STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, and THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.	Case 122 No. 44861 MP-2414 Decision No. 26816-A
RACINE EDUCATIONAL ASSISTANTS' ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, and THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.	Case 123 No. 45112 MP-2432 Decision No. 26817-A

PROTECTIVE ORDER CONCERNING TRADE SECRETS
AND ORDER TO SHOW CAUSE

This matter is before the Examiner on the motion of Employers Insurance of Wausau, A Mutual Company ("Wausau"), for a protective order covering testimony and documents subpoenaed by the complainants from Delores Clancey, Wausau's Vice President of Group Services and Claim Administration. Wausau appeared by its corporate counsel, Kris Weirauch, and by Robert J. Dreps of LaFollette & Sinykin. The parties appeared by their counsel of record in this proceeding, Robert C. Kelly for the complainants and Jack D. Walker for the respondents.

Wausau has moved for a protective order on the grounds that the subpoenaed information about its claim processing procedures is proprietary and confidential property which constitutes valuable trade secret information. Based upon my review of the documents and the preliminary testimony of Delores Clancey, and having heard the arguments of counsel, I find that Wausau has shown good cause for the entry of a protective order pursuant to Sec. 804.01(3), Stats.

IT IS HEREBY ORDERED that Wausau's motion for the entry of a protective order is granted, and pursuant to the Commission's authority under Sec. 111.71(1), Stats., and ERB 10.11, 10.16 and 10.18, Wis. Admin. Code, it is further ordered that:

1. This Order may be changed for good cause upon motion of any party, with ten days' notice to Wausau as provided in paragraph 4 following.

2. This Order shall govern production of the following documents, including all copies, excerpts and summaries thereof, as well as any and all testimony relating to such documents and/or relating to the confidential information contained in such documents: All written guidelines or procedures used by Wausau in processing claims from claimants under the RUSD Health and Dental Care Plan, including medical and dental UCR guidelines, preadmission review guidelines, concurrent review guidelines and medical and dental consultant review guidelines, and UCR determinations and claim flow (collectively "Confidential Material"). All Confidential Material shall be stamped "CONFIDENTIAL" by Wausau.

3.Confidential Material shall be subject to the following restrictions:

(a) The parties may use Confidential Material only for the purpose of preparing for and conducting the proceeding (including appeals) and not for any business purpose whatsoever, and shall not give, show, make available or communicate such Confidential Material in any way to anyone except those persons or parties specified in sub-paragraph (b) below to whom it is necessary that such Confidential Material be given or shown for the purpose permitted under this paragraph.

(b) Confidential Material may be disclosed only in accordance with the terms hereof to the following:

(i) counsel of record and clerical, paralegal and other staff employed by such counsel who are assisting in the conduct of the proceeding and for that purpose only;

(ii) no more than one representative of each party whose assistance counsel in good faith requires in the conduct of the proceeding;

(iii) no more than one expert witness or consultant for each party whose assistance counsel in good faith requires in the conduct of the proceeding;

(iv) the Commission, any arbitrator, mediator or fact finder in the proceeding (in the manner provided in sub-paragraph (c) hereof) and Commission personnel; and

(v) court reporters employed in connection with the proceeding.

(c) All pleadings, exhibits or other materials filed with or sent to the Commission, any arbitrator, mediator or fact finder which incorporate or disclose Confidential Material shall be labeled "Confidential -- Subject to Commission Order" and filed with the Wisconsin Employment Relations Commission under seal, and shall remain under seal until and unless the Commission orders otherwise.

4.Each person given access to Confidential Material pursuant to the terms hereof shall be advised that (i) Confidential Material is being disclosed pursuant to and subject to the terms of this Order and may not be disclosed other than pursuant to the terms hereof, and (ii) that the violation of the terms of the Order (by use of Confidential Material for business purposes or in any other impermissible manner) may constitute contempt and subject the violator to such remedies and/or penalties as may be available. Before any person not employed by the Commission is given access to Confidential Material pursuant to paragraph 2(b) (ii) or (iii) above, he or she must acknowledge receipt in writing of a copy of this Order. A copy of each such acknowledgement must be sent to Wausau's counsel, Kris Weirauch, Corporate Legal Department, Wausau Insurance Companies, 2000 Westwood Drive, Wausau, Wisconsin 54401 within ten (10) days of its execution.

5.This order shall be binding throughout the proceeding (including any appeals) and after its conclusion. One copy of all briefs, pleadings

or other filings with the Commission which incorporate or disclose Confidential Material may remain in the possession of the parties' counsel, but shall remain subject to the terms and conditions of this Order. All other Confidential Material shall be returned to Wausau at the address set forth above within three (3) days after the conclusion of the proceeding (including any appeals).

6. The provisions of this Order shall govern the conduct of the proceeding and all disclosures of Confidential Material as defined herein. The parties may extend the provisions of the Order to additional documents and testimony through agreement in writing or on the record at depositions or other hearings in the proceeding without further Commission order or, failing agreement, may move the Commission to so extend the Order.

7. The production or disclosure pursuant to this Order of any Confidential Material by Wausau shall not waive or prejudice its right to object to the production or disclosure of other documents or information in the proceeding or any other action.

8. The attorneys of record are responsible for compliance with the terms of this Order as to their own agents, including, but not limited to, access to and control, duplication and distribution of Confidential Material. Parties shall not duplicate any Confidential Material other than for filing with the Commission under seal; provided that counsel for each party shall be permitted to make one copy for use in preparing for and conducting the proceeding. All such copies shall be subject to the terms and conditions of this Order, including but not limited to paragraph 5 requiring return to Wausau.

9. This Order shall be enforceable in the same manner as a protective order issued pursuant to Sec. 804.01(3), Stats.

ORDER TO SHOW CAUSE

As the record to date demonstrates that Complainants have subpoenaed documents from Wausau more extensive than anything A & H Administrators, Inc. was required to produce, Complainants may show cause in writing within fourteen days from the date below why the subpoena should not be quashed with respect to the documents.

Dated at Madison, Wisconsin this 11th day of July, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

MEMORANDUM ACCOMPANYING
PROTECTIVE ORDER CONCERNING TRADE SECRETS
AND ORDER TO SHOW CAUSE

At the outset of the hearing in this matter, Complainant Unions subpoenaed certain insurance information from two insurance administrators, as follows:

> All written guidelines or procedures used by (the administrator) in processing claims from claimants under the RUSD Health and Dental Care Plan including medical and dental UCR guidelines, preadmission review guidelines, concurrent review guidelines and medical and dental consultant review guidelines, and UCR determinations and claim flow.

Identical subpoenas were served on Kathleen Niles, the Account Administrator formerly handling the District's account for A & H Administrators, Inc., and on Delores Clancey, Vice President for Group Services and Claim Administration of Employers Insurance of Wausau. Niles appeared, gave testimony, and was excused, even though no documentary information was produced in response to the A & H subpoena. Her testimony was to the effect that much of the claims handling by A & H was done without formal guidelines of the kind subpoenaed, but the usual and customary rate guidelines were not produced even though Niles' testimony demonstrated that such were in existence in documentary form; Complainant did not press the matter.

When Clancey was called as a witness, however, Employers Insurance of Wausau (Wausau) interposed an objection, through its counsel, to any requirement that Clancey testify or produce documents pursuant to the subpoena, at least without a protective order to keep Wausau's trade secrets secret. Complainant Unions agreed, at the hearing, to the entry of a protective order, but have since reversed their position. Respondent District, at the hearing, declined to stipulate to entry of a protective order. As this was the first instance in the Commission's history of such a request, the undersigned opted to request briefs on the issue, following brief testimony from Clancey as to the nature of the material sought.

Wisconsin's Uniform Trade Secrets Act 1/ defines a trade secret in the following terms:

> (1) Definitions
>
> > (b) "Readily ascertainable" information does not include information accessible through a license agreement or by an employe under a confidentiality agreement with his or her employer.
> >
> > (c) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:
> >
> > 1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
> >
> > 2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

With respect to trade secrets, Sec. 227.45 (1), Stats., provides in part that . . . "The agency or hearing examiner shall give effect to all rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact." In turn, Sec. 905.08 specifies the nature of the privilege concerning trade secrets as follows:

> 905.08 Trade Secrets. A person has a privilege, which may be claimed by the person or the person's agent or employe, to refuse to disclose and to prevent other persons from disclosing a trade secret as defined in s. 134.90(1)(c), owned by the person, if the allowance of the privilege will not tend to conceal fraud or

1/ Section 134.90, Stats.

> otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

And Sec. 804.01 (3) sets forth the terms governing issuance of protective orders generally:

> (3) PROTECTIVE ORDERS. (a) Upon motion by a party or by the person from who discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:
>
> 1. That the discovery not be had;
>
> 2. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> 3. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> 4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> 5. That discovery be conducted with no one present except persons designated by the court;
>
> 6. That a deposition after being sealed be opened only by order of the court;
>
> 7. That a trade secret, as defined in s. 134.90 (1) (c), or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; . . . .

Clancey's unopposed testimony was to the effect that several types of data were subpoenaed, which she identified as the usual and customary fee file, the operations manual, and referral guidelines. Clancey testified that the UCR file is a combination of Wausau's own data and the data of an industry trade association with respect to which Wausau had signed a nondisclosure agreement. Clancey described the operations manual as a "very detailed" manual developed over the course of 17 years, which specifies methods and resources of claim investigation, which is available only to staff at or above the supervisory level and which is reclaimed upon the employee's termination. The other data subpoenaed, Clancey testified, is maintained on a continuously updated computer file, and is not normally produced in hard copy. Clancey testified that such developed techniques of claim investigation confer a competitive advantage in the marketplace for administering claims, and that the fee data and medical review guidelines are specific to Wausau's methods and procedures. She stated that a competitor without such developed manuals and files could derive competitive advantage from possession of Wausau's.

Clancey further testified that the manuals and computer files subpoenaed are sufficiently unique to Wausau that no other insurance company would pay all claims in the same manner or following the same investigative techniques, beyond the "very basic" procedure common to all insurance firms. Also, Clancey stated that in doubtful cases, the District would have the final say as to payment or nonpayment, as this is a self-funded plan.

Wausau argues first that to overcome the trade secret privilege, Complainants must establish that the requested information is both relevant and necessary to the presentation of their case. Wausau argues that even with a protective order, disclosure of a trade secret may not be compelled under Sec. 905.08, Stats., unless the refusal to disclose would "tend to conceal fraud or otherwise work injustice." Wausau notes that there is no issue of fraud, and argues that Complainants bear the burden of proving that injustice would be created by failure to disclose. Wausau argues that disclosure is not necessary for the presentation of Complainants' case, because Complainants have waived that argument by failing to enforce the subpoena issued to A & H for its UCR data. Also, Wausau argues, its claim processing guidelines and procedures are not necessary in the record in order to establish that its administration of the plan differs from A & H's. Wausau presented testimony from Clancey, and an affidavit offering to testify further in detail, to the effect that Wausau's procedures and guidelines for administering the plan differ "significantly" from those of A & H, because Wausau's procedures and guidelines, as well as UCR data, are unique. Wausau notes that A & H was not required to produce written guidelines, or procedures, or UCR data, and therefore no comparison can be

made. Wausau contends that there is obvious benefit to competitors such as A & H from disclosure of Wausau's highly developed guidelines and procedures, and that a balancing test is required by the trade secret privilege which in this instance weighs heavily in Wausau's favor.

In the alternative, Wausau contends that it is entitled to a protective order limiting the use of its trade secrets. Wausau contends that hearing examiners under Chapter 227 are required to give effect to the evidentiary privilege involved in the same manner as judges, and that the terms of an appropriate protective order were essentially agreed on the record. Wausau notes that in the Complainants' brief, Complainants departed from the agreements reached at the hearing, and now argue that no protective order should be granted; Wausau contends that the unopposed testimony of Clancey clearly demonstrate the validity of such an order. Wausau notes that Complainants cross-examined Clancey on Wausau's claim of trade secret protection and afterwards stated that they did not object to the entry of an order for the purposes of this proceeding. Wausau notes that the documents subpoenaed have never been provided by the Company to anyone within or outside the insurance industry, and argues that Complainants' claim that they are entitled to know all of the information sought because they represent the covered employes is without foundation, because Clancey testified without contradiction that the subpoenaed information was not available to the District or any other insured party. Furthermore, the Complainants preserved their right to contend at another time or in another proceeding that it had a general right to this information, and that is not at issue here. Finally, Wausau contends that Clancey can testify with detail similar to Niles' testimony as to the same lines of questioning, and there is no basis for concluding that Complainants need the subpoenaed documents, because Complainants did not pursue the parallel documents from
A & H.

Complainants contend that a union cannot meet the burden of proving that a change in insurance administrator impacts on wages, hours and working conditions if the information demonstrating such an impact is not available to it. Complainants note that in Madison Metropolitan School District vs. WERC 2/ the Court of Appeals stated that a case-by-case balancing test must be applied to determine whether the matter at hand was primarily related to wages, hours or conditions of employment. The Complainants argue that in the Commission's prior decision in that case 3/ the Commission used language implying that the union had the burden of demonstrating that there was a relationship between the identity of the carrier or administrator of the insurance plan and the benefits to employes. Specific information as to how claims under the plan will be administered and paid, Complainants argue, is a key to making such a demonstration. Complainants argue that the testimony of Kathleen Niles was extensive and detailed, and Niles provided substantial information regarding the policies and procedures A & H used. Complainants contend that this defeats Wausau's argument that A & H's lack of written guidelines precludes the Commission from comparing the two administrators. Complainants note also that A & H was known to Complainants as the existing administrator for five years, and therefore Niles' testimony concerning claims processing was based on actual claims filed. Complainants contend that since Wausau is an unknown entity to employes, it is justifiable to expect the documentary data to be forthcoming. Complainants contend that Wausau has provided no evidence to show that it would be harmed in any way by the revelation of the subpoenaed materials, contending that Clancey's testimony was conclusionary and failed to demonstrate how any other insurer would derive economic benefit from disclosure. Complainants therefore contend that the balance between potential harm to Wausau and advantage to completeness of the record favors Complainants.

The District contends that at best the data sought are marginally probative. The District argues that it is not bound, in its final determination of whether to pay a disputed claim, by any of Wausau's review procedures, because this is a self-funded contract and it is clear from Clancey's testimony that the District has the final say. Thus, the District contends, the data have minimal relevance. The District also notes that Wausau's written guidelines will show no comparative data, because A & H produced none. As to turnaround time for payment, the District contends that Ms. Clancey could be asked that orally, and that the subpoenaed material would not show this anyway. The District notes that the Complainants did not argue at the hearing that Clancey's testimony was conclusionary, but make this argument in their brief even though they had the opportunity to cross-examine Clancey and thereupon agreed that the matters in dispute did constitute trade secrets. The District also contends that it should be protected from open records laws in the event that the Examiner finds the documents involved to constitute trade secrets, and notes that solely because of its concern for open records requirements it declined to stipulate to the entry of such an Order.

2/ 133 Wis.2nd 462, 395 N.W. 2d 825, 1986.

3/ Decision No. 22129, 22130 (11/84).

I find that Wausau has adequately established that the information at issue constitutes trade secrets. With respect to the operations manual, the detailed investigative techniques which it contains are clearly material to a company's ability to differentiate itself in the insurance marketplace, and the unopposed testimony demonstrating that the manual has been developed over 17 years and is available only to staff at or above the supervisory level tends to indicate that it is treated as a valuable resource. Simultaneously, that restriction and the fact that the manual is reclaimed upon an employe's termination appears to me to constitute "efforts to maintain its secrecy that are reasonable under the circumstances" within the meaning of the Uniform Trade Secrets Act. Also, the fact that A & H does not possess such a manual implies that it and other insurance administrators similarly situated might obtain a "free ride" from disclosure of such data. The UCR file, meanwhile, may as Complainants contend consist largely of a record of the charges made for particular services by particular providers, and these charges clearly cannot be a trade secret. But the file apparently also involves elements of calculation which, according to uncontradicted testimony, are unique to Wausau. That file is also maintained in a fashion not generally accessible to the public and Wausau appears to engage in reasonable efforts to maintain its secrecy, in this instance, by producing no hard copies. The referral guidelines appear to be handled similarly, and to involve similar considerations to the UCR file. I conclude that all of the information subpoenaed therefore derives independent economic value from not being generally known, and that it is subject to reasonable efforts to maintain its secrecy. This applies also, of course, to Clancey's testimony concerning the details of such claims methods, referral guidelines and UCR data. Entry of the protective order requested is therefore appropriate. I make no finding with respect to the District's request to be excused from open records provisions, however. While under certain circumstances, open records and trade secrets statutes may create a conflict for the District, harmonization of these statutes is a matter for the courts.

This, however, does not end the matter, because the contention by Wausau that it should be excused production of the documents subpoenaed appears to have some merit. As Wausau argues, the standard for determination of the degree of protection required is one which provides that under some circumstances no production at all should be enforced, and the standard envisions a balancing test between the interests of completeness of the record, of the furtherance of justice, and of the right to security of the trade secrets involved. Section 8.04.01 (3), quoted above, clearly shows that more than one degree of protection is available, depending on circumstance.

In the present instance, two factors in particular bear on whether the documentary material should be produced. One is that the fundamental nature of this case is, as argued by Complainants, a comparison between one insurance administrator and another. But where Complainants have essentially determined that the one administrator can be excused production of certain documents, it is unclear why the other should be expected to run some risk of disclosure of trade secrets in order to comply. The second factor is that while Clancey's testimony, dismissed by Complainants as conclusionary, is incomplete as of this date, it tends to establish precisely what Complainants appear to wish proved, namely the existence of differences between the two insurance administrators in what will be paid and how it will be paid. Wausau, here, is effectively arguing that Complainants have had full value from Clancey's testimony, and that the documents are not necessary to establish the differences Complainants sought to prove. The evidence adduced thus far, and Complainants' decision not to pursue the parallel documents from A & H, combine to persuade me that the District's contention that Complainants are using "a depth charge to fish for information of minimal potential relevance" has a degree of merit. There is nothing in the record to date to demonstrate that information co-extensive with Niles' testimony cannot be received, subject to the protective order, through testimony from Clancey; and the balancing test as to the documents subpoenaed thus appears to favor Wausau. The issue of partial quashing of the subpoena, however, was not squarely presented until the briefs were filed. The Order therefore gives Complainants two weeks to show cause in writing why the subpoena should not be quashed as to the documents sought.

Dated at Madison, Wisconsin this 11th day of July, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner