the arbitral process. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (7th Cir. 1967). In the latter case, the Supreme Court described the "discovery-type standard" applicable to grievance information requests: that the Board was "acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." Id. at 437.[6]

In a subsequent case, however, the Supreme Court recognized that even though the requested information may be relevant, an employer's legitimate interest in preserving the confidentiality of that information must be given respect. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (6th Cir. 1979).

Thereafter, in *Pennsylvania Power Co*., 301 NLRB 1104 (1991), the Board synthesized the two Supreme Court opinions in a case dealing with a request by a union for the names of, and information furnished by, informants whose accusations had led to the drug testing of several employees. The Board stated (id. at 1105–1106; footnotes omitted):

> It is clear from the foregoing that in dealing with union requests for relevant, but assertedly confidential, information, the Board is required to balance a union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer. The appropriate accommodation necessarily depends on the particular circumstances of each case. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests.

In the present case, in its answer to the complaint, Respondent asserted what clearly amounts to a confidentiality defense ("The information [requested] could only result in retaliation, coercion and intimidation of individuals who have been willing to come forward.") At the hearing, on cross-examination and direct examination, Respondent pursued the notion of a confidentiality defense (e.g., Tr. 53, 113). But curiously, near the end of the hearing, counsel for Respondent seemed to agree that the confidentiality issue was not grounded upon concern about harassment of the informants, should they be identified (which would appear to be the only sound basis for asserting a claim of confidentiality) (Tr. 128–129):

> MS. CARLOZZI: [I]s it in fact true that Mr. O'Donnell did not make any threats toward anybody?
>
> MR. RAPPOPORT: Objection. The posture that threats by Mr. O'Donnell is [not] the reason this information wasn't given. It's not a defense.
>
> JUDGE RIES: Objection is sustained.
>
> BY MS. CARLOZZI: Mr. Kulp, at that meeting, or at any other time, you did not have any information that there was in fact any intimidation, or a threat of intimidation, by the Union?
>
> MR. RAPPOPORT: Objection.
>
> MS. CARLOZZI: Your Honor, in cross-examination, I'm entitled to go into this area. If Respondent wants to say—
>
> JUDGE RIES: Respondent is saying on the record that it is [not] proffering that as a reason for not giving the information.
>
> MR. JOYCE: Your Honor, just so I'm clear. I thought—
>
> JUDGE RIES: That there was any concern about intimidation.
>
> MR. JOYCE: That's Respondent's proffer, and thats fine.
>
> MS. CARLOZZI: Respondent is saying—
>
> JUDGE RIES: That's what I heard from the objection, and he just made it. They are not postulating their defense on any claim of intimidation, or fear of intimidation.

Although this colloquy began as an objection by Respondent to questions about actual threatened intimidation of informants by the Union, it evolved into seeming acquiescence by Respondent in the theory that it was not basing a defense on "concern about intimidation" or "fear of intimidation." On brief, counsel for the General Counsel runs with this apparent concession (Br. 15), while at the same time contending that there is, in any event, no warrant in the record for a confidentiality defense (Br. 15–17). Respondent's brief, on the other hand, argues fear of intimidation in total disregard of the quoted exchange.

I am strongly inclined to believe that counsel for Respondent did not consciously intend to agree that he was waiving his confidentiality defense based on "fear of intimidation." The discussion quoted above began with an inquiry as to whether there had been an *actual* threat by President O'Donnell, which counsel for Respondent said that he was not alleging, and then, closely read, took a turn which counsel evidently did not notice. I shall therefore assume that Respondent continues to proffer fear of intimidation and reprisal as the reason that it sought to keep confidential the names of the informants.[7]

[5] Further evidence of O'Donnell's unreliability appears in his testimony at Tr. 63 that in other cases where the Company had refused to name informants, it had advised him that a promise of confidentiality had been provided, whereas at Tr. 67, O'Donnell said that there had been no "other instances where the Company has not provided [him] with information because they promised to make this information confidential."

[6] The Court cited 4 Moore Federal Practice sec. 26.16[1], 1175–1176 (2d ed.): "Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy."

[7] Apparently in anticipation of such a position, counsel for the General Counsel notes on brief that she "was precluded from cross-examination of Respondent's witnesses regarding this issue based upon the Judge's assertion that Respondent was not postulating their [sic] defense on any claim of intimidation or fear of intimidation. Accordingly, absent such evidence, any argument by Respondent of harassment or intimidation must now be rejected. *Fairmount Hotel*, 304 NLRB 746." But counsel's initial question was addressed to whether O'Donnell had in fact made any threats against the informants. I shall assume that Kulp not only would have conceded that O'Donnell had not done so, but also that no one had actually threatened the informants,

In *Pennsylvania Power & Light,* supra, a case rather similar to this one, the Board held that the identities of informants whose tips had led to drug testing (and discharge) of several employees were relevant. The sole basis given for concluding that the names of the informants were potentially "relevant" was the existence of a policy pursuant to which employees could be tested only if there was a "suspicion" that he or she was under the influence of drugs. The administrative law judge's decision in *Pennsylvania Power* wrote that the test derived from an "announced procedure" by the employer based on "reason to believe that an employee may be under the influence of drugs." 301 NLRB at 1109. The Board, however, while at first saying that the Respondent "implemented the policy" and that the record was silent as to whether it was unilaterally imposed (id. at 1104 fn. 3), later stated that the Respondent had the burden of establishing "that it had reasonable suspicion, *as specified in the contract*, for testing the grievants." (Id. at 1107 fn. 16; emphasis added.) I shall assume that the Board erred in referring to a contractual provision. It was on the basis of this policy that the Board found the information to be relevant (301 NLRB at 1106):

> Although "suspicion" is a minimal standard, it is nonetheless one to which the Respondent has committed itself, and, moreover, one that permits a conclusion that the standard has been violated. For all the Union knows, the Respondent might have acted on tips that were based not on behavior indicating drug use or other specious [sic] motivation. Information about what led the Respondent to order the employees tested would lend support to union arguments that the Respondent had no ground for its 'suspicion' and thus no reason to test employees. Conversely, such information might well indicate to the Union that further pursuit of the grievances would be fruitless.

The General Counsel and the Charging Party find in the present case an analogy to the "suspicion" standard in *Pennsylvania Power*. They ground the analogy on the testimony of O'Donnell that in 1986, the Union was told by former Vice President Hukill that "based on informants, or anonymous tips alone, that the Company would not conduct surveillance's or investigations, and that the informant itself [sic] would have to be credible before an investigation or a surveillance would be made"; and that 6–8 months later, O'Donnell had been reassured by former Labor Relations Manager Charles Rippon that a tip from an informant "would have to have merit before an investigation or surveillance would take place."

I was not overly impressed by the testimony of O'Donnell, but it was not contradicted on this point. While Hukill has since retired and the record does not disclose his whereabouts, O'Donnell testified that Rippon is currently employed by GPU Nuclear Corp., which operates the Three-Mile Island station. Since the record gives no indication of Hukill's or Rippon's unavailability, I feel constrained to credit O'Donnell's testimony.

It is not clear whether Rippon's oral 6-year-old assurance that information would have to have "merit" in order to trigger an investigation established the sort of binding "standard" that the Board found in the term "suspicion" in *Pennsylvania Power*. It seems to be a meaningless assurance; if the information must be found to have "merit" ab inito, there would be no need to institute an investigation. If this assurance is to be accepted as an enforceable promise, "merit" would have to be understood to mean something like "probable cause."

However, relevance of the identity of the informants could perhaps also be established in another way. As in *Pennsylvania Power*, it would be relevant in an arbitration if the Union could use it to show that the surveillance was based on the union activism of Eppinger or was otherwise invidiously selective. 301 NLRB at 1106. As we have seen, at the third-step meeting, O'Donnell first stated that he needed the names of the informants in order to "clear the names" of persons who were being falsely accused of informing. In later discussion, he specifically charged the Respondent with "setting up" Eppinger and related that a member of management had told him that the Respondent "fully intended to watch Mr. Eppinger in an attempt to get something on him," and he immediately thereafter said that John Doe I or II "could be the same person who told the management person I spoke to to try and get something on Ned." It does not seem unreasonable to say that by expressly making this connection, O'Donnell conveyed to Respondent a legitimate basis for wanting the identity of the two John Does. In *Pennsylvania Power*, the employer did not ask, and the union did not explain, the basis for the request; it was the Board which supplied the rationale for holding the information to be potentially relevant. See also *Brazos Electric Power*, 241 NLRB 1016, 1018 (1979). Furthermore, here, as in *Pennsylvania Power*, the employers showed no interest in the unions' reason for wanting the names of the informants; in both cases, the employers were committed to nondisclosure in the name of confidentiality.

While, in *Pennsylvania Power*, the Board concluded that the evidence sought by the union was relevant, it further found, in striking the balance required by *Detroit Edison*, supra, that the respondent's claim of confidentiality carried the day. The reach of the rationale is debatable. Stress is placed equally on safety, the nuclear plant, the character of the activity, and the need for unimpeded access to drug tips (301 NLRB at 1107):

> The connection of confidentiality to the safety of the public and other employees and to job performance is plain here. The Respondent's workplace includes both nuclear and fossil power production plants as well as other inherently dangerous work settings that make the need for a drug-free environment both obvious and necessary. The Respondent contends that if it is not able to maintain strict confidentiality in its drug program, informants will be deterred from coming forward with information regarding drug use by other employees. The Respondent further claims that identifying informants potentially subjects them to harassment. We find these arguments persuasive. Like the employer in *Detroit Edison*, supra, the Respondent has demonstrated the strength of its concerns, and we find no national labor policy warranting a remedy that would "unnecessarily disserve" the legitimate interest in confidentiality here. *Detroit Edison*, supra, 440 U.S. at 341.

The heart of the foregoing rationale seems to be that the identity of informants may be kept secret when the matter about which they are informing poses a threat to safety in the workplace and/or to the public, and a practice of revealing their identity to a union would deter them from informing and poten-

---

which is as far as the General Counsel could have gone with this line of questioning.

tially subject them to harassment.[8] If *Pennsylvania Power* is really a "narrow exception," as contended by the General Counsel and the Charging Party, to the otherwise liberal access-to-information rule, it would mean that in the present case, the Union would be entitled to the information sought, since no threat to safety in general was involved here.

It is worth noting that in a case decided shortly after *Pennsylvania Power*, a Board panel (former Member Devaney dissenting) adopted the decision of an administrative law judge which held that the union was not entitled to the names of persons who had complained about the inattentive driving of a forklift driver. *Boyertown Packaging Corp*., 303 NLRB 441 (1991). The administrative law judge made no reference to *Pennsylvania Power* or to safety considerations. He reached back, instead, to *Anheuser-Busch, Inc*., 237 NLRB 982 (1978), in which a grieving union sought witness statements in the possession of the employer. The Board refused to order the release of the statements on the principal ground that efforts might be made to "coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all." It might be supposed that the same concern would apply to release of the names of witnesses known to the employer, but in *Anheuser-Busch* the Board also stated, "An employer does have a duty to furnish a union, upon request, the names of witnesses to an incident for which an employee was disciplined." 237 NLRB at 984 fn. 5. It seems essentially impossible to distinguish between the disclosure of witness statements and witness identities where the issue is potential intimidation of those witnesses.

Nonetheless, the *Anheuser-Busch* case, as reaffirmed in *Boyertown Packaging*, does signify that the identity of witnesses can be revealed to an opposing party prior to a grievance hearing, even though the potential to sabotage the process is then at its zenith.[9] If this is so, it would seem to follow that the names of informants, whose testimony is not directly important to the employer's case, but whose involvement is potentially useful to the union's grievance, should, a fortiori, be made available to the union on request. I.e., if the Board is willing to expose the names of the witnesses to an event prior to the hearing, despite the possibility of intimidation which could choke off their evidence, then there is seemingly little basis for arguing that a union should not have access to names of persons whose testimony the employer will not need, but whose identity may prove useful to the union for other purposes. Thus it would appear to me, as long as the second prong of *Anheuser-Busch* is still in effect, that the confidentiality honored by the Board in *Pennsylvania Power*[10] must have been due to the particular circumstances found compelling by the Board in that case—serious public and employee safety considerations. It could, of course, be argued that informants about theft or any other conduct adversely affecting the safe, efficient, and economical operation of the employing facility should similarly be protected from disclosure, lest they be deterred from promoting a social good, but, as discussed, I cannot conclude that the Board has thus far taken that tack.

I therefore conclude that the Respondent violated Section 8(a)(5) and (1) by refusing to provide to the Union the names of the persons whose information led to the surveillance of Eppinger.

CONCLUSIONS OF LAW

1. Metropolitan Edison Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Electrical Workers System Council U-9, Local 563, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing, in and after January 1993, to provide the Union with the names of the informants against Ned Eppinger, Respondent violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent violated the Act, the traditional remedies, including a cease-and-desist order and the posting of a notice, are in order.

There seems to be no real dispute that entry of a cease-and-desist order would be appropriate here. See *Westinghouse Electric Corp*., 304 NLRB 703, 708–709 (1991). However, Respondent argues that in view of the settlement of Eppinger's grievance, the request for the names of the informants should be considered moot. It cites cases (*Valley Oil Co*., 210 NLRB 370 (1974); *Southwick Group*, 306 NLRB 893 (1992)) which have held that requested information may become irrelevant.[11] The standard set forth in *Westinghouse* is whether there has been a showing of continued "demonstrated relevance" of the requested information. 304 NLRB at 703 fn. 1. In *Postal Service*, 307 NLRB 429 (1992), the Board clearly placed the burden of proof on the respondent, stating (at fn. 2; emphasis added):

> In Westinghouse, no exception was taken to the judge's findings that the only possible relevance of the information was in connection with a proceeding to reopen the arbitration, and the arbitrator was completely without authority to reopen such record. In the instant case, no such showing has been made by the Respondent and, accordingly, we agree with the judge that an affirmative remedy is warranted.

The General Counsel and the Charging Party point out that the collective-bargaining agreement establishes no time limits

[8] The latter two consequences, while separately articulated by the Board, appear to be sides of the same coin: i.e., employees will likely not inform because they would thereby invite harassment if revealed.

[9] See also *Transport of New Jersey*, 233 NLRB 694 (1977); *Fairmont Hotel*, 304 NLRB 746 (1991); *Resorts International Hotel*, 307 NLRB 1437 (1992); and *New England Telephone Co*., 309 NLRB 196 (1992), all of which involved actual witnesses to incidents for which employees were disciplined.

[10] The Board has said that the employer has its "own interest" in maintaining a pledge of confidentiality, which is "reasonable in light of the general potential for retaliation against informants in the investigation of criminal drug use." *Mobil Oil Corp*., 303 NLRB 780, 781. In some cases, the Board has stressed the failure of witnesses to request anonymity as a reason for dismissing a claim of confidentiality. *Fairmont Hotel*, 304 NLRB at fn. 3; *Resorts International Hotel*, 307 NLRB at 1438. That seems to be somewhat at odds with the quoted *Mobil* language. In the present case, as noted, John Doe I did not ask for confidentiality until after telling Frantz about Eppinger. The part this fact should play is unclear.

[11] In *Valley Oil*, the administrative law judge so held, and the General Counsel filed no exception.

for filing a grievance, and contend that article II, 2.2 of the agreement, which prohibits discrimination because of union activity, could arguably be invoked in a new grievance proceeding. While this seems fanciful, I cannot reject it out of hand. It is, I suppose, possible that an arbitrator could hold that the unlawful refusal of an employer to furnish a union with information relevant to a grieved discharge is a basis for disregarding a settlement of the earlier grievance. It might also be that an arbitrator could distinguish between a discharge and unlawful "discrimination," and, while giving full weight to a settlement of the former, agree to issue a separate limited decision as to the latter, perhaps requiring the posting of a notice or some similar remedy. However debatable these possibilities might be, I cannot say that a "showing has been made by the Respondent" (a very difficult standard to meet) that they could not be realized. Accordingly, I shall recommend that Respondent be required to make the names of informants John Doe I and II available to the Union.[12] See *Operating Engineers Local 513 (Various Employers)*, 308 NLRB 1300 fn. 1 (1992).

[Recommended Order omitted from publication.]

[12] The Charging Party also argues that, armed with incriminating information, it could file an 8(a)(3) charge on Eppinger's behalf. It recognizes that a 10(b) defense would be raised, but relies on the line of cases which tolls the statute of limitations when a respondent has "fraudulently conceal[ed] its unlawful conduct." *Pacific Intercom Co*., 255 NLRB 184 (1981). The basic notion behind this doctrine has to do with the concealment of "conduct"; although the Board has not always kept this principle clearly in focus, see *Brown & Sharpe Mfg. Co*., 312 NLRB 444 (1993), it seems obvious that Sec. 10(b) cannot be circumvented by the argument that the employer concealed evidence of a discriminatory motive. To so hold would nullify Sec. 10(b), at least as far as Sec. 8(a)(3) is concerned.