

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

UNITED STATES POSTAL SERVICE,

and

Case No. 5-CA-140963

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO

and

STAPLES, INC. (Limited Intervenor)

ORDER

On January 4, 2016, the American Postal Workers Union, AFL-CIO, (the Charging Party) filed a challenge to the confidentiality designation that the United States Postal Service (the Respondent) made with respect to one document – a draft “Retail Channel Strategy” power point presentation, dated March 26, 2012 (the document), created for the Respondent by McKinsey & Company, a third-party consultant. On January 11, 2016, the Respondent filed an opposition to the Charging Party’s challenge in which the Respondent contends that the document contains confidential and proprietary information and that confidentiality was not knowingly waived.

The document itself states on its first page that its contents are “confidential and proprietary.” However, the Respondent inadvertently included the document with the non-confidential material, rather than with the designated confidential material, that it produced pursuant to subpoena. In addition, the Respondent subsequently filed a discovery motion that was part of an effort to protect the confidentiality of the document but, by doing so, the Respondent inadvertently made the document itself (which was an attachment to the motion) available for viewing at the Board’s website. In the case of each of these inadvertent disclosures, it was the Charging Party who brought the disclosure to the Respondent’s attention.

The Respondent acted promptly to remedy the inadvertent disclosures. On the same day that the Respondent learned the document had been produced *without the confidentiality* designation, the Respondent’s counsel asked the Charging Party not to disclose the document further while he investigated, and the day after that the Respondent’s counsel notified the Charging Party that the Respondent was designating the document as confidential. On December 2, 2015, the Respondent learned that, by including the document as an attachment to the discovery motion, it had made the document viewable at the Board’s website, and on December 4, 2015, I granted the Respondent’s motion to place the attachment under seal so that it would no longer be viewable at the Board’s website.

The Charging Party’s challenge to the designation of the document as confidential does not assert that material in the document is not confidential and/or proprietary information, but rather argues that the Respondent waived any claim of confidentiality by making the two inadvertent disclosures discussed above. In this case, I previously issued a protective order<sup>1</sup>

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<sup>1</sup> The protective order was issued on November 3, 2015, and modified on December 4, 2015.

regarding the handling of documents that a party produces in this proceeding, but designates as confidential material that the receiving party may only disclose for purposes relating to this litigation. That protective order provides, at section 4.3:

If timely corrected, an inadvertent failure to designate qualified information or items [as confidential] does not, standing alone, waive a Producing Party's right to secure protection under this Order for such material. Upon timely correction of a failure to designate, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

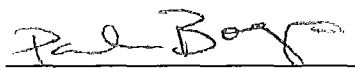
That section is appropriate in this case given the large number of documents being produced pursuant to subpoena and the resulting likelihood, even inevitability, of inadvertent disclosures. In this case, I find that the Respondent's disclosure of the document was inadvertent, that the Respondent corrected this mistake in a timely fashion, and that there are no other factors that warrant a finding that the Respondent waived confidentiality.

Although I find that the Respondent has not waived confidentiality with respect to the document, the reality, recognized by both the Respondent and the Charging Party, is that the document was not only temporarily viewable to the Charging Party's members on the Board's website, but also viewable to them on a private website that received the document from a contact purportedly associated with the Charging Party. The Charging Party represents that, as a result, it has received multiple inquiries from members concerned about the document. Given this, I will permit the Charging Party to communicate limited information to its members regarding the confidential document, although the document itself is still confidential and may not be shared except to the extent allowed by the protective order.

The information that the Charging Party may provide to its members regarding the document is as follows: (1) the document is dated March 26, 2012, and was prepared for the Respondent by a third-party consultant; (2) the document was not prepared by the Respondent and does not, on its face, reveal whether the Respondent adopted any of the proposals contained in it; (3) in the document, the consultant makes a number of proposals to the Respondent, including that the Respondent invest in high traffic postal service locations and that it eliminate the majority of the standard volume postal services locations and migrate that work to retail partners that are not staffed by the Charging Party's members. The Charging Party's contact with members regarding the document shall not direct them to a website or other source where the confidential document may be viewed. The Charging Party will continue to treat as confidential other information in the document, including: cost per dollar revenue figures, cost to serve figures, capital start-up expense figures, estimated savings figures, proprietary tools and frameworks, and other confidential or proprietary information contained in the document.

SO ORDERED.

Issued at Washington, District of Columbia this 20<sup>th</sup> day of January, 2016.

  
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PAUL BOGAS  
Administrative Law Judge

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SERVICE SHEET

A copy of the Order in the above named case has been served upon the following by electronic mail.

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