

III. COMMUNICATIONS BETWEEN GRIEVANTS AND THEIR UNIONS: PRIVILEGED OR NOT?

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Although there is a dearth of published decisions on the subject, arbitrators are often confronted with claims of privilege when an employer inquires into discussions that a non-attorney union representative has had with a grievant or other union members regarding the facts of a case. In many cases, arbitrators are inclined to shield such discussions from disclosure, perhaps based on concern that permitting disclosure will adversely affect the union's ability to represent its members, or simply on the basis that the role such union representatives play in an arbitration is akin to that of an attorney. As is discussed in this paper, however, absent evidence that the attorney-client privilege has attached or that the attorney-work product privilege applies, there is no legal foundation for recognizing a union-grievant privilege in the context of arbitration proceedings. To the contrary, the courts have consistently and clearly stated that because privileges, by their very nature, impair the search for the truth, they are to be narrowly construed and, absent statutory authority, normally will not be judicially created.

Unlike many legal issues faced by arbitrators, the issue of whether or not to permit inquiry into such communications is one that may impact the validity and enforceability of an arbitration award. This is because the decision directly implicates one of the few bases for overturning an arbitration award—the exclusion of relevant evidence.¹ In this paper, we will explore the scope of the legal doctrines most often cited in support of excluding evidence of such union-grievant communications. As will be seen, in our view, these doctrines do not support the adoption of a broad union-grievant privilege and should be applied only in circumstances falling within their narrowly drawn scope.

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¹See, e.g., *Federal Arbitration Act*, 9 U.S.C. § 10 (refusal to hear evidence pertinent and material to the controversy constitutes grounds for vacation of award).

The Collective Bargaining Privilege

The Privilege as Defined in Berbiglia, Inc.

Unions advocating the recognition of a union-grievant privilege often rely on the so-called “collective bargaining privilege,” arguing that the grievance and arbitration procedure is an extension of the collective bargaining process and that the rationale underlying that National Labor Relations Board (NLRB) created privilege is equally applicable to union-grievant discussions. As shown below, however, the collective bargaining privilege has been progressively narrowed by the NLRB since its creation and does not provide support for a broad and ill-defined union-grievant privilege.

The NLRB first defined the collective bargaining privilege in the leading case of *Berbiglia, Inc.*² There, the NLRB affirmed an administrative law judge’s decision revoking an employer’s subpoenas for records of communications between the union and its members and other organizations. The case involved unfair labor practice charges arising from the employer’s alleged failure to bargain in good faith, interference with employees’ rights following a failed petition for decertification, and the employer’s alleged retaliation following a strike. The employer sought information regarding communications between the union and its members in the context of attempting to establish that the union’s reasons for striking made the strike an unfair labor practice strike. The administrative law judge revoked the major portion of the employer’s subpoenas and reaffirmed the revocation upon review, explaining that:

[R]equiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members. If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure. This necessity is so self-evident as apparently never to have been questioned.³

The decisions in *Berbiglia, Inc.* drew support from the Ninth Circuit’s 1976 decision in *Harvey’s Wagon Wheel, Inc. v. NLRB*,⁴ in

²233 NLRB 1476, 97 LRRM (BNA) 1369 (1977).

³*Id.* at 1496.

⁴550 F.2d 1139 (9th Cir. 1976).

which the appellate court held that statements of union representatives and employees to the Board in the context of a Board investigation were privileged from disclosure in response to a Freedom of Information Act (FOIA) request. In that case, the court affirmed the district court's holding that employee affidavits were exempt from disclosure, but remanded so that the district court could consider the question of whether the exemption could be applied to non-employee statements gathered by the Board. The court explained its rationale as follows:

Statements of union representatives and agents of the employee, for example, should normally be protected from disclosure as a matter of law. Otherwise, the danger of their withholding relevant information for fear of exposing crucial material regarding pending union negotiations would be manifest.⁵

As noted in *Berbiglia*, the same policy also informs the long-established privilege of conciliators not to testify regarding contract negotiations, in order to permit the parties to a conciliation to speak freely to the conciliator without fear of disclosure.⁶

While the broad language contained in *Berbiglia* could have given rise to a sweeping interpretation of the collective bargaining privilege, arguably shielding from disclosure any and all collective bargaining-related communications between unions and their members and similar internal management communications, the Board and the courts have, instead, increasingly restricted its scope.

Subsequent Application of the Collective Bargaining Privilege

The privilege defined in *Berbiglia* has been applied in subsequent proceedings almost exclusively to protect internal, confidential communications made in the course of formulating bargaining strategy during the course of collective bargaining negotiations. For example, in *Champ Corp.*,⁷ the Board affirmed, inter alia, the revocation of the employer's subpoena for records of the union's collective bargaining preparation sessions on multiple grounds,

⁵*Id.* at 1143. See also *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (holding witness statements in pending NLRB unfair labor practice proceedings exempt from FOIA disclosure, at least until completion of the hearing).

⁶*Berbiglia*, 233 NLRB at 1500 n.22 (citing *Tomlinson of High Point, Inc.*, 74 NLRB 681, 685 (1947)).

⁷291 NLRB 803, 817-18 (1988).

including that “failure to revoke the subpoena, insofar as it may be found relevant, would do unwarranted injury to the process of collective bargaining.”⁸

However, in *Morton International, Inc.*,⁹ the administrative law judge emphasized that the collective bargaining privilege is a narrow one. While holding that notes of the employer’s bargaining committee, reflecting bargaining strategies, tactics, reactions, and internal discussion points, constituted confidential “work product” privileged from disclosure, he drew a distinction between such confidential “work product” and notes taken by the bargaining team “recording factual occurrences, such as when, where, what, and by whom something was said [on a discrete topic] during collective bargaining sessions.” The latter were held not privileged and were relevant, in that case, to a disputed issue over when the union had been put on notice of the employer’s position regarding relocation of time clocks. All notes “of a factual nature” taken by members of the bargaining committee during the collective bargaining sessions were subject to discovery pursuant to subpoena.

Recent Limitations on Application of the Privilege: The Collective Bargaining Privilege and Contract Negotiation Strategy Discussions

The collective bargaining privilege, when applied at all, generally is applied only in the context of internal collective bargaining strategy sessions. Even there, decisions since *Berbiglia* have increasingly limited its scope.¹⁰

Many believe that following the Board’s 1988 decision in *Patrick Cudahy, Inc.*,¹¹ the collective bargaining privilege has been reduced to a slightly broader variety of the attorney-client privilege, applicable only to bargaining strategy communications involving counsel. In *Patrick Cudahy*, a law firm was hired to assist and give advice to the employer in connection with its contract negotiations for a successor agreement with the union. The Board issued subpoenas

⁸See also *Chicago Tribune Co.*, 303 NLRB 682 (1991) (relying in part on *Berbiglia*, rejecting employer’s purported defense that union accepted a proposal for improper reasons: “To inquire into the motives of contracting parties who accept proposals would create endless possibilities for protracted litigation which would ultimately destroy collective bargaining.”).

⁹1993 WL 1609483 (NLRB Div. of Judges 1993).

¹⁰See, e.g., *Morton Int’l, Inc.*, *supra* (holding privilege applicable only to “work product” reflecting strategies, tactics, reactions, and internal discussion points, but not to notes “of a factual nature” taken by members of a bargaining team during collective bargaining sessions).

¹¹288 NLRB 968 (1988).

directing the employer to produce at the trial of the union's unfair labor practice charges various documents, including the employer's "bargaining notes, proposals, letters, memoranda, and strategies" relating to the negotiations. The employer filed a petition to revoke the subpoenas to the extent they requested documents that reflected privileged communications between the attorneys and management. The only privilege raised by the employer—and thus the only privilege addressed by the Board—was the attorney-client privilege. The Board held that the attorney-client privilege applied, even where the communications to be shielded necessarily included discussions of business and economic considerations related to the negotiations as well as legal advice, and noted that the modern collective bargaining process "invites the contribution of legal advice at all stages."

Labor attorneys often advise an employer or a union in contract negotiations and may even serve as the party's chief negotiators because of their expertise and knowledge in this highly specialized area of the law. Their advice is relevant not only to the question of the lawfulness of the particular bargaining strategies and dealings with the opposing party or employees but also to how particular contract language is likely to be construed in arbitration if disputes about contractual provisions arise.¹²

Citing "specifically labor law policy reasons as well," the Board noted that "when the legal advice relates to collective bargaining, we will not readily and broadly exclude attorney-client communications from the privilege on the ground that business and economic considerations are also present."¹³ Accordingly, the Board held that documents reflecting communications between the employer's management and the attorneys hired to assist with the negotiations were protected by the attorney-client privilege.¹⁴ The Board further held that the union's allegations of unfair labor practices in the negotiations did not bring the documents within the crime-fraud exception to the privilege, in which communications "in furtherance of" a crime or fraud that would otherwise be privileged are nonetheless subject to disclosure.¹⁵

¹²288 NLRB at 971.

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.* at 972.

Ten years later, the Board affirmed without comment an administrative law judge's opinion that construed *Patrick Cudahy* to restrict application of the collective bargaining privilege to communications involving counsel. In *Taylor Lumber & Treating, Inc.*,¹⁶ the administrative law judge's ruling permitted the union's subpoena for records of the employer's "intramanagement strategy communications" to stand. The employer argued such records were entirely shielded from disclosure by the policies cited in *Berbiglia*. In rejecting the employer's argument, the judge questioned the soundness of the policy reasoning advanced in *Berbiglia*, as well as:

the degree to which the Board itself had genuinely embraced that reasoning, in the light of the Board's decision in *Patrick Cudahy* . . . where the Board could have, but did not, simply rely on *Berbiglia* reasoning to shield any management bargaining strategy records, but instead shielded from discovery only those records involving communications with the employer's attorney, and did so solely on the basis of the attorney-client privilege.¹⁷

Accordingly, the only documents shielded from discovery by the judge in *Taylor Lumber* were those reflecting confidential communications between members of the employer's management control group and an attorney employed by a management consulting business, who served as the employer's chief negotiator in its negotiations with the union and also provided legal services in connection with other labor relations matters.¹⁸

No Published Decision Has Applied the Privilege to Protect Communications Between a Union and Its Members in the Context of Investigating or Preparing for Grievance Arbitrations

We have found no published arbitration award, Board decision, or state or federal court opinion in which documents and evidence related to a grievant's communications with non-attorney union representatives in preparation for arbitration proceedings were

¹⁶326 NLRB 1298, 1299-1300 & n.11 (1998).

¹⁷*Id.* at n.11.

¹⁸*Id.* at 1298-1300.

held protected by the collective bargaining privilege.¹⁹ Indeed, federal courts have expressly rejected application of a collective bargaining privilege to union-grievant communications in preparation for grievance proceedings.²⁰

In at least one case, the Board has expressly declined to apply the privilege where the communications to be shielded did not involve bargaining strategy. In *National Football League Mgmt. Council*,²¹ a case arising from the 1987 football players' strike, the Board declined to quash a subpoena for the Management Council's notes of meetings of its executive committee regarding rules that established when replacement players could be hired and the setting of a deadline in advance of the players' planned return to work for eligibility to play and be paid for the following weekend's scheduled games. The Management Council, relying on *Patrick Cudahy, Inc.*,²² moved to quash the subpoena on the grounds that the notes, taken by the Council's general counsel, were protected by the attorney-client privilege and constituted attorneys' work product, and that they represented the Management Council's strategy for collective bargaining. The motion was denied in part on ground that the notes "primarily reflected discussions of purely business matters, which were not directed to [the general counsel], cer-

¹⁹In one published case, a joint labor-management system board of adjustment created pursuant to the Railway Labor Act granted a union motion to prevent the airline employer from questioning the union's grievance chairman about his communications with the grievant. Without supporting authority, the board decided that "the grievant/Union relationship is indeed important enough to be recognized as privileged *in the present case.*" *In re Mesa Airlines, Inc.*, 1998 WL 1110343 (Arb.), Gr. No. MES-47-97-DS (1998). Other decisions have held that there is no such privilege under the Railway Labor Act. *E.g., McCoy v. Southwest Airlines Co.*, 211 F.R.D. 381, 388 (C.D. Cal. 2002); *American Airlines, Inc. v. Superior Court*, 114 Cal. App. 4th 881, 892, 173 LRRM (BNA) 3066 (2003) ("We discern nothing in the RLA that expressly or implicitly indicates Congress intended to create a communications privilege between union representatives and employees.").

²⁰*McCoy v. Southwest Airlines Co.*, 211 F.R.D. 381, 387 (C.D. Cal. 2002) (employees' discussions with union representatives in preparation for grievance hearings were not privileged); *Walker v. Huie*, 142 F.R.D. 497, 500-01 (D. Utah 1992) (rejecting claim of privilege for communications where police officer's conduct during an arrest led to disciplinary proceedings and a lawsuit by the arrested citizen; testimony of union representative who represented officer in disciplinary hearing was sought, and permitted, in the arrestee's lawsuit); *Hunt v. Maricopa Employees Merit Sys. Comm'n*, 127 Ariz. 259, 264, 619 P.2d 1036 (Ariz. Sup. Ct. 1980) (lay union representatives could represent clerk in disciplinary hearing before county board of supervisors, but communications with such representatives would not be privileged); see also *In re Grand Jury Subpoenas Dated January 20, 1998*, 995 F. Supp. 332, 334-37 (E.D.N.Y. 1998) ("the court declines to recognize a common law privilege shielding conversations between union officials and members on matters of union concern").

²¹309 NLRB 78, 97 (1992).

²²288 NLRB 968 (1988).

tainly not as an attorney, and in which [he] did not directly participate, except to listen,” and thus were not protected by the attorney-client privilege, and in part because the administrative law judge hearing the case “found that the notes did not concern themselves with future collective-bargaining strategy.”²³ The decision thus impliedly restricts application of the collective bargaining privilege to communications regarding collective bargaining negotiation strategy.

Although the Board and arbitrators are not strictly bound by the Federal Rules of Evidence, the hostility of federal courts to the expansion of existing privileges or creation of new ones may underlie the apparent refusal to extend the collective bargaining privilege beyond the contract negotiation arena.²⁴

State courts have similarly rejected expansive interpretations of the attorney-client or collective bargaining privilege. For example, a California Court of Appeal held that neither federal law nor a state statute declaring that employees may designate representatives to negotiate terms and conditions of their employment created an evidentiary privilege for communications between union representatives and their members.²⁵

²³309 NLRB at 97.

²⁴*See, e.g., University of Pa. v. EEOC*, 493 U.S. 182, 189, 110 S. Ct. 577, 582, 107 L. Ed. 2d 571 (1990) (rejecting academic peer review privilege); *United States v. Arthur Young & Co.*, 465 U.S. 805, 817, 104 S. Ct. 1495, 1502–03, 79 L. Ed. 2d 826 (1984) (rejecting work product immunity for accountants); *United States v. Gillock*, 445 U.S. 360, 373, 100 S. Ct. 1185, 1193–94, 63 L. Ed. 2d 454 (1980) (rejecting speech-or-debate privilege for state legislators); *Trammel v. United States*, 45 U.S. 40, 50 (1980) (privileges are an obstacle to the investigation of the truth and ought to be strictly confined within the narrowest possible limits); *United States v. Nixon*, 418 U.S. 683, 705–13 (1974) (privileges are not lightly created nor expansively construed, for they are in derogation of the search for truth; rejecting unqualified executive privilege); *Couch v. United States*, 409 U.S. 322, 335, 93 S. Ct. 611, 619, 34 L. Ed. 2d 548 (1973) (rejecting accountant-client privilege); *Branzburg v. Hayes*, 408 U.S. 665, 690–91, 92 S. Ct. 2646, 2661, 33 L. Ed. 2d 626 (1972) (rejecting news reporter’s privilege); *In re Grand Jury (Virgin Islands)*, 103 F.3d 1140, 1146–47 (3d Cir. 1997) (rejecting, like eight other circuits, parent-child privilege); *In re Grand Jury Proceedings*, 5 F.3d 397, 399 (9th Cir. 1993) (rejecting “scholar’s privilege” for information received in confidence); *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir. 1992) (rejecting insurer-insured confidentiality privilege); *United States v. Holmes*, 594 F.2d 1167, 1171 (8th Cir.) (rejecting probation officer-parolee privilege), *cert. denied*, 444 U.S. 873, 100 S. Ct. 154, 62 L. Ed. 2d 100 (1979). As these cases make clear, privileges are not favored in the law due to their tendency to inhibit the search for truth and, therefore, should be limited to those expressly created by the legislature.

²⁵*American Airlines, Inc. v. Superior Court*, 114 Cal. App. 4th 881, 890–93 (2003) (granting petition for writ of mandate challenging trial court’s denial of motion to compel union representative’s deposition testimony in wrongful termination action); *see also Montebello Rose Co. v. Agricultural Labor Relations Bd.*, 119 Cal. App. 3d 1, 32 (1981) (rejecting application of attorney-client privilege to communications between employer’s management and attorney-negotiator; “Since [employer’s] labor negotiations could have been conducted by a non-attorney, it is self-evident that communications with [the attorney] relating to the conduct of those negotiations were not privileged unless the dominant purpose of the particular communication was to secure or render legal service or advice.”).

Arbitrators have also been reluctant to extend the collective bargaining privilege beyond the context of bargaining strategy communications, and even the traditional attorney-client privilege is applied more narrowly outside the realm of contract negotiations. For example, Arbitrator Edward L. Suntrup declined automatically to shield from discovery an in-house counsel's investigation notes in *Fort Wayne Commun. School v. Fort Wayne Educ. Ass'n*.²⁶ The arbitrator held that the attorney's notes of her investigation of an incident that led to the grievant's termination may not be privileged, if the attorney acted as management in recommending the discharge. The fact that she was an attorney would not shield her notes from discovery unless her actions in relation to the employer were those of an attorney advising or providing legal services to a client, rather than as a supervisory employee of the corporation. If the attorney's investigation was intended as the basis for her recommendation regarding discipline, rather than for the purpose of advising the corporation how to comply with the law in handling the employee's alleged misconduct, then her notes fell outside the attorney-client privilege and must be disclosed.²⁷

Even communications between a union attorney and a grievant preparing for arbitration may not be privileged, as no attorney-client relationship is established between a union's lawyer and an individual member/grievant, unless the member/grievant has independently retained and paid the attorney.²⁸

In *Ivaco, Inc.*,²⁹ the plaintiffs were retired union members who contacted union lawyers after they learned that their former employer sought to modify or terminate certain of their benefits. During litigation of the plaintiffs' subsequent class action, their former employer served discovery requests on the union, seeking

²⁶AAA 51 390 00185-00 (2001).

²⁷*Id.*

²⁸*United Steelworkers of Am. v. Ivaco, Inc.*, 2002 WL 31932875, No. 1:01-CV-0426-CAP (N.D. Ga. 2003) (no attorney-client relationship or privilege where retired union members consulted union lawyers seeking advice and representation regarding loss of benefits); *Gavin v. National Marine Eng'rs Ben. Ass'n*, 966 F. Supp. 4, 7-8 (D.C. 1997) (no attorney-client relationship and thus no duty of confidentiality where attorney represented union member in grievance procedures); see also *Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 862-63 (10th Cir. 1996) (attorney retained by union acts as union's representative, rather than representative of individual union members); *Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985) ("We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an 'attorney-client' relationship in the ordinary sense with the particular union member who is asserting the underlying grievance.")

²⁹*Supra* note 28.

information about the union lawyers' communications with the plaintiffs. The plaintiffs claimed those communications were protected by the attorney-client privilege because the plaintiffs sought legal advice and representation concerning their loss of benefits, and because they intended the communications to be confidential. The court disagreed, holding that, "an attorney-client relationship does not form between union members and a union staff attorney, because *the attorney's client is the union rather than the union members (or former union members)*."³⁰

The plaintiff in *Gwin*³¹ contacted his union and was directed to a union lawyer, Hirn, for legal advice, when he first suspected he would be disciplined by his employer. In the course of consulting with Hirn, the plaintiff provided a tape recording he had secretly made of a telephone conversation between himself and a company executive. Hirn later used the tape recording to impeach the executive during a separate arbitration of a union-management contract dispute. Gwin was fired, in part for having made the secret tape recording, and Hirn represented him when he grieved his termination. Afterward, Gwin sued the union, claiming in part that Hirn owed him a duty of confidentiality as his attorney and breached the attorney-client privilege by disclosing the tape recording without his consent. The court noted that it was undisputed that Hirn was retained by the union to act as its outside counsel, that the union referred Gwin to Hirn, and that Gwin knew, when he sent Hirn the tape recording, that Hirn was also representing the union and its members in the contract dispute. Accordingly, the court found there was no attorney-client relationship between Gwin and Hirn and that Gwin's purported expectation of confidentiality was unreasonable.³² "It is well established, as a matter of law, that an attorney handling a labor grievance on behalf of a union does not enter into an 'attorney-client' relationship with the union member asserting the grievance."³³

For the same reason, courts have uniformly held that attorneys retained by unions to represent the unions and their members in individual grievance proceedings may not be liable to the grievant/members for malpractice.³⁴ The *Peterson* case was brought by

³⁰2002 WL 31932875 at *3 (emphasis added).

³¹*Supra* note 28.

³²966 F. Supp. at 7-8.

³³*Id.* at 7.

³⁴*Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985).

a former professional football player against his union and two of its attorneys, whom he claimed had given him bad advice on which he detrimentally relied in pursuing a grievance. The court recognized that where an attorney represents a union in an arbitration proceeding, the underlying grievance “belongs to a particular union member who has a very real interest in the manner in which the grievance is processed,” but it is the union that has retained the attorney, is paying for the attorney’s services, and is frequently the party to the arbitration proceedings. Indeed, the court noted that the union member generally “views the union attorney as an arm of his union rather than as an individual he has chosen as his lawyer. In fact, it is not uncommon for the union member to be completely unaware . . . prior to the arbitration hearing, of who on the union’s staff is actually handling his grievance.” The attorney’s client is the union, not the member/grievant.³⁵

In holding that no attorney-client privilege attaches to communications between a union member and the union-retained lawyer assigned to prosecute his or her grievance, the *Gwin* and *United Steelworkers* courts also impliedly held that no privilege exists to protect such communications between a member and any union representative. This implied holding is consistent with decisions such as those in *McCoy* and *Walker*, and the Board’s ruling in *National Football League Mgmt. Council*, discussed above.³⁶

Conclusion

Although there may be some uneasiness about permitting disclosure of communications between a grievant and a non-attorney union representative made in connection with the investigation of a potential or actual grievance, the authorities do not support creation of such a union-grievant privilege. Moreover, even when the communications are between union counsel and the grievant,

³⁵771 F.2d at 1258–59. See also *Waterman v. Transportation Workers’ Union Local 100*, 8 F. Supp. 2d 363, 370–71 (S.D.N.Y. 1998) (union attorney immune from malpractice action arising from representation in connection with grievance); *Donato v. McCarthy*, 2001 WL 821532, 2001 D.N.H. 129 (D.N.H. 2001) (no liability to union member for malpractice where union hired and paid the attorney).

³⁶There may, of course, be attorney work product objections available to protect certain communications between the union’s counsel and the grievant where it can be established that disclosure of the communications would necessarily disclose the attorney’s legal theories and thinking. In many cases, however, the work product doctrine will provide only a conditional privilege.

the attorney-client privilege often does not apply. Of course, each such situation needs to be looked at individually, particularly when a union attorney is involved, as other privileges, such as the attorney-work product doctrine, may come into play depending upon the particular facts. However, an arbitrator should make sure that any claim of privilege is firmly grounded in the law, particularly because sustaining such a privilege could result in creating valid grounds to challenge the validity of the arbitration award.