C#10986

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between NATIONAL ASSOCIATION OF LETTER CARRIERS and UNITED STATES POSTAL SERVICE with AMERICAN POSTAL WORKERS UNION Intervenor	GRIEVANT: Branch 2207 POST OFFICE: Torrance, CA CASE NO. H7N-5C C12397

BEFORE: Professor Carlton J. Snow

APPEARANCES: John C. Oldenburg
Keith Secular
Robert L. Tunstall

PLACE OF HEARING: Washington, D. C.

DATE OF HEARING: January 28, 1991

POST-HEARING BRIEFS AND REPLY BRIEFS: JUNE 17, 1991

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, this arbitrator concludes that the Employer violated the parties' National Agreement when the Employer denied a Union request for information respecting the possible discipline of two supervisors from the grievant's post office, who are alleged by the Union to have engaged in specific misconduct both close in time to and similar to that charged against the grievant, so that the Union could compare the actual conduct and subsequent treatment of the grievant and the supervisors and/or potentially argue that the grievant's discharge was disparate and thus not for just cause.

Although the disclosure of the requested information is required, the parties shall have ninety days from the date of this report to meet and negotiate a methodology by which the information is to be divulged, consistent with the analysis set forth in this report. If the parties fail to agree, either may seek an evidentiary hearing before an arbitrator in order to explain the true nature of a supervisory employe file; and the arbitrator will render an award mandating the process by which the requested information will be disclosed. The arbitrator shall retain jurisdiction in this matter to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

DATE: July 29, 1991

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
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BETWEEN)
)
NATIONAL ASSOCIATION OF)
LETTER CARRIERS)
)
AND) ANALYSIS AND AWARD
)
UNITED STATES POSTAL SERVICE) Carlton J. Snow
) Arbitrator
WITH)
)
AMERICAN POSTAL WORKERS UNION)
As Intervenor)
(Branch 2207 Grievance))
(Case No. H7N-5C C12397))

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1987 to November 21, 1990. The American Postal Workers Union intervened in the dispute without objection. A hearing occurred on January 28, 1991 in Room 10841 of the United States Postal Service headquarters located at 475 L'Enfant Plaza in Washington, D.C. Mr. John C. Oldenburg, Senior Attorney in the Office of Field Legal Services, and Mr. Dominic J. Scola, Jr., Labor Relations Department, represented the United States Postal Service. Mr. Keith Secular of the Cohen, Weiss, and Simon law firm in New York City, represented the National Association of Letter Carriers. Mr. Robert L. Tunstall, Assistant Director of the Clerk Craft Division, represented the American Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties. Ms. Donna A. O'Neill of Diversified Reporting Services, Inc., recorded the proceedings and submitted a transcript of 68 pages.

There were no challenges to the substantive or procedural jurisdiction of the arbitrator, and the parties stipulated that the matter properly had been submitted to the arbitrator for resolution. The parties elected to submit post-hearing briefs and reply briefs, and the arbitrator officially closed the hearing on June 17, 1991 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The parties stipulated that the issue before the arbitrator is as follows:

> Did the Postal Service violate the National Agreement when the Employer denied a Union request for information respecting the possible discipline if two supervisors from the grievant's Post Office who are alleged by the Union to have engaged in specific misconduct both close in time to and

similar to that charged against the grievant, so that the Union could compare the actual conduct and subsequent treatment of the grievant and the supervisor and/or potentially argue that the grievant's discharge was disparate and thus not for just cause? If a violation has occurred, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 17 - REPRESENTATION

Section 3. Rights of Stewards

When it is necessary for a steward to leave his/her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor and such request shall not be unreasonably denied.

In the event the duties require the steward to leave the work area and enter another area within the installation or post office, the steward must also receive permission from the supervisor from the other area he/she wishes to enter and such request shall not be unreasonably denied.

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

While serving as a steward or chief steward, an employee may not be involuntarily transferred to another tour, to another station or branch of the particular post office or to another independent post office or installation unless there is no job for which the employee is qualified on such tour, or in such station or branch, or post office.

If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted. All polygraph tests will continue to be on a voluntary basis.

ARTICLE 31 - UNION-MANAGEMENT COOPERATION

Section 3. Information

The Employer will make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

. . . .

Nothing herein shall waive any rights the Union or Unions may have to obtain information under the National Labor Relations Act, as amended.

IV. STATEMENT OF FACTS

In this case, the Union has challenged management's denial of information about discipline issued to nonbargaining unit supervisors. The disagreement between the parties is not about the facts as much as it is about the implication of the facts. On August 1, 1988, management issued a letter carrier a Notice of Removal. The Notice of Removal listed six separate charges, including a charge that the letter carrier had falsified an official report of an on-duty vehicle accident.

While a grievance was being processed regarding the letter carrier's Notice of Removal, the Union submitted a request for information and documents about recent investigations and discipline issued to two supervisors who allegedly

had falsified postal records. Management denied the request, and the Union filed a grievance distinct from the disciplinary grievance about the Notice of Removal itself. When the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Union

It is the position of the Union that the Employer violated the parties' agreement by denying a Union request for information about the Employer's discipline which it imposed on nonbargaining unit supervisors. According to the Union, the requested information is relevant and necessary in order to determine whether just cause existed for disciplining a bargain unit member who was accused of a similar violation in time and scope to the alleged infractions by two postal supervisors.

It is the contention of the Union that Article 17.3 of the parties' agreement expressly provides for a review of the allegedly relevant documents. The Union also maintains that Article 31.3 guarantees the Union access to the information it seeks in this case. (See, Union's Post-hearing Brief, p. 10).

The Union also argues that the position taken by management in this case has been rejected by administrative and

judicial tribunals. (See, Union's Post-hearing Brief, 14). Specifically, the Union argues that similar requests for information by the Union in the past have led to judicial and administrative decisions that such information is both necessary and relevant. Such tribunals allegedly have determined that claims of privilege and confidentiality with respect to the information have no merit. Accordingly, the Union concludes that the same decision should be reached in this case.

B. The Employer

The Employer argues that management did not violate the parties' agreement when it denied a Union request for information about discipline issued to nonbargaining unit supervisors. It is the view of the Employer that there are two bases for denying the Union's request in this case. First, the Employer contends that "comparisons of craft and supervisory discipline are beyond an arbitrator's jurisdiction," and this fact makes the Union's request for information about supervisors an act "serving no legitimate end." (See, Employer's Post-hearing Brief, 7 and Reply Brief, 3). It is the contention of the Employer that whether or not a disparity in discipline issued bargaining unit and nonbargaining unit members exists is relevant only if the arbitrator has jurisdiction to consider the fact of a disparity. Since he

allegedly does not have such authority, the request for such information properly has been denied, according to the Employer's theory of the case. Second, the Employer argues that, even if the requested information is relevant, it is, nevertheless, confidential and privileged, preventing disclosure on that basis. (See, Employer's Post-hearing Brief,27).

The Employer has approached its first argument from several directions. Primarily, the Employer argues that "only information which can at least arguably be put to some use can be relevant." (See, Employer's Post-hearing Brief, 7). In the opinion of the Employer, the "ultimate use of the comparative data sought by the Union is beyond an arbitrator's authority, since it concerns discipline of supervisors who are not subject to the labor contract between the parties." Hence, "supervisors, by virtue of their express exclusion are not proper subjects for comparison." (See, Employer's Post-hearing Brief, 12 and Reply Brief, 4).

The Employer further contends that its interpretation of this issue is supported by policies of both the National Labor Relations Act as well as the Postal Reorganization Act and that comparisons between bargaining unit members and supervisors would mean, in effect, that the unions would become the bargaining agent for supervisors. Such an eventuality would be in violation of statutory regulations. (See, Employer's Post-hearing Brief, 27).

Moreover, the Employer maintains that, even if the requested information is relevant to the Union's duty of

representation, the information sought is, nonetheless, confidential and privileged. In essence, the Employer argues that, because the "Union's interest in arguably relevant information does not always predominate over other legitimate interests," the Employer's strong interest "in preserving the confidentiality of personal data concerning its supervisors which arise from the very essence of the supervisory function and relationship" outweighs any interest on the part of the Union. If the interests of the parties are reasonably balanced by the arbitrator, the Employer concludes that such an analysis favors management's theory of the case. (See, Employer's Post-hearing Brief, 30).

Finally, the Employer argues that, should the arbitrator find the Union's need for the withheld information to outweigh management's interest in the confidentiality of such information, "those interests nonetheless are 'reasonably' deserving of some appropriate degree of consideration and protection. Accordingly, the Employer has urged that the arbitrator, while retaining jurisdiction, "invite the parties by mutual agreement to develop within a given time frame a methodology for divulging the information." (See, Employer's Post-hearing Brief, 34-35).

VI. ANALYSIS

A. A Brief Overview

Sharing information in a labor-management relationship is an issue that has been confronted by many parties in a variety of industries, and a number of general guidelines have emerged from administrative agencies and judicial decisions. A duty to disclose relevant information in the bargaining context has its roots in Section 8(d) of the National Labor Relations Act. This provision defines the duty to bargain collectively but sets forth no specific requirement that particular information be disclosed by either party. Official guidelines make clear that the requirement of disclosure covers information which "is necessary to the proper discharge of the duties of the bargaining agent." (See, NLRB v. Whitin Mach. Works, 217 F.2d 593, 594 (CA 4, (1954)). It is clear that the requirement to disclose covers both parties. (See, e.g., Detroit Newspaper Printing & Graphic Communications, 598 F.2d 267 (CA D.C. 1979)).

A key test of disclosure is that the information meet the requirement of relevance. Is the information sought by a party potentially or probably relevant to the performance of its function in the relationship between the parties? There is a presumption of relevancy if the requested information pertains directly to a subject about which there is a mandatory obligation to bargain. One court has described this rule as follows:

> The rule governing disclosure of data is not unlike that prevailing in discovery procedures under modern codes. There the information must be disclosed unless it appears plainly irrelevant. Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issue. (See, Yawman & Erb Co., 187 F.2d 947 (2nd Cir. 1951)).

Under modern rules of discovery in a judicial setting, the "sporting theory" of justice has given way to a modern rule that considerably broadens the range of information to be shared by parties. Rule 26 of the Federal Rules of Civil Procedure governs the scope of discovery, and it instructs that information may be sought about "any matter, not privileged, which is relevant to the subject matter involved in the pending action." (See, Fed. R. Civ. P. 26(b)(1)). The test is not whether the material is admissible as evidenced at the trial. The modern rule of discovery is broad, and it is virtually necessary to show that the requested information is prohibited by some clear-cut limitation on the scope of discovery.

The National Labor Relations Board and the U.S. Supreme Court have endorsed this modern rule of discovery for application in the collective bargaining context. (See, e.g., Truitt Mfg. Co., 351 U.S. 149 (1956), and Acme Indus. Co., 385 U.S. 432 (1967)). The premise of the Court is that, without relevant information, the parties will be unable to function properly in a collective bargaining relationship. Accordingly, information necessary for administering a

collective bargaining agreement must be shared. (See, e.g., Curtis-Wright Corp., 347 F.2d 61 (CA 3, 1965); Kroger Co., 226 N.L.R.B. 512 (1976); and B.F. Goodrich Co., 89 N.L.R.B. 1151 (1950)).

Although the requirement of discovery has been narrowed by the rule of relevancy, the NLRB and courts have defined "relevancy" broadly. It is necessary that the requested information appear to be "reasonably necessary" for the parties to perform their respected functions. (See, e.g., Otis Elevator Co., 170 N.L.R.B. 395 (1968); and NLRB v. Item Co., 220 F.2d 956 (CA 5, 1955)). It is clear that the Court and the NLRB have applied a modern rule of discovery to the collective bargaining context. The requested information should be disclosed "unless it plainly appears irrelevant." (See, Teleprompter Corp., 570 F.2d 4, 8 (CA 1, 1977)). Over the years, there have been requests for information concerning nonmembers of a bargaining unit, and there has been a general tendency of courts and the National Labor Relations Board to require that such information be shared. The test has continued to be the probable or potential relevance of the information to members of the bargaining unit, and a highly flexible rule of discovery has been applied even in these circumstances. (See, e.g., New York Times Co., 270 N.L.R.B. 1267 (1984); Barnard Engineering Co., 282 N.L.R.B. 617 (1987); Boyers Const. Co., 267 N.L.R.B. 227 (1983); Hawkins Const. Co., 285 N.L.R.B. 147 (1987); and Earl and G Indus., 269 N.L.R.B. 986 (1984)).

There have been some cases in which an employer was required to provide information about supervisors. (See, e.g., Globe Stores, Inc., 227 N.L.R.B. 1251 (1977); Northwest Publications, 211 N.L.R.B. 484 (1974); and Int'l Harvester Co., 241 N.L.R.B. 600 (1970)). The NLRB consistently has maintained that a union has a right to review information necessary "to service and police the contract." (See, Viewlex, Inc., 204 N.L.R.B. 1080 (1973)). If there is information in the personnel files of nonbargaining unit employes, the NLRB has required that it be produced if it is necessary to process a grievance. (See, e.g., NLRB v. Electrical Workers (IBEW), 763 F.2d 887 (CA 7, 1985)).

These administrative and judicial principles are relevant because the parties did not bargain their collective bargaining agreement into existence in a vacuum, and they are presumed to have been familiar with well-established principles of the sort represented by these judicial decisions. The United States Supreme Court has been clear about the fact that there are "many sources" for understanding a collective bargaining agreement, as long as the essence of any award is drawn from the agreement itself. (See, United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)). While the search in a contract interpretation case is for the common meaning of the parties, such meaning is dependent on the context and legal realities extant when the agreement came into existence.

B. The Requirement of Relevancy

At the heart of this dispute is the scope of the Employer's obligation to provide the Union with information it believes it needs to fulfill its duties to bargaining unit members. The parties have added to statutory requirements to share information by including a contractual provision covering the duty to do so. Article 31.3 of the collective bargaining agreement states:

> The Employer will make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information. (See, Joint Exhibit No. 1, p. 95, emphasis added).

The contractual obligation does not end there. Article 17.3 of the agreement amplifies the contractual commitment as follows:

> The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied. (See, Joint Exhibit No. 1, p. 75, emphasis added).

The controversy in this case is not about whether management has an obligation to provide information to the Union when the information is required in order for the

Union to fulfill its duties to bargaining unit members. That obligation is certain, as set forth in express language in the parties' agreement. The more narrow dispute in this case concerns what is or is not "relevant information" that a party believes is "necessary to determine whether to file or to continue the processing of a grievance under this Agreement." (See, Joint Exhibit No. 1, p. 95).

In their agreement, the parties have not defined "relevant information;" and the Employer has taken the position that the information requested in this case about two supervisors who allegedly falsified postal records is not "relevant information" necessary for administering the parties' collective bargaining agreement. As the Employer sees the case:

> Information concerning the conduct and discipline of supervisors--sought in hopes of discovering disparity of treatment--can be relevant only if the National Agreement authorizes an arbitrator to afford relief if he finds such disparity in the first place and believes it to be unjustified. But if, as a threshold matter, the agreement does not authorize an arbitrator to second-guess management's exercise of discretion in disciplining its supervisors--for the purpose of judging craft discipline--then it serves no purpose to release information about supervisory discipline in particular cases of allegedly similar misconduct. (See, Employer's Post-hearing Brief, 6-7).

The Employer has argued that the measurement of relevance is determined by the ultimate use to which the information requested could be put. According to the Employer, an arbitrator could not consider discipline imposed on non-bargaining unit members to determine if just cause existed for discipling a bargaining unit member. In other words,

"when all possible use of such information is known from the beginning to be foreclosed, so is the possibility of its relevance." (See, Employer's Post-hearing Brief, 7). It is the belief of the Employer that, "when it is known at the threshold that the requested information can have no 'evidentiary' application, then there can be no 'discovery' relevance either." (See, Employer's Reply Brief, 7).

Numerous cases have been cited by the Employer in support of its theory of the case. One is reasonably analogous to the matter at hand. In that case, the arbitrator stated:

> Action or non-action against supervisors is a matter totally outside the National Agreement and within managerial discretion, and cannot be utilized in arbitration to provide a basis for a disparate treatment argument. Such an argument must pertain to bargaining unit employees only. (See, Employer's Exhibit No. 6).

It is unnecessary to evaluate the correctness of the arbitrator's conclusion in Employer's Exhibit No. 6. This is so because the issue here is not limited to whether the information requested by the Union could be considered by an arbitrator. The broader question is whether the information sought by the Union could have any relevance on its decision with respect to "whether to file or continue the processing of a grievance." (See, Joint Exhibit No. 1, p. 95). The parties have implicitly adopted a broad definition of "relevancy" as it has emerged in modern discovery rules.

The parties themselves have also had occasion to debate what constitutes relevant and necessary information within the context of Article 31.3. In a national

arbitration decision, Arbitrator Richard Mittenthal sustained a grievance with respect to management's refusal to supply minutes of certain meetings held jointly by the Employer and representatives of the Mail Handlers Union. (See, Union's Exhibit No. 6). Arbitrator Mittenthal stated in his decision:

> No doubt some type of investigation precedes the submission of a grievance. Information is developed and a decision is made by APWU as to whether or not a grievance is warranted. If there seems to be no merit in a particular complaint, presumably no grievance would be filed. It is for the APWU alone to "determin[e] . . . if a grievance exists . . . ", to "determine whether to file . . . a grievance . . ." If the information it seeks has any "relevancy" to that determination, however slight, its request for this information should be granted. Assume for the moment that the EI/QWL minutes were not "relevant" to the work jurisdiction grievance filed five weeks after APWU initially requested these minutes. That assumption cannot control the disposition of the present case. Whether a piece of information is "relevant" to the merits of a given claim is one thing; whether such information is "relevant" to APWU's determination to pursue (or not pursue) that claim through the filing of a grievance is quite another. The latter question allows "relevancy" a far broader reach and should have permitted the APWU, for the reasons already expressed, to receive the appropriate EI/QWL minutes. (See, Union's Exhibit No. 6, p. 10, emphasis in the original).

Applying the Mittenthal principle to this case, it could be assumed, merely for sake of discussion, that the disciplinary files of supervisors might not be "relevant" to the merits of a subsequent arbitration proceeding; but such material, nonetheless, is probably and potentially relevant to a decision by the Union to file or not to pursue a grievance. As Arbitrator Mittenthal made clear, it is for the Union alone to determine

both whether a grievance exists and whether to file a grievance; and access to the requested disciplinary information about the supervisors arguably was relevant in making such a decision.

There is strong authority for this conclusion. For example, in NLRB v. United States Postal Service, the U.S. Court of Appeals enforced a decision of the NLRB that required management to disclose its records of disciplinary action taken against supervisors who engaged in gambling activities. (See, 888 F.2d 1568 (11th Cir. 1989)). The Court explained that:

> In determining the relevance of the requested information, relating to non-unit employees, a liberal discovery-type standard is employed. The NLRB need not decide the merits of the underlying dispute for which the information is being sought. Rather, the NLRB need only find a 'probability that the desired information is relevant, and that it would be of use to the Union in carrying out its statutory desires and responsibilities.' (See, 888 F.2d 1568, 1570 (11th Cir., 1989), emphasis added).

The U.S. Supreme Court has explained the wisdom behind such a flexible standard. In NLRB v. Acme Indus. Co., the Court reviewed with approval a case in which the National Labor Relations Board had found that the Employer committed an unfair labor practice by refusing to provide information about the removal of certain equipment from a plant. (See, 385 U.S. 432 (1966)). Finding that the underlying issue before the Court was whether the NLRB should have awaited an arbitrator's decision on the relevancy of the requested information before enforcing statutory rights, the Supreme

Court stated:

> Far from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be over-burdened. Yet, that is precisely what the [Employer's] restrictive view would require. It would force the unions to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. (See, 385 U.S. 432, 438 (1966)).

Applying that principle in this case, it is clear that the same analysis holds true. If the Union were provided with records indicating that the Employer routinely subjected supervisors to punishment as severe, or even more severe, than the sanctions imposed on bargaining unit members for similar violations, considerations of filing a grievance might be dispelled altogether. Further use of the parties' grievance procedure might be avoided, and the goal of union-management cooperation set forth in Article 31 of the National Agreement might be better served.

In this sense, information requested in this case is probably relevant to the Union's contractual obligations. "Information of 'probable relevance' is not rendered irrelevant by an employer's claims that it will neither raise a certain defense nor make certain factual contentions, because 'a union has the right and the responsibility to frame issues and advance whatever contentions it believes may lead to a successful resolution of the grievance.'" (See Pennsylvania Power & Light, 301 N.L.R.B. 138 (1991)).

As the analysis to this point has established, it is unnecessary to decide whether the disciplinary records of supervisors in this case ultimately could be used for purposes of comparison in an arbitration proceeding. It is also unnecessary to resolve the Employer's argument that such use of the requested information would constitute a conflict with provisions of the National Labor Relations Act and the Postal Reorganization Act. (See, Employer's Post-hearing Brief, 15-27). It is worth noting, however, that the Employer's interpretation of this issue is not consistent with a recent decision of the National Labor Relations Board. The NLRB recently affirmed the ruling of an administrative law judge who stated:

> In this connection, [the Postal Service] argues that the use of information concerning discipline of supervisors would have the practical effect of allowing the Union to dictate how supervisors are to be treated. This misses the point. A finding that such information is relevant does not lead to the conclusion that such a comparison between the discipline given to the two groups must cause the Postal Service to alter its discipline of supervisors. The discipline given to supervisors would be examined by an arbitrator who would consider the arguments of [the Postal Service] with respect to why the discipline of supervisors should differ from that given to unit employees. (See, 301 N.L.R.B. 104 (Feb. 14, 1991)).

C. The Defense of Confidentiality

The Employer expressly declined to raise the issue of confidentiality in this proceeding under the aegis of the Privacy Act. (See, Tr., 23). The Employer, nevertheless, asserted that the highly sensitive nature of the requested information in this case made it confidential and privileged from discovery. (See, Employer's Post-hearing Brief, 28). The Employer contended that this defense precluded the Union's access to the information requested.

Administrative and judicial guidelines have begun to evolve some general tests with regard to the defense of confidentiality. Is there a legitimate business need to keep the requested information from the Union? Has the Employer attempted to respond to the Union's information request within the bounds of reasonable restrictions on the information? How broad was the Union's request? (See, Kroger Co. v. NLRB, 399 F.2d 455 (6th Cir. 1968); General Electric Co. v. NLRB, 466 F.2d 1177 (6th Cir. 1972); and NLRB v. Pfizer, Inc., 763 F.2d 887 (7th Cir. 1985)). It is clear that the sort of information sought by the Union is not confidential per se. (See, Washington Gas Light Co., 273 N.L.R.B. 20 (1984)).

Aspects of the Employer's defense are most persuasive. First, the parties' agreement provides that necessary information "shall not be unreasonably denied," and this condition implies that some relevant information might be withheld when it is reasonable to do so. (See, Employer's Post-hearing

Brief, 27-28). Second, sensitive information is often contained in employe personnel files. A union's desire to obtain such information should not necessarily predominate over other legitimate interests of employes in confidentiality. It becomes necessary to balance the interests of the parties.

What the Employer needs to establish is a substantial interest in protecting the confidentiality of an employe's file in order to overcome the presumption of disclosure. The Union's need for the requested information must be balanced against the breach of confidentiality if personal employe information is released. Assume, for example, that the information request covered medical records, and an employer denied access to such sensitive information in good faith. One would want to know the extent to which the employer treated the information confidentially or to what extent other managers had access to the information or whether there was some established policy of confidentiality with respect to the precise information sought by the union.

There was no showing, for example, that the supervisors in this case have an expectation of confidentiality with regard to these particular records. Confronting a similar issue, one court concluded that employes would not expect discipline records of the sort requested by the Union in this case to remain confidential. The court stated:

> Employment records, unlike active tests results, are frequently introduced as evidence in grievance proceedings. Thus, an employee might reasonably anticipate the release of his work history to the

> union representatives for the limited purpose of evaluating a union member's grievance. (See, Salt River Valley Water Users Ass'n, 769 F.2d 639, 643 (9th Cir., 1985)).

There was no showing that the Employer promised the supervisors confidentiality with regard to the records sought by the Union. There is every reason to believe that their expectation as supervisors was no different from that of an employe in a grievance proceedings.

The defense put forth by the Employer in this case is essentially the one it advanced in NLRB v. United States Postal Service. (See, 888 F.2d 1568 (11th Cir. 1989)). In that case, the court enforced an order of the NLRB requiring the employer to disclose information concerning discipline with respect to gambling activities by postal supervisors. The U.S. Court of Appeals expressly rejected the defense of confidentiality advanced by the employer, and logic supports a similar conclusion in this case. In the court's decision, it stated:

> Simply because disclosure of the information may reveal that supervisors may have violated state and federal laws against gambling is not a sufficient reason to find that the information must remain confidential. Otherwise, virtually all requests for information on activities leading to disciplinary or potential legal action would be found to have such status. (See, 888 F.2d 1568, 1572 (11th Cir. 1989)).

With respect to management's concern that allowing access to such disciplinary information risks "eroding the undivided loyalty" of supervisors and might subject them to embarrassment and harassment, the U.S. Court of Appeals concluded that, "despite these arguments, we find that

keeping the information confidential does not outweigh the union's interest in gaining access to the information." (See, 888 F.2d 1568, 1572). The court noted that the "information requested concerns wilful activity which the Post Office has made the basis for discipline and discharge of employees." (See, p. 1572). The same observation is true in this case.

With regard to the threat that disclosure of such information posed to preserving supervisory loyalty, the court explained that:

> As the NLRB noted, the unit employees who participated in the prohibited activities were already aware of the supervisors' involvement. Moreover, through their activities, the supervisors who engaged in prohibited conduct have already compromised their loyalty to the post office. (See, 888 F.2d 1568, 1572 (11th Cir. 1989)).

If the allegations are correct in this case, these supervisors, too, already have compromised their loyalty to management.

The record in this case is not clear with regard to general knowledge of the alleged supervisory transactions, but it is sufficient to note that the Union is aware of the allegations and seeks to verify them. In other words, bargaining unit members are aware of alleged errant behavior by certain supervisors, and it must be presumed, in the absence of contrary evidence, that falsifying official documents is a wilful act.

The appropriate standard to be applied in a case of this sort is similar to the one used in Pennsylvania Power

& Light. (See, 301 N.L.R.B. 138 (1991)). In that case, the National Labor Relations Board stated:

> 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 circumstance 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 for an accommodation between the union's information needs and the employer's justified interest. (See, 301 N.L.R.B. 138 (1991)).

Evidence submitted to the arbitrator makes it reasonable to conclude that the union's need for the information in this case outweighs the Employer's interest in confidentiality. Some disclosure of what otherwise might be deemed sensitive and private information in supervisory files is in order. The extent and manner of the disclosure are best left to the parties, consistent with the principles set forth in this report. It is particularly appropriate for the parties to seek a negotiated accommodation in a case of this sort because the record submitted to the arbitrator is devoid of any evidence about the nature of information compiled in supervisory discipline files. Without such information, it is impossible to render an informed decision with respect to the extent and nature of appropriate disclosure.

A reasonable balancing of the parties' respective interests requires that the Union receive information which is necessary and relevant to allow it to fulfill its contractual obligation to members of the bargaining unit while, at the same time, not exceeding that scope of disclosure. Concerns of the Employer must also be accommodated. For example, it is necessary to protect individuals from disclosing any information about unrelated disciplinary incidents. Unrelated medical, psychiatric, or other sensitive information needs to be protected. The parties also need to consider ways to prevent disclosures from unintended uses, and "sanitizing" the records in order to mask a supervisor's identity at least needs to be discussed by the parties.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the parties' National Agreement when the Employer denied a Union request for information respecting the possible discipline of two supervisors from the grievant's post office, who are alleged by the Union to have engaged in specific misconduct both close in time to and similar to that charged against the grievant, so that the Union could compare the actual conduct and subsequent treatment of the grievant and the supervisors and/or potentially argue that the grievant's discharge was disparate and thus not for just cause.

Although the disclosure of the requested information is required, the parties shall have ninety days from the date of this report to meet and negotiate a methodology by which the information is to be divulged, consistent with the analysis set forth in this report. If the parties fail to agree, either may seek an evidentiary hearing before an arbitrator in order to explain the true nature of a supervisory employe file; and the arbitrator will render an award mandating the process by which the requested information will be disclosed. This arbitrator shall retain jurisdiction in this matter to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Carlton J. Snow
Professor of Law

Date: July 29, 1991