

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

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DOCKET NO. 92-9

GENE MCCORT

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MEMORANDUM AND ORDER

At issue is a Motion for Protective Order filed by Vermont Railway, Inc. Vermont Railway seeks to prevent audit reports prepared by Grievant on Vermont Railway, which have been filed by Grievant in this matter, from becoming public records. Vermont Railway moves that the Board issue a Protective Order providing that the audit reports and all testimony relating thereto not become public records, but shall be deleted from the record in this matter and/or sealed so that they do not become public records and/or available in a hearing open to the public. Grievant objects to the issuance of a protective order by the Board. The State has no objection to the issuance of such an order.

The State Employees Labor Relations Act provides that "(a)ll findings, conclusions and determinations of the board and the records of all hearings and other proceedings, unless otherwise provided by law, shall be public records." 3 VSA §929. Vermont Railway contends that the audit reports and any related testimony are not public records pursuant to the provisions of the Vermont Access to Public Records Act, specifically 1 VSA §317 (b) (6) and (9). §317 (b) (9) provides as follows:

(b) As used in this subchapter, "public record" or "public document" means all papers, staff reports, individual salaries, salary schedules or any other written or recorded matters produced or acquired in the course of agency business except: . . .

(9) trade secrets, including, but not limited to, any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it; . . .

The Chittenden Superior Court has interpreted the trade secret exemption under §317 (b) (9) to cover the type of material at issue in this case. In Mount Mansfield Television, Inc. v. Babcock, et al (Chittenden Superior Court Docket No. S 1418-89 CnC, April 6, 1990), the court adopted the test applied by a federal court interpreting a similar provision of the federal Freedom of Information Act, Burke Energy Corp. v. Dept. of Energy, 583 F.Supp. 507 (D. Kan. 1984), in determining whether the Vermont Department of Banking and Insurance was required to release to a television station, among other materials, an audit report on an insurance company in the Department's possession. Under the test, the information can be withheld if the following requirements are met: (a) the information must be financial or commercial in nature, (b) the information must be obtained from a person outside the government structure, and (c) the information must be confidential or privileged. Burke Energy Corp., 583 F.Supp. at 510-11. Information is confidential if its disclosure is likely to impair the government's ability to obtain necessary information in the future, or to cause substantial harm to the competitive position of the person from which the information was obtained. Id. at 511. Information also is confidential if it is of the type that would not customarily be released to the public by the person from whom it is sought. Id. In applying the Burke

test, the court in Mount Mansfield Television determined that the audit report was protected from disclosure pursuant to §317 (b) (9).

In applying the Burke three-part test to this case, we conclude that the audit reports prepared by Grievant meet the test. The audit reports clearly meet the first two parts of the test because they contain information on Vermont Railway which is financial in nature, and they are based on information obtained from a company - Vermont Railway - which is a "person outside the government structure."

Also, we conclude that the information in the audit reports is confidential in nature. Grievant's employer, the Vermont Agency of Transportation, informed Vermont Railway that the audit reports which the Agency does on companies are confidential and would not be released except with the permission of the company which was audited or by court order. Given such assurances, it is evident that the financial information contained in the audit report is of the type that would not customarily be released to the public by Vermont Railway and the disclosure of the audit reports to the public is likely to impair government's ability to obtain necessary information from companies in the future. If we were to permit the audit reports to become public records, competitors of Vermont Railway would be able to acquire private information about the financial situation of Vermont Railway. This would grant competitors an unfair competitive advantage that the provisions of §317 (b) (9) are designed to prevent. Thus, we conclude that the audit reports are not public records. Given

this conclusion, there is no need to address whether §317 (b) (6) also protects the audit reports from public disclosure.

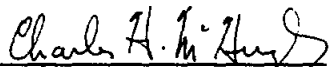
Our conclusion is limited to sealing the audit reports from public disclosure, and does not restrict Grievant from seeking to enter the reports into the record in this matter. If the Board concludes that the audit reports are properly admissible, they will be part of the record considered by the Board but will not be accessible to the public. This will protect both the interests of Grievant in the presentation of his case and the interests of Vermont Railway in keeping sensitive business information from inappropriate public disclosure.

Now therefore, based on the foregoing reasons, it is hereby
ORDERED:


1. The audit reports, and drafts of such reports, prepared by Grievant on Vermont Railway, which have been filed by Grievant in this matter, shall be sealed from public disclosure; and
2. Grievant shall submit for inspection any further audit documents on Vermont Railway which he intends to offer as evidence in this matter, and such materials shall be sealed from public disclosure pending the ruling of the Vermont Labor Relations Board as to whether they will be admitted into evidence.

Dated this 20th day of August, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Louis A. Toepfer


Leslie G. Seaver