United States Court of Appeals
For the First Circuit

No. 85-1226

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HOLYOKE WATER POWER COMPANY,

Respondent.

LOCAL 455, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Intervenor.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before

Coffin, Circuit Judge,

Aldrich, Senior Circuit Judge,

and Wisdom,* Senior Circuit Judge.

Linda Dreeben with whom Rosemary M. Collyer, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, and Elliott Moore, Deputy Associate General Counsel, were on brief for petitioner.

Jason Berger, P.C. with whom Peabody & Brown, was on brief for respondent.

James O. Hall for intervenor.

Donald R. Crowell, II, Linda E. Rosenzweig, Pepper, Hamilton & Scheetz, Stephen A. Bokat, Stephen A. Bokat and National Chamber Litigation Center, Inc. on brief for Chambers of Commerce of the United States, Amicus Curiae.

Michael H. Gottesman, Jeremiah A. Collins, David M. Silberman, Laurence Gold and Laurence Cohen on brief for American Federation of Labor and Congress of Industrial Organizations, Amicus Curiae.

November 27, 1985

* Of the Fifth Circuit, sitting by designation.

WISDOM, Senior Circuit Judge:

The issue in this case is whether an employer must allow a non-employee union representative into its plant to measure noise levels in a particularly noisy room. We conclude that the union's representative is entitled to access to the room.

I.

Holyoke Water Power Company operates the Mt. Tom power plant. One room of the plant contains two large fans that force air into the plant's burners. This "fan room" is extremely noisy. The company has posted a notice that hearing protection must be worn in the fan room, and provides ear protectors for that purpose. No one is stationed in the fan room, although employees must enter it to perform maintenance and repair work.

During 1981 and 1982, the Mt. Tom Plant began burning coal instead of oil. Prior to the conversion, the fans ran at full speed about sixty percent of the time. They now run at full speed about ninety-five percent of the time. The union, which represents the company's production and operations employees, sent an industrial hygienist into the plant to survey possible hazards created by the conversion to coal. The hygienist requested access to the fan room. When the company refused the request, the union filed an unfair labor practice charge. The Board ruled in favor of the Union. 273 N.L.R.B. No. 168 (Jan. 11, 1985). It now petitions for enforcement of the order.

II.

Prior to this case, the Board treated union requests for access to an employer's property to obtain health and safety information as simple requests for information. See Winona Industries, 257 N.L.R.B. 695 (1981). The Supreme Court has held that employers must "provide information that is needed by the bargaining representative for the proper performance of its

duties". NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S.Ct. 565, 17 L.Ed.2d 495 (1967). Safety and health conditions are conditions of employment about which employers must bargain upon request, and are therefore within the scope of the bargaining representative's duties. See Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB, 711 F.2d 348, 360 (D.C. Cir. 1983). The union, however, is not invariably entitled to enter the employer's plant to obtain information. "A union's bare assertion that it needs information . . . does not automatically oblige the employer to supply all the information in the manner requested." Detroit Edison Co. v. NLRB, 440 U.S. 301, 314, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979). The information must be relevant to the union's duty to represent its members. See Emeryville Research Center v. NLRB, 441 F.2d 880, 883 (9th Cir. 1971). "When the employer presents a legitimate, good faith objection on grounds of burdensomeness or otherwise, and offers to cooperate with the union in reaching a mutually acceptable accommodation, it is incumbent on the union to attempt to reach some type of compromise with the employer as to the form, extent, or timing of disclosure." Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1098 (1st Cir. 1981).

We agree with the Administrative Law Judge's conclusion, approved by the Board, that the company was required to grant the hygienist access under Winona. The information sought by the union clearly was relevant to the union's statutory duty to bargain about conditions of employment[1/]. The record shows that even short exposures to high levels of noise can cause loss of hearing, stress, hypertension, nervousness, or irritability. Although union employees are not permanently stationed in the fan room, they enter it

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1/ Information bearing on conditions of employment, including plant noise levels, may be presumptively relevant. Press Democrat Publishing Co. v. NLRB, 629 F.2d 1320, 1324 (9th Cir. 1980). We need not, and do not, decide that question today.

regularly and may remain inside for a full day. The company argues that the information is irrelevant because employees did not raise the issue with the company. The union's right to information, however, "is not dependent upon the existence of some particular controversy or the need to dispose of some recognized problem". Oil, Chemical & Atomic Workers, 711 F.2d at 361. Moreover, at least two employees complained to the union about the noise level in the fan room. The information is not irrelevant merely because the company has posted a warning outside the fan room and provided hearing protection for employees. One witness testified that the company's ear protectors have a tendency to slip off when worn over hardhats. We agree, moreover, that "the proposition that a union must rely on an employer's good intentions concerning the vital question of health and safety of represented employees seems patently fallacious". 711 F.2d at 361. Finally, the fact that the union might have raised the issue earlier, but did not, does not render the information it requests irrelevant.2/

We agree with the Board's conclusion that the company failed to provide the union with the information it needed. One company study measured the average noise levels to which individual employees were exposed as they moved about the plant during an eight-hour period. The union is interested in noise levels in the fan room alone. A second company study, made after the union's complaint was filed by a company employee who is not an industrial

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2/ Similarly, the fact that the Occupational Safety and Health Administration has promulgated a noise standard, see 29 C.F.R. § 1910.95, does not make the requested information irrelevant. The union is entitled to bargain for a standard that exceeds the one established by OSHA. Although the union could have obtained the results of noise studies on file with OSHA under 29 C.F.R. § 1910.20, OHSA measurements may be subject to the same defects as measurements made by the employer. Moreover, the Board has held that the union's right to obtain information from the employer is not affected by the availability of the information from other sources absent special circumstances. See Colgate-Palmolive Co., 261 N.L.R.B. 90, 92 n.13 (1982).

hygienist, did measure noise levels in the fan room. The results of this study may have been affected by the exact location of the measuring apparatus and by the positioning of doors and louvers. The union expert's recommendations, moreover, are based in part on direct observation of employee work patterns. In short, we agree with the Board's finding that the noise measurements requested by the union have an inherently subjective component, so that the union reasonably insisted on obtaining access for its own hygienist.

The company argues that in these circumstances the union was obliged to pursue other means of obtaining the information it sought before filing an unfair labor practice charge. We disagree. The company flatly refused to provide the union's hygienist with access to the fan room. In our view, the union reasonably concluded that no other source of information was adequate. In any event, the company did not offer to provide any information until after the unfair labor practice charge had been filed. The union reasonably concluded that it could not obtain the information without an order from the Board.

III.

The Board reached the same result by a different route. It rejected the Winona test, and instead balanced the Union's interest in obtaining access against the Company's interest in preventing an invasion of its property. The Supreme Court first adopted this balancing approach to handle requests for access by non-employee union organizers who are likely to disrupt the employer's operations. See NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956). Babcock & Wilcox and its progeny do not obviously govern this case. The balancing cases typically arise out of union requests for access posing a significant threat to the employer's rights. In Hudgens v. NLRB, for example, non-employees asserted a right to picket on the

employer's property. 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). Clearly the potential for disruption is not as great where, as here, the union already represents the employees, and seeks access only to study a possible threat to the health and safety of its members.

Babcock & Wilcox, moreover, discusses the employer's duty to refrain from interfering with protected employee activities. 351 U.S. at 109, 112. That duty is imposed by § 8(a)(1) of the National Labor Relations Act. This case, by contrast, is based on the employer's affirmative duty to bargain under §§ 8(a)(5) and 8(d) of that Act. Less weight may be due the employer's property rights when the employer is subject to a duty to bargain.

The choice between Winona and a balancing test is not crucial in a situation such as the one presented in this case. The National Labor Relations Act requires the Board to resolve conflicts between § 7 rights and property rights and to seek accommodation of those rights "with as little destruction of one as is consistent with the maintenance of the other". Babcock & Wilcox, 351 U.S. at 112. The Supreme Court has said that "[t]he locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context". Hudgens v. NLRB, 424 U.S. at 522. If the union's interest in obtaining information is substantial, and the employer's interest in keeping union representatives off its property is insignificant, both Winona and a balancing test point to the same result.

Because we agree with the Board that the outcome in this case is the same under either test, we need not decide whether the general balancing formula of Babcock & Wilcox applies to requests for access by unions that already represent the employees. While the outcome necessarily is closer under a balancing test than under Winona, the company's interest in denying access in

this case appears to be insubstantial. The potential for disruption is not great, since the union already represents the employees. The industrial hygienist's investigation will last a day or less. Since no employees are regularly stationed in the fan room, the hygienist will not disrupt employee work patterns.

The company suggests that a remand would allow it to develop the property interests at stake. Under Winona, the company was free to argue that allowing access would cause it undue hardship or inconvenience, or interfere with its business operations. See Soule Glass and Glazing Co. v. NLRB, 652 F.2d at 1098-99. We think this afforded the company a sufficient opportunity to develop its property interests.

The Board's petition for enforcement of its order is GRANTED.

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Respondent violated Section 8(a)(1) and (5) of the Act by denying the Union's request for such access. In so doing, the judge noted the obligation of an employer to provide a union with information relevant and necessary to the union's performance of its representation duties. He noted also that an employer is obligated to bargain on request about health and safety conditions since they are terms and conditions of employment. Then, relying on Winona Industries, 257 NLRB 695 (1981), the judge noted that requests for access to survey for safety hazards are in the nature of requests for information and that access cannot be denied. He found that granting access would not cause the Respondent any undue hardship, and he noted the testimony of the Union's hygienist that its testing would take at most 1 day to complete.

In finding a violation, the judge rejected the Respondent's contentions that (a) access is irrelevant and unnecessary to the Union's representation duties, and (b) the Respondent did supply the information sought, albeit in the form of the test results then in the Respondent's possession. The judge noted that the many hazards inherent in exposure to high noise levels certainly make this matter relevant to the Union's representation duties. He further found the test results given the Union were inadequate for the Union's purposes. He noted that the first test merely gauged the average noise level to determine if it fell within OSHA standards, and he noted the undisputed testimony of the Union's hygienist that hearing can be damaged even where the average noise level falls within OSHA standards. Finally, he noted that there was some dispute as to the method and results of these tests.

In its exceptions the Respondent argues, inter alia, that the Union's request for access must be balanced against the Employer's property rights and that, here, its property rights must prevail because the Respondent has provided the Union with studies and has allowed the Union's business agent

access to the fan room. Accordingly, the Respondent contends, it has provided the Union with an alternate means of obtaining the needed information, thus obviating the need for access to its premises.

We agree with the Respondent's contention that an employer's right to control its property is a factor that must be weighed in analyzing whether an outside union representative should be afforded access to an employer's property. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). Thus, we disagree with the judge's analysis insofar as it finds that a request for access is tantamount to a request for information; that is, the union is entitled to access if it is shown that the information sought is relevant to the union's proper performance of its representation duties. While the presence of a union representative on the employer's premises may be relevant to the union's performance of its representative duties, we disagree that that alone, ipso facto, obligates an employer to open its doors. Rather, each of two conflicting rights must be accommodated. Fafnir Bearing Co. v. NLRB, 362 F.2d 716 (2d Cir. 1966). First, there is the right of employees to be responsibly represented by the labor organization of their choice and, second, there is the right of the employer to control its property and ensure that its operations are not interfered with. As noted by the Supreme Court in Babcock & Wilcox, supra, 351 U.S. at 112, the Government protects employee rights as well as property rights, and "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."

Thus, we are constrained to balance the employer's property rights against the employees' right to proper representation. Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must

yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.

In sum, the circumstances presented in each case involving a request for access must be carefully weighed, and each of the conflicting rights must be carefully balanced and accommodated in reaching a decision. We shall in the future analyze such cases in this fashion, and we overrule those prior Board cases such as Winona Industries, supra, to the extent that they set forth an inconsistent analysis.

Applying this analysis to the instant case, we find that the Respondent's property rights, on balance, are outweighed and that the Respondent must afford the union hygienist reasonable access to its fan room to conduct noise level studies.

First, we agree with the judge that health and safety conditions are a term and condition of employment about which an employer is obligated to bargain on request. Clearly, health and safety data is relevant to the Union's representation obligation. Minnesota Mining Co., 261 NLRB 27 (1982). It is a matter of common knowledge that exposure to excessive noise presents potential health hazards, and in this case no one disputes that the Respondent's fan room is very noisy. The Respondent's safety superintendent acknowledged that there is a noise problem there. In these circumstances, the employees' right to responsible representation entails the Union's obtaining accurate noise level readings for the fan room to ascertain the extent of the hazard and to

suggest means of ensuring that employees are properly protected. Balancing this right against the Respondent's asserted property rights, we find that, here, the property rights must yield to the extent necessary to enable the union hygienist to independently conduct his noise level tests.

We note that the Respondent says that access would entail interference with production; however, we also note that the fan room is not a production area and no employees work there full time. Rather, only mechanics and operators enter periodically to maintain and repair the equipment. In these circumstances, it appears that the presence of a union hygienist in the fan room would occasion little if any interference with the production process. Moreover, for the reasons relied on by the judge, we agree that the test results which the Respondent supplied are insufficient to meet the Union's purposes. Nor is the Respondent's willingness to permit the Union's business agent to enter the fan room sufficient absent evidence that the business agent is qualified to perform the tests and evaluate the results.

Accordingly, we agree with the judge that the Respondent must permit a union hygienist to enter its fan room to test for noise hazards. However, since the judge did not in his recommended Order place any restrictions on the access ordered, we shall modify the recommended order to provide that the access be for a reasonable period sufficient to allow the union hygienist to fully observe and survey noise level hazards. This limitation is in line with our resolve to accommodate the conflicting rights with as little destruction of one as is consistent with the maintenance of the other.[5]

[5] For this reason, and because such access has not even been shown necessary in the first place, we reject the contention of the General Counsel and the Union that the recommended Order should be modified to provide for plantwide access.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Holyoke Water Power Company, Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) On request, grant access, by an industrial hygienist designated by the Union, to the FD fan room for a reasonable period sufficient to permit the hygienist to fully observe and survey noise level hazards."

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

Dated, Washington, D.C. 11 January 1985

Donald L. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOLYOKE WATER POWER COMPANY

and

Case No. 1-CA-20618

LOCAL 455, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

Robert P. Redbord, Esq., of Boston, MA,
for the General Counsel.
James O. Hall, Esq., of Boston, MA,
for the Charging Party.
Jason Berger, Esq. and Tina L.
Hestrom, Esq., of Boston, MA,
for the Respondent.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: This case arose upon a charge filed by Local 455, International Brotherhood of Electrical Workers, AFL-CIO, herein the Union, on January 14, 1983. The Complaint, which issued on February 25, 1983, alleges that Holyoke Water Power Company, herein the Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein the Act, by refusing to give the Union's industrial hygienist access to the Forced Draft Fan Room (FD Fan Room) at Respondent's Mt. Tom location to observe and survey safety hazards regarding noise levels since the Union's request on January 11, 1983.

Respondent, in its answer, denied the commission of any unfair labor practices. Although Respondent admitted it denied access it claims that access is not necessary for, or relevant to, the Union's function as the exclusive bargaining representative of unit employees.

A hearing was held on April 11 and 12, 1983 in Boston, Massachusetts. All parties filed briefs. Based upon the entire record in the case, including my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions of law. 1/

1/ General Counsel's motion to correct transcript is hereby granted.