Anheuser-Busch, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 2295, AFL–CIO, CLC. Case 31-CA-6636

August 25, 1978

DECISION AND ORDER

On September 26, 1977, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The pertinent facts are as follows: Respondent operates a brewery. International Brotherhood of Electrical Workers, Local Union No. 2295 AFL-CIO, CLC, herein called the Union, represents Respondent's maintenance electricians, journeymen, apprentices, and working foremen. The collective-bargaining agreement in effect at the time of the incidents herein occurred provides for a grievance procedure culminating in binding arbitration.

On Thursday, August 12, 1976, employee Richard Roberts was involved in an altercation with employee Joe McDaniel. The following day, Roberts was involved in another altercation with employee Joe Vaccare. McDaniel and Vaccare reported these incidents to General Foreman Vincent Petretti. Shortly after the second incident, Electrical Foreman Frank Fennell interviewed McDaniel, Vaccare, and Roberts. Fennell told Roberts that he was being suspended pending an investigation by the Employer's industrial relations department. Fennell then asked McDaniel, Vaccare, and Petretti to put their versions of the August 12 and 13 incidents in writing and forward them to Industrial Relations Manager James Turner.

After Roberts was suspended, Fennell learned that Roberts had been involved in similar incidents in the past with employee Robert Jones and Maintenance Foreman Roy Slabey. Fennell asked Jones and Slabey to put their versions of these prior incidents in writing. Fennell also mailed two disciplinary reports to Roberts, one a reprimand for using "threatening and abusive language toward a fellow employee, Mr. McDaniel," and ther other a suspension notice which stated that Roberts was "suspended with intent to discharge" for using "threatening and abusive language toward Mr. Vaccare." The use of threatening and abusive language toward a fellow employee is a violation of Respondent's plant rules.

Industrial Relations Manager James Turner began his investigation on August 13. On Monday, August 16, he called a meeting of Roberts, Acting Union Steward Decker, Fennell, and Fennell's superior, George Edwards. During this meeting, Turner asked Roberts about several incidents of which he had learned in the course of his investigation, including one in which Roberts had allegedly thrown a stick and one in which he had allegedly brandished a wrench. Roberts discussed the facts and circumstances of the prior incidents as he recalled them and supplied the names of the employees and supervisors involved. Also on August 16, Roberts filed a grievance alleging that he had been unjustly suspended.

Between August 16 and 23, Turner acquired statements from employees Wayne Soltys and Herb Niesslein regarding the incidents which Turner had discussed with Roberts on August 16. On Friday, August 20, Turner telephoned Roberts and informed him that a 5-day suspension had been imposed on him, covering the week of August 16-20. Roberts returned to work on Monday, August 23.

On August 23, the Union requested a meeting on Roberts' grievance. At this meeting, Turner and Fenell represented Respondent, and Union Business Representative Donald Frakes and Steward James Dalton represented the Union. Roberts also attended. The incidents of August 12 and 13 were discussed, Roberts giving his version and Fennell giving the substance of McDaniel's and Vaccare's statements. At this meeting, Turner said that he had written statements from McDaniel and Vaccare. He also mentioned the prior incidents and said that he had statements from employees involved in them, but he did not mention the names of employees other than McDaniel and Vaccare. Frakes asked that the Union be allowed to see the statements, but did not request the names of employees who had given them or the substance thereof. Turner refused to show the statements to the Union, saying that the people who provided statements had been told their identities would not be disclosed, that turning them over to the Union would open up an opportunity for Roberts to harass those who gave statements, and that, because the employees who gave statements were union members, the Union itself could obtain the information. Turner

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the Resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

offered to trade the statements for the Union's statement from Roberts. Frakes replied that the Union did not have a statement from Roberts. Nothing ever came of the offer and the matter was not raised again. Neither party ever asked Roberts for a written statement.

In a letter to Turner dated August 30, Frakes reiterated his request for the statements. On August 31, the Union requested that Roberts' grievance proceed to arbitration. During late August and September, Frakes and Dennis Harley, the Union's attorney, repeatedly requested that the Union be provided with copies of the statements. Also during this time, Steward Dalton was directed to investigate the incidents for the Union. Dalton spoke with McDaniel, Vaccare, and Jones, each of whom refused to give the Union written statements or copies of the statements given to Turner. Dalton also heard rumors that Slabey, Soltys, and Niesslein had given statements, but Dalton did not talk with them, did not ask Roberts about them, and did not pass on the rumors to other union officials. As steward, Dalton had been aware of the circumstances surrounding the Jones and Slabey incidents when they occurred, 6 months and 1-1/2 years, respectively, before Roberts' suspension. Dalton did not, however, inform the Union that these incidents may have been the ones to which Turner had referred during the August 23 grievance meeting.

On several occasions during September through December, the Union's attorney, Harley, and Respondent's attorney, Willard Carr, discussed the Union's requests for the statements. Neither Harley nor the Union ever asked for anything other than the statements themselves. In late November, the Union filed the instant 8(a)(5) and (1) charges. On December 30, Carr wrote a letter to counsel for the General Counsel at the Board's Regional Office stating that Respondent and the Union had reached the following informal settlement of the 8(a)(5) and (1) charges: Harley would withdraw the charges; Carr would give Harley a list of the employees who had given statements; when a witness was called at the arbitration hearing, that witness' statements would be given to Harley; and such statements were to be provided to Harley only and were not to be disclosed to Roberts or union officials. The Regional Office did not accept this proposed settlement and proceeded with the 8(a)(5) and (1) charges.[2]

During a meeting on January 4, 1977, Carr offered to show the statements to Harley if Harley agreed not to review them with the Union. Harley declined the offer. Carr then read portions of the statements to Harley and gave him a list of the employees who had given statements. By letter dated Janaury 7, Harley asked each of the seven individuals who had given statements to contact him so they could discuss the matter. None of the seven responded to Harley's request.

On January 27, Harley had his first face-to-face conversation with Roberts. This was the first time Roberts had been asked by the Union about the incidents prior to August 12 and 13. Harley asked Roberts if he had been involved in any altercations with employees other than McDaniel and Vaccare. Roberts related one prior incident but denied ever having threatened any employees.

The arbitration hearing was held on February 15. The stipulated issues were whether Roberts' suspension violated the collective-bargaining agreement and, if so, what the appropriate remedy was. Of the seven individuals who had given statements, six testified.[3] The statements of McDaniel and Vaccare were placed in evidence and the Union, therefore, obtained access to them. Following the direct examination of the other four witnesses, their statements were shown to Harley, but at Carr's insistence they were not shown to Roberts or to the union officials. When questioned at the arbitration hearing about the incidents prior to August 12 and 13, Roberts admitted having threatened to run Jones out of the plant, having told Soltys he would take him outside and beat some sense into him, having thrown a stick at Soltys, and having threatened Niesslein with a wrench. Roberts also testified that during the August 16 meeting he had provided Turner with the names of the employees involved in these prior incidents. On June 9, the arbitrator issued his award, finding that Robert's suspension was not in violation of the collective bargaining agreement.

The lawfulness of Roberts' suspension is not at issue in this proceeding before the Board. The question, rather, is whether Respondent had an obligation under Section 8(a)(5) of the Act to honor the Union's requests for the statements.

The Administrative Law Judge found that the statements, relating to alleged improper conduct by Roberts, were relevant to and needed by the Union in order to evaluate the merits of Roberts' grievance and to determine whether to proceed to arbitration. Relying primarily on *N.L.R.B.* v. *Acme Industrial*

[2] At the unfair labor practice hearing, Harley testified that Carr's letter to counsel for the General Counsel was an accurate reflection of his agreement with Carr, except that he had not agreed that the statements would be limited to his use only and would not be disclosed to the Union. The Administrative Law Judge found, and we agree, that Harley and Carr did not have a full meeting of the minds with regard to a complete resolution of the matter.

[3] Employee Niesslein did not testify at the arbitration hearing. His statement, therefore, was not shown to Harley at that hearing. All seven statements were introduced into evidence at the unfair labor practice hearing.

Co., 385 U.S. 432 (1967), the Administrative Law Judge concluded that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to honor the Union's requests for the statements.

We disagree with the Administrative Law Judge's conclusion that Respondent had a statutory obligation to furnish the witness statements to the Union. We, of course, recognize and continue to adhere to the *Acme* principle that Section 8(a)(5) of the Act imposes on an employer the "general obligation" to furnish a union, upon request, information relevant and necessary to the proper performance of its duties as bargaining representative. Witness statements, however, are fundamentally different from the types of information contemplated in *Acme*, and disclosure of witness statements involves critical considerations which do not apply to requests for other types of information. We do not believe that the principle set forth in *Acme* and related cases dealing with the statutory obligation to furnish information may properly be extended so as to require an employer to provide a union with statements obtained during the course of an employer's investigation of employee misconduct.[4]

Requiring prearbitration disclosure of witness statements would not advance the grievance and arbitration process. In this regard, we note particularly the recent opinion of the Supreme Court in *N.L.R.B.* v. *Robbins Tire and Rubber Company*, 98 S.Ct. 2311 (1978). The issue before the Court in that case was whether the Freedom of Information Act (FOIA), 5 U.S.C. § 552, required the Board to disclose, prior to a hearing on an unfair labor practice complaint, statements of witnesses whom the Board intended to call at the hearing. In determining that the FOIA does not require the Board to disclose such statements, the Court discussed the potential dangers of their premature release, including the risk that "employers, or in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all." 98 S.Ct. at 2325. The Court also expressed concern that witnesses may be reluctant to give statements absent assurances that their statements will not be disclosed at least until after the investigation and adjudication are complete. 98 S.Ct. at 2325. In *Robbins Tire*, the narrow issue before the Supreme Court was whether production of witness statemetns taken by the Board would "interfere with enforcement proceedings" within the meaning of Exemption 7(a) of FOIA, 5 U.S.C. § 552(b)(7)(A). We, however, believe that the same underlying considerations apply here and that requiring either party to a collective bargaining relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the grievance and arbitration process.

Moreover, in the present case, Respondent did not withhold from the Union its view of the incidents which resulted in Roberts' disciplinary suspension and in no way impeded the Union's investigation of Roberts' grievance. The disciplinary reports which Fennell mailed to Roberts stated that on August 12 and 13 Roberts had violated the plant rule against using threatening and abusive language toward fellow employees. These reports gave McDaniel's and Vaccare's names and, at the August 23 meeting, Fennell informed the Union of the substance of McDaniel's and Vaccare's versions of the August 12 and 13 incidents based on their statements. On August 23, the Union also learned that Respondent had statements from other employees and supervisors who had been involved in similar incidents with Roberts in the past, but the Union did not request the names of those individuals or any other information concerning those incidents.[5] Furthermore, Acting Union Steward Decker was present at the August 16 meeting during which Roberts himself discussed the circumstances surrounding the incidents prior to August 12 and provided the names of the employees involved. In addition, Steward Dalton, who was personally aware of at least some of the prior incidents, was not prevented from investigating them on behalf of the Union. Also, on Janaury 4, 1977, Respondent's attorney gave the Union's attorney a list of the employees who had given statements and read portions of the statements aloud.

In any event, without regard to the particular facts of this case, we hold that the "general obligation" to honor requests for information, as set forth in *Acme*

[4] Member Murphy, who joins in the holding herein, finds this case distinguishable from *Tool and Die Makers' Lodge No. 78 of District No. 10 of the International Association of Machinists and Aerospace Workers, AFL-CIO (Square D Company, Milwaukee Plant)*, 224 NLRB 111 (1976), in which she dissented from the finding that a union did not unlawfully refuse to bargain in violation of Section 8(b)(3) by declining to disclose to the company before arbitration certain assertedly relevant documents which the union claimed to have in its possession. There the documents sought were not statements of witnesses, the union asserted the information was dispositive of its claim but adamantly refused to supply even an inkling of the matters to which it was referring, and the company had no basis for identifying the nature of the claimed information; on those facts Member Murphy found the union's position to be analogous to that of an employer who has the obligation to furnish information to a union so that the union can intelligently decide whether to proceed on a grievance, in accord with *N.L.R.B.* v. *Acme Industrial Co.*, *supra*. In contrast, in the instant case the Union was at all times in full possession of all facts upon which it could determine whether it wished to proceed on the grievance; furthermore, the Company here orally informed the Union of the substance of the affidavits and supplied much detail, including the identity of most of the affiants.

[5] 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. *Transport of New Jersey*, 233 NLRB 694 (1977). However, the record clearly establishes that at all times material herein, the Union requested only that Respondent furnish the witness statements themselves.

and related cases, does not encompass the duty to furnish witness statements themselves. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was tried at Los Angeles, California, on May 5 and 11, 1977. The charge was filed on November 26, 1976, by International Brotherhood of Electrical Workers, Local Union No. 2295, AFL–CIO, CLC, herein called the Union. The complaint, which issued on January 17, 1977, and was amended at the hearing, alleges that Anheuser-Busch, Inc., herein called the Company, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended.

Issue

The primary issue is whether, in the context of grievance proceedings, the Company unlawfully refused to bargain by failing to honor the Union's request to furnish it with copies of written statements the Company had taken from employees and supervisors relating to a 5-day suspension of employee Richard Roberts.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Company.

Upon the entire record of the case,[1] and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company is a Missouri corporation with an office and place of business in Van Nuys, California, where it operates a brewery. The Company annually sells and ships goods and services valued in excess of $50,000 directly to customers located outside California and annually derives gross revenues in excess of $500,000. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] By post-trial motion, counsel for Respondent requests that the opinion and award of arbitrator William S. Rule, dated June 9, 1977, which relates to the suspension of Roberts, be made part of the record in this case. Counsel for the General Counsel urges that the motion be granted. The motion is hereby granted and the decision and award added to the exhibit file as Resp. Exh. 11.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

The Union represents the Company's maintenance electricians, journeymen, apprentices, and working foremen.[2] The collective-bargaining relationship goes back to 1954. The collective-bargaining contract in effect at the time of the incidents involved in this case occurred provides for a grievance procedure culminating in binding arbitration.

On August 12, 1976, Richard Roberts, an employee of the Company, was involved in an altercation with fellow employee Joe McDaniel. On August 13, 1976, Roberts was involved in another altercation with fellow employee Joe Vaccare. The Company undertook an investigation of the two incidents and secured statements from five employees and two supervisors. Some of the statements related to the August 12 and 13 matters, and others related to prior incidents in which Roberts had allegedly engaged in improper conduct toward employees. Roberts was given a suspension with intent to discharge, which was later changed to a 5-day suspension. A grievance was filed on behalf of Roberts and ultimately an arbitration award sustained the 5-day suspension.

Shortly after the statements were taken, the Union asked to see them so that it could intelligently evaluate Roberts' grievance. The Union's request was repeated on numerous occasions. The Company consistently refused to show any of the statements to the Union before the arbitration hearing took place. Two of the statements were put in evidence at the arbitration hearing. In addition, during the arbitration hearing, the Company showed the Union's attorney the statements of individuals whom the Company called as witnesses. The union attorney looked at those statements with understanding that he would not show them to the Union. Except for the two statements that were palced in evidence at the arbitration hearing, the Union had access to the statements for the first time when the Company placed the statements in evidence during the hearing of the instant case.

The sole question presented at this hearing was whether the Company had an obligation under Section 8(a)(5) of the Act to honor the Union's request to see the statements. The propriety of the 5-day suspension is not itself in issue.

B. *The Sequence of Events*

1. The statements

The facts involved in the August 12 and 13, 1976, incidents were not litigated at the hearing of this case. They

[2] The complaint alleges, the answer admits, and I find that the Union represents the Company's employees in the following appropriate unit:

> All maintenance electricians, journeymen, apprentices and working foremen, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

were litigated in the arbitration hearing. The arbitrator held:

> The record is quite clear the Grievant had a confrontation with Mr. McDaniel at about 1:30 a.m. on August 12 and that he had words with Mr. Vaccare early in the morning of August 13. The record is also clear the Grievant meant to intimidate both men. McDaniel was sitting in a chair in front of a cabinet and the Grievant deliberately opened the door of the cabinet into him without saying anything. The Grievant was not speaking to McDaniel and had not been for some time. The Grievant went to Vaccare on Line 1 palletizer, told him he didn't want to work with him any more and that Vaccare should go on days.

The arbitrator also referred to prior incidents involving Roberts, as follows:

> The Grievant stated on the record he was upset with Jones in November 1975 or January 1976 and that he told Jones something to the effect that Jones shouldn't work here. The Grievant admitted he either brandished or raised a wrench toward Niesslein though he claimed it was only to get his attention. The Grievant stated he had thrown a stick at Soltys though only after Soltys had driven close to him with his fork truck. The Grievant also admitted shouting at Slabey on a job when he was in a hurry and this had been reported to Fennell.
>
> Shop Steward Dalton did acknowledge that McDaniel, Vaccare, Jones, and Slabey had all complained to him about threats by the Grievant at one time or another.

After an initial inquiry, the Company gave Roberts a "notice of violation of plant rules and regulations" dated August 13, 1976, which notified him that he was suspended with intent to discharge.

Between August 12 and 19, company representatives took statements from a number of employees and supervisors concerning the August 12 and 13 incidents as well as prior incidents relating to Roberts. A company representative interviewed Roberts about those matters but did not take a written statement. Five employees gave statements. McDaniel gave one concerning the August 12 incident. Vaccare gave one concerning the August 13 incident. Niesslein gave a statement (as written up by Don Burnell) which concerned an incident sometime before in which Niesslein asserted that Roberts challenged him to a fight. Jones gave a statement in which he claimed that in November 1975 Roberts threatened to run him out of the plant. Soltys gave a statement in which he asserted that on prior occasions Roberts had abused him. In addition, General Foreman Vincent Petretti gave a statement concerning the August 12 and 13 incidents, and Maintenance Foreman Slabey gave a statement relating to prior misconduct by Roberts.[3]

On August 20, 1976, Industrial Relations Manager James Turner imposed a 5-day suspension on Roberts. The suspension lasted from August 16 through 20, 1976. Roberts returned to work on August 23, 1976.

On August 16, 1976, while Roberts was in a suspended status, a grievance was filed protesting the suspension.[4]

2. Efforts by the Union to secure the statements

On August 16, 1976, Acting Union Steward George Uglean asked Electrical Foreman Frank Fennell and Maintenance Superintendent George Edwards to see the statements concerning the Roberts incident. Both told him that it was in the hands of the industrial relations department and that they had nothing to do with it. The grievance was filed the same day.

On August 23, 1976, a grievance meeting was held. The Union had asked for the meeting to discuss the suspension of Roberts. Industrial Relations Manager James Turner and Electrical Foreman Frank Fennell represented the Company at the meeting. The Union was represented by Business Representative Donald Frakes and Steward James Dalton. Roberts also attended. There was a general discussion concerning the incidents which led to Roberts' suspension, in the course of which Turner made reference to incidents that had occurred prior to August 12 and 13. Turner mentioned an incident in which Roberts brandished a wrench against another employee. He did not identify the other employees involved in the prior incidents. During the meeting, Turner said that he had statements from McDaniel, Vaccare, and others. Union Business Representative Frakes asked to see the statements and Turner replied that he could not give them to him. Frakes said that he wanted the statements to determine how the facts the Union had obtained from Roberts and the chief steward compared with the Company's information. Frakes also said that it was necessary for the Union to have those statements so that it could determine the merits of the grievance. Turner replied that it was not the first problem that they had had with Roberts, that he respected the confidentiality of the employees who gave him the statements, and that if the Company provided the statements to the Union it would open up an opportunity for Roberts to harass those employees.[5] Turner also said that the people who gave the statements were members of the Union and that the Union could obtain the information from them. Turner told Frakes that if the Union would provide the Company with a copy of Roberts' statement the Company might be willing to trade statements. Frakes replied that if the Union had Roberts' statement it would be happy to provide the Company with a copy. The matter was then dropped and nothing further came of the suggestion.

By letter dated August 30, 1976, Frakes once again asked for copies of the statements. The letter stated:

> During the grievance meeting of August 23, 1976, I requested copies of the statements that had been given to the Company in regards to Richard Roberts' sus-

[3] It was stipulated, and I find, that Petretti and Slabey are supervisors within the meaning of the Act.

[4] On September 1 and 10, 1976, two other grievances were filed relating to Roberts' claim that he was not given full access to his personnel file.

[5] On September 10, 1976, Roberts brought intraunion charges against Electrical Foreman Frank Fennell in which he alleged that Fennell falsely accused and suspended him.

pension, so that this office could evaluate the validity of the Company's action.

I am again requesting the Company to provide *all statements* that were given in regard to Richard Roberts.

If, this office has not received the requested information by the close of business September 5, 1976, we will have no alternative but to take other measures to acquire the requested information.

Because of the time limitations set forth in the contract, the Union, by letter dated August 31, 1976, formally requested that the Roberts suspension grievance proceed to arbitration. A few days later, Frakes spoke to Turner about the August 30 letter in which the Union had again requested the statements. Turner said that the Company hadn't changed its position. Frakes replied that if he did not get the statements the Union could not determine whether they had a case or not and the Company would be forcing the Union to go to arbitration. Turner replied that his position had not changed and that the Union could do what it had to.

In addition to requests by union officials for the statements there were a number of written and oral communications between Union Attorney Dennis Harley and Company Attorney Willard Carr, Jr., concerning the same matter.

On September 10, 1976, Harley called Carr and asked whether Carr was aware of Roberts' suspension. Carr replied that he had just returned from vacation and was not familiar with the situation. Harley told Carr that the Company had statements concerning the incidents that led to the suspension. He said that those statements were relevant to the question of whether or not the Union should pursue the grievance to arbitration, that the Union had the right to those statements, and that the statements were needed to evaluate the grievance. Carr replied that he would check into it and call back. Harley said that the Union was prepared to evaluate the matter and change its position about going to arbitration.

In mid-September 1976, Harley called Carr again and asked whether a decision had been made with regard to the statements. Carr replied that the Company would not give the Union the statements. Carr also said that the Union could pursue the matter to arbitration and seek to have the arbitrator issue an order compelling the Company to produce the documents. Harley answered that he thought such a procedure would be very costly and that the Union shouldn't have to go to arbitration in order to get statements it needed to determine whether or not to go to arbitration. Carr said that another alternative would be to give Harley a copy of an individual's statement when the individual was called to testify at the arbitration. Carr told Harley that Roberts was a violence-prone individual who had threatened people and that the Company would not make the statements available. Carr also said that the individuals who gave statements had been promised that their identities would not be disclosed unless they were called to testify at the arbitration proceeding.

By letter dated September 27, 1976, Harley notified Carr that the Union intended to pursue appropriate administrative remedies to secure the statements. The letter also indicated an agreement between the parties to hold the arbitration in abeyance until the resolution of the administrative remedies.

On September 28, Harley called Carr on the telephone once again. Harley said that his client wanted to go forward with the arbitration and that without the statements the Union could not respond to Roberts in a meaningful way when he asked why he was suspended. Harley said that he wanted to revive the Company's previous offer relating to the arbitrator's deciding whether the statements should be given to the Union. Carr repeated that he would not give the statements until the arbitrator had ordered it. Carr also said that if the arbitrator ordered the production of the statements he probably would not comply with regard to the supervisors' statements.

Carr testified that during his various meetings with Harley an agreement was reached to the effect that the statements would be made available to Harley at the arbitration hearing if the people who gave the statements were called to testify. Carr wrote to counsel for the General Counsel on December 30, 1976, stating that the parties had reached an informal settlement based on an agreement that Harley would withdraw the charges; that the Company would provide Harley with a list of the employees who had given statements; that when a witness was called at the arbitration the statement of that witness would be given to Harley; and that the information on such statements was to be provided to Harley only and was not to be disclosed to Roberts or any union representative. The General Counsel did not accept the proposed settlement. Harley testified in substance that the procedure set forth in Carr's December 30 letter was in fact followed at the arbitration proceeding and that he thought they had worked the situation out as far as the NLRB was concerned. He also testified that it was not his understanding that the statements would only be given to him and not to the Union, and that he never agreed to such a procedure. Carr and Harley were both fully credible witnesses. Their different interpretations of what was said in their conversations satisfies me that they did not have a full meeting of the minds with regard to a complete resolution of the problem.

There was another disagreement between Harley and Carr. Carr testified that even though Harley did not say anything specifically to the effect that the Union had to go to arbitration because Roberts was agressive toward the protection of his rights, everything that Harley did say led Carr to that conclusion. Harley had told Carr that Roberts had threatened to file charges or sue the Union if the Union did not arbitrate the case. Though Carr may have believed that the matter was going to arbitration whether or not he gave the Union the statements, Harley did tell Carr that the Union was prepared to evaluate the matter and change its position about going to arbitration. There was no meeting of minds with regard to the inevitability of arbitration.

On January 4, 1977, Carr and Harley met in Carr's office. Harley said that the Union was entitled to the statements and Carr disagreed. Carr offered to show Harley the statements if Harley agreed not to review them with Roberts. Harley answered that if he obtained the statements he

would have to give them to the Union and it was the Union who had to decide what to do with the case. Carr said that the individuals who had given the statements had been promised that their identities would not be divulged unless they testified. However, during that meeting Carr gave Harley a list containing the names of the seven individuals who had given statements and told him who were supervisors. Carr believed that the Union already knew the names through discussions with Roberts.

By letter dated January 6, 1977, Harley notified Carr that the Union had not previously known the names. In that letter Harley stated that Carr's offer to provide the Union [6] with a copy of employee statements at the time the employee testified at the arbitration was not a sufficient resolution of the dispute. The letter went on to say,

> The union should have been provided this information at such time as the parties met to discuss the matter and my client's position is not advanced in any way by receiving these statements after the individual witnesses testify. Please be advised that I intend to raise these objections in the appropriate form.

3. The Union's efforts to secure the information and statements from the employees and supervisors

On a number of occasions, union representatives spoke to Roberts with regard to the suspension. Business Representative Frakes spoke to Roberts about six times between August 16, 1976, and the arbitration of February 15, 1977. Roberts told Frakes that the Union should arbitrate the suspension and that if the Union did not do so he would bring charges against the Union.

Immediately after the grievance meeting of August 23, 1976, Frakes instructed Union Steward Dalton to interview Vaccare, McDaniel, and others who might have information, and to obtain written statements from them. Vaccare and McDaniel gave Dalton their versions of the incidents in question but refused to give a written statement. They also refused to give Dalton a copy of the statements that the Company had taken. Dalton also spoke to Jones, who said that he did not want to get involved and would not give a statement. Dalton had heard rumors that employee Soltys and a machinist named Herb, as well as Maintenance Foreman Roy Slabey, had given statements to the Company. Dalton did not talk to Soltys or Herb because they were not on the same shift as Dalton and he did not know them. Dalton did not talk to Slabey because Slabey was a supervisor.

On January 4, 1977, the Union obtained from the company a definitive list of the names of people who gave statements. That list did not contain addresses. By letter dated January 7, 1977, Union Attorney Harley asked all seven of the people who had given statements to contact him so that he could discuss the matter with them. Those letters were given to Industrial Relations Manager Turner, who delivered them to the people involved. Harley did not receive a reply from any of those people.

4. The arbitration

The contract between the parties contained an arbitration clause that provided, "The arbitrator shall render a decision upon the question presented only and shall not have authority to change or modify any of the terms of this agreement." [7] The contract also provided that each party would bear the expense of its own presentation and that the charges of the arbitrator would be born equally by the Company and the Union. There is no language in the contract relating to the production of documents by a party in grievance or arbitration proceedings.

The attorney for the Company and the attorney for the Union executed an arbitration submission agreement under which they agreed that the arbitrator was to determine the following issues: "(a) Was the suspension of Richard Roberts on August 16, 1976, a violation of the Agreement? (b) If the answer to (a) is in the affirmative, what is the appropriate remedy?" That agreement also provided that the arbitrator was to have no authority to add to, subtract from, change, or modify any provision of the agreement and that the arbitrator was authorized only to interpret the provisions of the agreement and apply them to the specific facts of the specific grievance.

The arbitration hearing was held on February 15, 1977. Six of the seven individuals who gave statements to the company testified at that hearing.[8] The statements of Vaccare and McDaniel were placed in evidence, and therefore the Union had an opportunity to see them. When the other four witnesses testified, their statements were shown to Union Attorney Harley, but on the Company's insistence those statements were not shown to Roberts or the Union. All the statements were admitted in evidence in the trial of the instant case.

On June 9, 1977, the arbitrator issued his award finding that Roberts' suspension was not a violation of the agreement. In his decision the arbitrator referred not only to the August 12 and 13 incidents, but also to prior incidents involving Roberts.

C. *Analysis and Conclusions*

As the United States Supreme Court held in *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967):

> There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149. Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.

[6] It appears that even as of January 6, 1977, there was confusion as to whether the statements were to be shown only to Harley or whether they were to be shown also to the Union.

[7] The contract states:

> [A]ny employee who feels aggrieved as the result of any disciplinary action taken by the Company, or entertains any other grievance or dispute concerning application of this agreement, shall have recourse to the grievance procedure as set forth in this agreement.

[8] The six were Vaccare, Soltys, Jones, Petretti, McDaniel, and Slabey. Niesslein did not testify.

In that case the high court sustained the Board's finding that an employer violated Section 8(a)(5) of the Act by failing to furnish a union with information relating to the transfer of certain plant equipment. Grievances had been filed under the contract relating to that transfer. The court referred to a discovery type standard and held that the Board had acted "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." (385 U.S. at 437). The court also held (385 U.S. at 438):

> 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 woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim.

In *Ohio Power Company*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (C.A. 6, 1976), the Board adopted an Administrative Law Judge's Decision that held:

> Where the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required.

The same logic applies to a situation where information is needed for a union to intelligently evaluate the merits of a grievance.[9]

In the instant case the Company took statements from five employees and two supervisors, all relating to alleged improper conduct by Roberts. Roberts was given a 5-day suspension, and a grievance was filed with regard to that suspension. The Company contends that the suspension was keyed solely to incidents that occurred on August 12 and 13, 1976. However, the Company's investigation, the statements taken, and the subsequent arbitration award all dealt with prior conduct of Roberts in addition to the August 12 and 13 incidents. In order to intelligently process the grievance, the Union had to obtain information relating to the August 12 and 13 incidents and to the other matters set forth in the statements.

The Union owed a duty of fair representation to all employees in the bargaining unit. *Vaca et al.*, v. *Sipes*, 386 U.S. 171 (1967); *Kaj Kling* v. *N.L.R.B.*, 503 F.2d 1044 (C.A. 9, 1975); *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962), enforcement denied 326 F.2d 172 (C.A. 2, 1963). That duty required the Union to use its best efforts to properly evaluate Roberts' grievance and to obtain all the information it could in order to make a determination as to whether to press the grievance to arbitration. As the Board held in *P.P.G. Industries, Incorporated*, 229 NLRB 713 (1977), a union breaches its duty of fair representation when it arbitrarily ignores a meritorious grievance or processes it in a perfunctory fashion. Under the circumstances of this case, the information contained in the statements was clearly relevant and would have been of use to the Union in carrying out its statutory duties and responsibilities.

As is set forth in detail above, the Union sought to obtain information directly from the individuals involved after the Company refused to furnish the statements. It had only very limited success in that regard. Some of the individuals involved did not speak to the Union at all, none of them gave written statements to the Union, and none of them responded to the union attorney's written request to speak to them. Under those circumstances the statements in the Company's possession were needed by the Union for the Union to properly perform its duties.[10]

The Union repeatedly requested the statements from the Company and clearly informed the Company that the statements were needed for the Union to determine the merits of the grievance. The union attorney told the company attorney that the Union was prepared to evaluate the matter and change its position about going to arbitration. When the Company suggested that the arbitrator decide whether the statements should be produced, the Union's attorney answered that he thought such a procedure would be very costly and that the Union should not have to go to arbitration in order to get statements that it needed to determine whether

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[9] In *Acme, supra*, the Supreme Court held (385 U.S. at 436):

> Sec. 8(a)(5) proscribes failure to bargain collectively in only the most general terms, but section 8(d) amplifies it by defining "to bargain collectively" as including "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . any question arising [under an agreement]."[3]

[3] Cf. *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 581: "The grievance procedure is, in other words, a part of the continuous collective bargaining process."

[10] As the Board held in *Kroger Company*, 226 NLRB 512, 513–514 (1976):

> Absent special circumstances, a union's right to information is not defeated merely because the union may acquire the needed information through an independent course of investigation.[4] The union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form. The union is entitled to an accurate and authoritative statement of facts which only the employer is in a position to make.[5] It is thus clear that where a request for relevant information adequately informs the employer of the data needed, the employer either must supply such information or adequately set forth the reasons why it is unable to comply.[11]

[4] *American Beef Packers, Inc.*, 193 NLRB 1117, 1120 (1971). Cf. *Building Construction Employers Association of Lincoln, Nebraska*, 185 NLRB 34 (1970); *Robert J. Weber and Richard K. Weber d/b/a Weber Fencer & Plywood Company*, 161 NLRB 1054, 1056 (1966).

[5] *S. H. Kress & Co.*, 108 NLRB 1615, 1620–21 (1954). Moreover, assuming, *arguendo*, that the Union unknowingly already possessed all of the necessary information, Respondent would at least be obligated to notify the Union that it could furnish no information which the Union did not already possess.

[11] Cf. *M.F.A. Milling Company*, 170 NLRB 1079, 1097 (1968); *J. I. Case Company (Rock Island, Illinois)*, 118 NLRB 520 (1957), enfd. 253 F.2d 149 (C.A. 7, 1958).

or not to go to arbitration.[11]

None of the statements were shown to the Union before the commencement of the arbitration proceeding. Two of the statements were admitted in evidence during the arbitration proceedings, and at that time the Union could see those statements. Four other witnesses were called by the Company and their statements shown to the attorney for the Union, but the Union was not permitted to see them. The seventh statement was not shown to either the union attorney or the Union until all seven statements were placed in evidence in the instant case.

The Company contends that the issues raised by the complaint are moot in that the parties agreed to the procedure followed at the arbitration. As set forth above, there was never a full meeting of the minds with regard to that procedure. In addition, there is still a sharp disagreement between the parties with regard to whether the Company had an obligation to show the Union the statements prior to the arbitration at a time when the Union could have used them to assist it in its evaluation of the merits of the grievance and in its determination whether or not to proceed to arbitration. The issues in dispute are not moot.

The Company contends that it had no obligation to furnish the statements because it had the right to protect the confidentiality of the individuals who gave the statements. However, the Company has not established that there was sufficient likelihood of violence or other improper conduct to relieve it of its obligation to furnish necessary information.[12]

In *Acme, supra*, the Supreme Court held that the Board has jurisdiction to enforce a union's statutory right to information and that the Board need not await an arbitrator's determination of the relevancy of the requested information before enforcing the Union's right. The Board has the authority to decide cases of this nature. However, the Board can, as a policy matter, defer to an arbitral forum. A very serious question is presented as to whether outstanding Board policy dictates such a deferral in the instant case. Roberts' 5-day suspension was not in itself subject to Board litigation. That matter was properly the province of the arbitrator. The issue at bar relates solely to an ancillary matter involving the processing of the 5-day suspension grievance. The parties have some 23 years experience in the collective-bargaining process. They have a procedure through arbitration to resolve the central question of whether Roberts was properly suspended for the 5 days. The statements in question are peripheral to that central matter. A serious argument can be made that the Board should not use its limited resources to involve itself in cases of this nature. However, the parties are in sharp disagreement as to what the Company's obligations are under the Act, and future problems may be avoided if clear legal guidelines are established by a resolution of the issues raised by the complaint.

In *American Standard, Inc.*, 203 NLRB 1132 (1973), the Board held that certain information sought by a union was either not relevant or not needed to enable the Union to represent employees more effectively. However, in that case the Board set forth the criteria to be used in determining whether deferral to arbitration was proper. The Board held (203 NLRB at 1132):

> It is now well settled that a collective-bargaining representative is entitled to information which may be relevant to its task as bargaining agent, and this is not a matter of deferral to arbitration where, as here, the material is sought as a statutory, rather than a contract, right.[3] It is clear in the case before us that there is no contract clause dealing specifically with the furnishing of information necessary and relevant to the processing of grievances or any other clause by which the Union waives its statutory right to such information.[4] Under these circumstances we do not agree with the Administrative Law Judge that this issue should be deferred to the arbitration procedure under *Collyer*.

[3] E.g., *The Timken Roller Bearing Company*, 138 NLRB 15, enfd 325 F.2d 746 (C.A. 6, 1963).

[4] See, e.g., *Tonic Industrial Company*, 150 NLRB 1463, 1465, enforcement denied 381 F.2d 258 (C.A. 7, 1965), reversed and remanded 385 U.S. 432 (1967).

In the instant case the information sought by the Union was relevant to its tasks as bargaining agent, the Union was seeking the material as a statutory rather than a contract right, the applicable contract did not have a clause dealing specifically with the furnishing of information necessary and relevant to the processing of grievances, and there was no contract clause by which the Union waived its statutory right to such information. In addition, the contract in question specifically provided that the arbitrator had authority to render a decision only upon the question presented and had no authority to change or modify any of the terms of the contract. The arbitration stipulation provided that the arbitrator had no authority to add to, subtract from, change, or modify any provision of the contract and was only authorized to interpret the provisions of the contract and apply them to the specific facts of the specific grievance. Under the teachings of *American Standard*, it would appear that the instant case should not be deferred to arbitration.[13] However, the viability of the *American Standard* decision is put somewhat in doubt by the Board's decision in *Roy Robinson, Inc., d/b/a Roy Robinson Chevrolet*, 228 NLRB 828 (1977). In that case the complaint alleged that a company violated Section 8(a)(5) and (1) of the Act by closing its body shop and discharging three employees without prior notice to or bargaining with a union. The contract provided that the employer should have the exclusive right to discharge employees. There was a contract provision entitled "Sub-Contracting," but that provision dealt only with employees working off hours. The contract contained a grievance procedure culminating in arbitration that was applicable to "Any complaint arising among the employees in the shop over the interpretation of this Agree-

[11] While there was an exchange of correspondence in which there was mention of the arbitrator deciding whether the statements should be produced, that issue was not submitted to the arbitrator.

[12] It is noted that the Company did give the Union a list of the names of those who gave statements.

[13] See also, *W. A. Schaffer Pen Company, a Division of Textron, Inc.*, 214 NLRB 15, 23-24 (1974); *A. O. Smith Corporation*, 223 NLRB 838, 843 (1976); *United Cars Tennessee, a Division of ITB, Inc.*, 202 NLRB 729-730, 731 (1973).

ment relative to hours, wages, overtime, working conditions, discrimination, classifications, or other terms of this Agreement (228 NLRB at 828)." There appeared to be no contract provision dealing directly with the close of part of the operation. A serious argument could be made that the issue in question related solely to a statutory right and not to a contract right. However, a majority of the Board held that the case should be deferred to arbitration, saying (228 NLRB at 830):

> As to the dissenters' argument that there is no contract provision which could even arguably give color to Respondent's conduct, we disagree. The Supreme Court said in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 582–583, that an order to arbitrate a particular grievance should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." We believe that the dispute here falls within that standard and is therefore properly referable to the parties' arbitration procedure.

While the matter is not free from doubt, I believe that the *American Standard* rather than the *Roy Robinson* case is controlling in the instant matter. *American Standard* dealt with the specific issue of the duty to supply information. It would appear anomalous to hold that a union is required to go to arbitration in order to obtain a determination as to whether it was entitled to the very information it needed to evaluate whether a grievance should be processed to arbitration. In addition, both the contract and the submission in the instant case narrowly restricted the jurisdiction of the arbitrator, and there appears to be no contract right to the statements that an arbitrator would have authority to vindicate. I therefore find that this case is not deferrable to arbitration.

In sum, I find that the statements taken by the Company from two supervisors and five employees relating to misconduct by Roberts were needed by the Union for it to evaluate the merits of Roberts' grievance and to assist it in determining whether the grievance should go to arbitration, and that the Company violated Section 8(a)(5) and (1) of the Act by refusing to honor the Union's request for those statements.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company, set forth in section III, above, occurring in connection with the operations of the Company described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

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

All seven statements were placed in evidence in the hearing of this case. The Union has full access to them.[14] There is, therefore, no need to order the Company to make those particular seven statements available to the Union.

The General Counsel argues that the Company should be ordered to bear the burden of the Union's share of the arbitration expenses.

The Company's breach of its obligation to bargain was not such an egregious and flagrant flouting of the statute as to warrant an extraordinary remedy or to require a broad cease-and-desist order. *Schuck Component Systems, Inc.*, 230 NLRB 838 (1977).[15] In addition, it is noted that in view of Roberts' threat to sue the Union if the Union did not arbitrate his grievance, it is quite possible that the Union would have arbitrated even if it had timely obtained the statements. The Company and the Union agreed in the contract that each party would bear the expense of its own presentation, and that the charges of the arbitrator would be borne equally by the Company and the Union. Under all of the circumstances, I do not believe that an extraordinary remedy or a deviation from the contract agreement would be appropriate.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following unit is appropriate for the purposes of collective bargaining:

> All maintenance electricians, journeymen, apprentices, and working foremen, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. The Union is the exclusive bargaining representative of the Company's employees in the above-described unit.
5. The Company refused to bargain in violation of Section 8(a)(5) and (1) of the Act by refusing, in the context of a grievance procedure, to furnish the Union with copies of written statements the Company had taken from five employees and two supervisors relating to conduct by employee Richard Roberts which led to a 5-day suspension.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[14] It is also noted that the grievance to which those statements related has been fully resolved through arbitration.

[15] I also find that the defenses raised by the Company in the instant case were debatable rather than frivolous. Cf. *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), enfd. as modified 502 F.2d 349 (C.A.D.C., 1974).