

*United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL*

Advice Memorandum

SAM

DATE: December 20, 2019

TO: Terry Morgan, Regional Director
Region 7

FROM: Richard A. Bock, Associate General Counsel
Division of Advice

SUBJECT: Greektown Casino, LLC 530-6067-6001-3730
Case 07-CA-245136 530-6067-6050-0000
737-2850-2233-0000

This case was submitted for advice as to whether the Employer unlawfully failed and refused to provide information requested by the Union in connection with an alleged violation of the anti-discrimination clause of the parties' collective-bargaining agreement based on a supervisor's allegedly racist behavior toward a unit employee. We conclude that: (1) the Employer violated Section 8(a)(5) by refusing to provide the Union with the requested June 10, 2019 video surveillance. When litigating the Employer's failure to provide the footage, the Region should urge the Board to follow common law principles and Federal Rules of Civil Procedure and find that parties have an affirmative duty to preserve information once it has been requested. In that regard, the Region should argue the Employer's destruction of the video information after the Union had requested it, even if purportedly according to the Employer's retention policy, estops the Employer from using the nonexistence of the video as a defense to the Section 8(a)(5) charge; and (2) the Region should not issue complaint alleging that the Employer unlawfully delayed providing the Union with the supervisor's witness statement, since the Employer provided the Union access to the statement following the mediation process.

FACTS

Local 7777, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (“Union”) represents a unit of, inter alia, casino table-game dealers at Greektown Casino-Hotel (“Employer”) in Detroit, Michigan. The parties have a collective-bargaining agreement that expires on October 16, 2020. Article 3 of the agreement contains a “No Discrimination” policy and states, in pertinent part,

Neither [the Employer] nor the Union shall discriminate against [employees] because of gender, race, color, creed, national origin, age,

religion, veteran status, disability, height, weight, familial status, sexual orientation or marital status.

On [REDACTED] ^{(b) (6), (b) (7)(C)}, 2019,¹ an [REDACTED] ^{(b) (6), (b) (7)(C)} allegedly asked [REDACTED] supervisor to help [REDACTED] tie [REDACTED] employee-ID lanyard tighter around [REDACTED] neck because it was too loose and dragging on [REDACTED] ^{(b) (6), (b) (7)(C)} where [REDACTED] was working. The supervisor allegedly responded by asking the employee, in earshot of other employees and casino patrons, whether the employee wanted the supervisor to [REDACTED] ^{(b) (6), (b) (7)(C)}. The employee reported the incident to the Employer and to [REDACTED] Union representative. The Employer suspended the supervisor, pending an investigation, which included taking the supervisor's statement.

When the supervisor returned to work on June 10—in the same position supervising the same employee—[REDACTED] allegedly approached the employee and asked, “how you doin’, [REDACTED] ^{(b) (6), (b) (7)(C)}?” while touching the employee’s back. The employee reported the supervisor’s statement to the Employer and Union and the supervisor was immediately moved to another location where [REDACTED] would no longer directly supervise the employee. The employee reported the alleged unwanted touching to the Union but it is unclear whether [REDACTED] ^{(b) (6)} reported it to the Employer.

On June 13, the Union submitted an information request to the Employer, which by its terms, requests information “[i]n [o]rder to monitor and administer the collective bargaining agreement.” Specifically, the Union requested: (1) “All witness statements pertaining to incident of [REDACTED] remark; including [supervisor’s];” and (2) “Surveillance tape of when [supervisor] entered the pit [i.e., an area on the casino floor where groups of table-games are set up] on June 10th and approached [employee].”

The Employer denied the information request on June 17, claiming it performed a thorough investigation finding no violation of the collective-bargaining agreement, and noting that no discipline for any Union members was administered. The Union’s response expressed its disagreement, cited the contract’s no-discrimination provision, and stated the information requested was necessary because the Union was conducting its own investigation of the supervisor’s alleged conduct.

[REDACTED] ^{(b) (6), (b) (7)(C)}, the Union filed a grievance alleging that the supervisor’s conduct violated the contract’s no discrimination provision.

On June 28, the Union reiterated its information request for witness statements and video surveillance, which the Employer again denied the same day. The Employer stated that it had taken appropriate action to remedy the situation and that because

¹ All dates hereinafter are in 2019.

the incident involved a salaried employee—i.e., a supervisor—the Employer would not provide any information to the Union. A similar exchange occurred on July 5 when the Union again demanded the requested information and the Employer provided a nearly identical response to the one given on June 28.

The Union filed the instant charge on July 18. The parties met with a mediator on [REDACTED] (b) (6), (b) (7)(C) to discuss the underlying grievance and information request pertaining thereto. During mediation, the Employer said it would give the Union the requested information if the Union signed a non-disclosure agreement (“NDA”).

The Union signed the NDA on August 30. By September 3, the Union had viewed the supervisor’s witness statement and a surveillance video from the initial May 28 incident, but not the requested June 10 surveillance video.

On September 13, during the course of the Region’s investigation of the charge, the Employer took the position that the June 10 video no longer existed because the employee failed to report that day’s incident to HR and, absent a specific reason to set it aside for preservation, the video was over-written after 14 days pursuant to the Employer’s existing retention policy.

ACTION

The Region should issue complaint, absent settlement, alleging the Employer violated Section 8(a)(5) by failing to provide the Union with the June 10 surveillance video. The Employer’s destruction of the facially relevant footage after it knew the Union had specifically requested it precludes the Employer from relying on the information’s nonexistence as a defense to the Section 8(a)(5) charge. The Region should also urge the Board to follow common law principles and Federal Rules of Civil Procedure and hold a party’s knowing destruction of information after it has been requested precludes the party’s reliance on its nonexistence as a defense to a refusal-to-provide-information allegation. However, the Region should not allege that the Employer unlawfully delayed providing the witness statement to the Union because the Employer provided it to the Union following the mediation process.²

As a preliminary matter, we note that the information requested by the Union is presumptively and facially relevant given the nature of the allegations against the supervisor, which directly implicate the no discrimination provision of the parties’

² Accordingly, this case does not furnish an appropriate vehicle to argue that the Board should overrule *Piedmont Gardens*, 362 NLRB 1135 (2015) (overruling *Anheuser Busch*, 237 NLRB 982 (1978), and holding witness statements in employer investigations of workplace misconduct disclosable).

collective-bargaining agreement and the employees' terms and conditions of employment generally.³

We conclude that the Employer had an affirmative duty to preserve the requested information and provide it to the Union, and reject the assertion that an otherwise lawful retention policy allows for the destruction of such information in these circumstances.

Generally, parties have a common law duty to preserve evidence within their "possession, custody, or control" that is potentially relevant to "specific, predictable, and identifiable litigation."⁴ For a defendant, that duty is triggered, "at the latest, when the defendant is served with the complaint."⁵ Failure to comply with that duty results in spoliation,⁶ which prevents other parties to the litigation from obtaining relevant evidence in discovery and undermines the integrity of the judicial process.⁷ Consequently, courts have the inherent power to impose sanctions for spoliation.⁸

The foregoing reasoning is particularly applicable here, where the Employer was in receipt of the information request for the surveillance video, yet nevertheless destroyed the video. Federal Rule of Civil Procedure 37(e)(2) is also instructive as it

³ *Nob Hill General Stores, Inc.*, 368 NLRB No. 63, slip op. at 6 (Aug. 29, 2019) (union's information request regarding bargaining unit employees is presumptively relevant and employer obligated to provide information to union); *Westinghouse Electric Corporation*, 239 NLRB 106, 107–8 (1978) (union entitled to information requested about racial discrimination by employer because it is presumptively relevant both under parties' contractual no-discrimination policy and as a statutory matter to ensure all bargaining unit members treated fairly), *enforced sub nom., Int'l Union of Elec. and Radio Mach. Workers AFL-CIO-CLC v. NLRB*, 648 F.2d 18 (D.C. Cir. 1980).

⁴ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 521–38 (D. Md. 2010) (internal quotation marks omitted).

⁵ *Id.* at 522.

⁶ THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 356 (4th ed. 2014), available at <https://thesedonaconference.org/node/238> ("Spoliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit.") (last visited Dec. 13, 2019).

⁷ See *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590–91 (4th Cir. 2001).

⁸ *Id.* at 590.

expressly provides for sanctions against a party that destroys electronically stored information or otherwise “act[s] with the intent to deprive another party of the information’s use.” These sanctions may include a presumption that the lost information was unfavorable to the party, instructing a jury that it may or must presume the information was unfavorable, or dismissing the action entirely.⁹ Such sanctions in the context of FRCP 37(e)(2) are consistent with a finding that the same conduct by an employer or union violates the duty to bargain in good faith.

The ALJ’s reasoning in *Earthgrains Co.*, is instructive. There, the ALJ concluded that the employer violated Section 8(a)(5) by failing to produce information notwithstanding the employer’s argument that it no longer existed.¹⁰ The ALJ criticized the employer for destroying information, ostensibly pursuant to its record-preservation practices, after it received the union’s information request. The ALJ rejected the employer’s defense that the information no longer existed, finding, “[b]y knowingly continuing to destroy documents containing key information being sought by the [u]nion, the [employer] manufactured its inability to produce [the] records.”¹¹ This conclusion was based on common evidentiary rules regarding spoliation. In that regard, we note that the Board and courts routinely draw upon evidentiary rules when addressing parties’ failure to provide relevant evidence.

Guided by these principles, the Region should urge the Board to hold that parties have an affirmative duty to preserve information once it has been requested and pending such time as the relevance of the information can be established.¹² Here, the

⁹ FED. R. CIV. P. 37(e)(2). See, e.g., *Wilmoth v. Murphy*, 2019 WL 3728280, at *4 (W.D. Ark. 2019) (defendant’s bad faith in failing to preserve photos warranted sanction that defendant not be allowed to call particular individuals as witnesses). Because the Board considers only whether the information was relevant to the party’s duty as collective-bargaining representative and not whether the underlying issue that spawned the request has merit, we do not suggest that any adverse inference be made on the underlying dispute between the parties that gave rise to the information request. See *E. I. Du Pont de Nemours & Co.*, 366 NLRB No. 178, slip op. at 4 (Aug. 27, 2018) (noting that ALJ improperly considered merits of union’s grievance and stated “[i]t is axiomatic that the Board does not evaluate the merits of the union’s contractual claim in determining relevance.”).

¹⁰ 349 NLRB 389, 398 (2007), enforced in relevant part, *sub nom.*, *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422 (5th Cir. 2008).

¹¹ *Id.* at 398.

¹² The Board’s responsibility to resolve questions of labor law gives it wide latitude to fashion appropriate rules for spoliation of relevant information that was timely requested. See *The Boeing Company*, 365 NLRB No. 154, slip op. at 22 (Dec. 14, 2017)

June 10 video footage existed at the time it was requested and was facially relevant to resolving the parties' underlying contractual dispute over the supervisor's alleged [b] behavior toward the employee. The Employer thus had an affirmative duty to preserve and provide the existing video footage at least as of June 13 when the Union gave clear notice of its request. Therefore, the Employer's failure to do so violated Section 8(a)(5).

Accordingly, the Region should issue complaint, absent settlement, alleging the Employer's failure to provide the Union with the June 10 video violated Section 8(a)(5) because the video was facially relevant and the Employer's knowing failure to preserve it once it had been requested by the Union estops the Employer from arguing the video's nonexistence as a defense to its failure to provide the information.

R.A.B.

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("the Board has the responsibility to decide all matters that are properly before it, based on [its] 'special function of applying the general provisions of the Act to the complexities of industrial life.'" (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963))).