
In the matter of the arbitration between :
Davis Vision, Employer :
- and - : **OPINION**
IUE/CWA Local 81408, Union : **AND AWARD**
(Creating new Accounts/Receivable job title) : **AAA Case No. 01-24-0007-7750**

BEFORE: Lise Gelernter, Arbitrator¹
HEARING DATE: December 16, 2024

APPEARANCES

For the Employer:

Hannah K. Redmond, Esq.
Bond Schoeneck & King
One Lincoln Center
Syracuse, New York 13202
hredmond@bsk.com

For the Union:

Sarah E. Ruhlen, Esq.
Satter Ruhlen Law Firm, PLLC
217 S. Salina St., 6th Fl.
Syracuse, New York 13202
sruhlen@satterlaw.com

OVERVIEW OF THE PARTIES AND THEIR DISPUTE

Davis Vision (Davis or Company), is a vision care insurer. IUE/CWA Local 81408 represents a bargaining unit of Davis’ employees that consists of “all full-time and specific regular part-time hourly associates in [Davis’] Latham, New York Customer Relationship and Information Technology Center.” Jt. Ex. 1, Art. 1, § 1. The bargaining unit members work in Davis’ call center and also handle duties associated with the mailroom, billing, benefits management and claims. T-Johnson;² Jt. Ex. 1, p. 35.

¹In a letter dated October 1, 2024, the American Arbitration Association advised me that the parties had selected me to serve as the arbitrator in this case. The hearing was held on December 16, 2024 at the Desmond Hotel in Albany, New York. Both parties had a full opportunity to make opening statements, present evidence, examine and cross-examine witnesses, and submit closing briefs by January 22, 2025.

²A “T-” followed by a witness’ last name indicates that the witness’ testimony was a source of the information provided.

The dispute in this case arose after Davis created a new Accounts Receivable Representative (A/R Rep) job on April 18, 2024. Jt. Ex. 3. After Jason Johnson, the Union President, saw the job posting on or about May 9, 2024, he spoke with the Company's Human Resources Director, Marci Nogueira. She told him that the A/R Rep job was not part of the bargaining unit because the A/R Rep would have access to confidential information. T-Johnson. Mr. Johnson thought the A/R Rep job fell within the bargaining unit because Union members had performed the same duties years ago before the Company had moved those tasks to the Company's Texas location where non-unionized employees did the work.

On June 5, 2024, the Union grieved the Company's decision to treat the A/R Rep as a non-Union employee and requested "[a]ll relevant data in regards to what 'confidential company information' this position the Company claims they would have access to." Jt. Ex. 2. The Company denied the grievance but did provide a listing of all the confidential information to which the A/R Rep would have access, including:

- Interaction with the company bank . . . accounts,
- Access to cash posting within company banking accounts,
- Company Electronic Funds Transfers
- Company credit card accounts . . .
- Company financial audit information and company audit functions . . .
- Authorization to download all company banking lockbox information . . .
- Access to all lockboxes and cash posting for both company brands and all 3 computer systems.
- Responsible for providing company data/accounting to the Finance team in the completion of the company monthly and company annual financial close processes
- Prepare IRS required 5500 forms for customers related to premium billed and paid amounts.

Union Ex. 2. The Company also stated the A/R Rep would be privy to "confidential information, discussions, and strategies on the part of management, along with the exercise of independent discretion and judgment of the employee" with respect to acceptance of alternative pay

arrangements. *Id.*

THE ISSUES TO BE DECIDED

The parties agreed to have the arbitrator decide the following issues:

Did the Company violate the collective bargaining agreement by designating the A/R Representative position as “non-union?”

If so, what shall the remedy be?

RELEVANT PROVISION OF THE COLLECTIVE BARGAINING AGREEMENT

Article 2 of the collective bargaining agreement (CBA) between the parties states, in relevant part:

ARTICLE 2 **RECOGNITION**

1. The Company recognizes the IUE/CWA Local 81408, its designated agents and representatives, its successors and/or assigns as the sole exclusive bargaining agent in all matters pertaining to wages, hours and other conditions of employment for all full-time and specific regular part-time hourly associates in its Latham, New York Customer Relationship and Information Technology Center . . . except as excluded below.

2. The term associate, wherever used in this Agreement, refers to all persons employed by the Company at its Latham, New York Customer Relationship and Information Technology Center. The Agreement excludes Company Officers, Department Managers, Supervisors, Information Systems and Human Resources associates, Trainers, Executive Secretaries, Corporate Receptionists, Payroll associates, temporary or seasonal associates and individuals that may have knowledge of confidential company information, whose sole purpose it is to support the operations of the Customer Relationship and Information Technology Center.

Jt. Ex. 1, Art. 2, p. 1.

EVIDENCE PRESENTED

Dan Gauthier, the Company’s Senior Director for Enrollment and Billing, helped to prepare the job description for the A/R Rep in early 2024 after the Company decided to end its

relationship with a third party vendor that had performed some billing services for Davis Vision.

T-Gauthier; Jt. Ex. 3. The A/R Rep does much of the work that the outside vendor used to handle. T-Gauthier.

The A/R Rep job description, dated April 18, 2024, describes the “Scope and Purpose of [the] Position” as:

Primary job responsibilities are assisting clients with billing/statement problems, posting checks and wires, balancing/auditing accounts utilizing CV/CVX or HSP. Provide effective communication with clients and staff, while handling inquiries and issues in a courteous, professional and timely manner. Must be flexible and disciplined enough to multi-task and handle a variety of tasks.

Jt. Ex. 3.

The job description also listed the following “Essential Functions:”³

- Research & apply daily checks to accounts. Post wires when given by Manager
- Download lockbox files and completes reconciliation as needed
- Research, reconcile, audit, resolve and make balance adjustment on accounts when necessary
- Download lockbox data from banks daily
- Manage tracking of adhoc billing in NetSuite to track and apply funds to as received.
- Filing of monthly statements
- Establish work procedures and processes for Billing Department that support company and departmental standards and strategic directives
- Maintain and support any SOC related control activities, retaining evidence as needed per definition.
- Regular reliable attendance is required

Jt. Ex. 3; *see also* Union Ex. 1. When the Company responded to the Union’s request for the identification of the “confidential company information” that would justify excluding the A/R Reps from the bargaining unit, the Company provided the listing quoted on page 2 of this award.

Union Ex. 2.

³Mr. Gauthier noted that three of the original job duties listed were incorrect. T-Gauthier. Those three job duties are not included in this listing.

Prior to the outside vendor handling much of what the A/R Rep was going to handle, the Company's Texas non-union office staff had performed much of the A/R Rep's functions from approximately 2006 or 2007 to late 2018. T-Johnson. Jason Johnson, the Union President for the past seven years, has worked at the company for 26 years and served in other Union offices during his tenure. T-Johnson. He testified that before the 2006 or 2007 transfer of functions to the Texas office, bargaining unit employees on the "negative balance team"⁴ in Latham who worked as Senior Collection and Provider Maintenance employees ("Senior Collection") had performed most of the same job duties. From Mr. Johnson's perspective, the A/R Rep now handles collections functions that the negative balance bargaining unit members handled prior to the functional transfer to Texas. Mr. Gauthier and Mr. Johnson confirmed that the Company did not eliminate any bargaining positions when it added the A/R Rep position.

Mr. Johnson compared the 2005 job descriptions for Senior Collection and Billing Specialist jobs,⁵ performed by bargaining unit members, with the A/R Rep job description. Union Exs. 3, 4; Jt. Ex. 3. He noted that both the Billing Specialist and Senior Collection employees performed many of the same functions as the A/R Reps; the A/R Rep and the Senior Collection job descriptions both include collections functions and the A/R Rep and Billing Specialist jobs process checks and handle other billing issues. *Id.* Mr. Johnson also pointed out that current and past bargaining unit members' jobs have and had access to some of the same type of confidential information that A/R Reps use.

The current Billing Specialist job description, revised in July, 2022, states that the "Scope

⁴A "negative balance" was a Company term for a "collections" issue because it arises when a customer owes money to the Company. T-Herrick.

⁵Billing Specialist is a current job title within the bargaining unit.

and Purpose of [the] Position” are:

Administer client billing support through new client setup and changes to existing accounts. Provide eBill support. Respond to customer inquiries through email, fax, and/or the telephone in a timely and professional manner.

Union Ex. 5. The posting lists the following relevant “Essential Functions:”

- Process Billing Tickets within Implementation & Billing Request RT Queues
- Create CV Billing Setups and Changes
- Process Check inquiries, stop payments, and manual check replacements
- Process credits and retroactive billing for premium billing
- Process DSA [Davis service adjustments] payments & Pre-Edits
- Process E-Bill Setups and assist with E-Bill inquiries.

Id. The 2005 job description for Billing Specialist had many of the same responsibilities. Union Ex. 3.

Dawn Herrick is a Billing Specialist who has worked for the Company for between 28 and 29 years. T-Herrick. A typical day for Ms. Herrick includes running invoices, setting up Compuvision software for new clients or to make rate changes, processing check inquiries to see if a check has been cashed, handling electronic funds transfer (EFT) failures by obtaining bank information and issuing a manual check from the Company’s account if the EFT failed or a check never cleared, and dealing with returned mail. Although she does not have access to the Company’s lockboxes directly, she said that the A/R Reps who open the bank lockboxes send her check images to find out where the checks should be applied if they don’t have that information. She has the discretion to make adjustments to customer payments. As part of her job, she has access to members’ identification numbers (including social security numbers), their billing history, and their rates. She does not have access to the lockbox information on the total balances available in the Company’s bank accounts. T-Herrick.

Ms. Herrick said she is not involved in audits, but that she provides all the information about billing clients that is necessary for audits. Billing Specialists also have access to all financial reports concerning providers who have “negative balances,” meaning that the provider has collected co-pays up front and then was later reimbursed fully for the services provided, leading to the provider owing Davis Vision any extra payment it collected. T-Herrick.

Conniebeth Myers is a Benefit Management Technician and has worked at the Company for 31 years. She has been in her current position for 16 years and was a Senior Collection employee who worked on the negative balance team from 2006 through mid-2008, when that function was transferred to the Company’s Texas office. Ms. Myers also served as Union President from 1998 to 2006 and has served as a Union shop steward and Sergeant at Arms. T-Myers.

The 2005 “summary” in the job description for Senior Collection and Provider Maintenance states: “Coordinate Collection of Material Co-pays from Providers that have a negative balance with Davis Vision and provide internal support for Financial Administration.” Union Ex. 4. Ms. Myers said that the 2005 job description for that position described most of the duties she had performed when she handled negative balances. It lists the following relevant “Essential Responsibilities:”

- 1) Coordinate and handle collection and application of negative balances.
- 2) Make collection calls to providers.
- 3) Generation and distribution of negative balance reports (second level).
- 4) Answer questions from internal and external customers concerning negative balances. . . .

Union Ex. 4.

As A Senior Collection employee, Ms. Myers ran financial reports for providers and for

each patient's co-pays, contracted rates and other financial information. She matched outgoing Company checks with payments due and would be in touch with the providers by phone to explain why there was a negative balance. She also bundled checks received with a deposit slip and sent them to the Company's Plainview office for deposit in the bank and she ran credit card payments. This gave her access to the Company's bank account and routing numbers. She had the authority to write off some debts below a preset amount. In 2008, there were three bargaining unit employees handling collections and three who did billing. T-Myers.

Currently, as a Benefit Management Technician (BMT), Ms. Myers creates benefit plans client managers sell to customers. She sets up fee schedules, generates panels of providers and can create special fee schedules for certain providers. She also has the authority to make retroactive adjustments if necessary. T-Myers.

Mr. Johnson acknowledged that bargaining unit members do not and had not had access to bank lockbox files and data, whereas one of the "essential functions" of the A/R Rep is: "Download lockbox files and completes reconciliation as needed." T-Johnson; Jt. Ex. 3. According to Mr. Gauthier, the A/R Rep's main functions are to log into external bank accounts to get lockbox data on a daily basis and to support the end-of-month reporting. Lockboxes are similar to secure post office boxes in a bank which receives check payments. T-Herrick. A/R Reps have credentials that permit them to access the lockbox information, which includes the Company's banking balances and other confidential financial information, Mr. Gauthier testified. Mr. Gauthier said that A/R Reps also have access to Netsuite, a financial reporting system for the Company, whereas bargaining unit members do not. Mr. Gauthier testified that during his tenure at the Company since 2016, bargaining unit members have not been able to interact with the

Company's banking accounts. However Ms. Herrick, as a Billing Specialist, and Ms. Myers, as a Senior Collection employee, processed Company checks, had access to bank account and routing numbers, and Ms. Herrick testified she issued manual checks from the Company's bank account when EFTs failed and processed check inquiries.

Mr. Johnson, who has bargained two contracts and Ms. Myers, who was on the Union's bargaining team for about 12 contracts, said that the Company never objected to any bargaining unit member participating in the contract negotiations even though they had access to confidential financial and customer information; the issue never arose. Mr. Johnson said that he understood the exclusions from the bargaining unit to cover anyone who could hire, fire or recommend employment changes. The contract's exclusionary language that refers to people who "may have knowledge of confidential company information, whose sole purpose it is to support the operations of the Customer Relationship and Information Technology Center ["CRIT]" covered people who worked on building or facility operations or who were secretaries to management officials, Mr. Johnson said. Ms. Myers understood the exclusionary language to refer to people who did jobs similar to the titles the CBA specifically excluded.

THE PARTIES' POSITIONS

The Union's position. The Union argues that since the CBA does not define what "confidential company information" means, and there was no evidence introduced concerning the parties' intent with respect to that language, it should be interpreted as a technical labor relations term. The Union points out that the National Labor Relations Board (NLRB) has interpreted the exclusion of "confidential" employees from bargaining units under the National Labor Relations Act (NLRA) to refer only to those employees who have access to confidential information about labor relations matters, such as strategy and positions. Since the A/R Rep is not involved at all in

labor relations matters, it is not a “confidential” position and is not excluded from the bargaining unit, according to the Union.

The Union also contends that the A/R Rep and bargaining unit members have access to much of the same “confidential” information and perform similar tasks, which means there is no reason to exclude the A/R Rep from the bargaining unit. Although bargaining unit members do not have credentials to access the Company’s banking lockbox, they regularly use information from the lockbox to perform their work, the Union argues. The Union compared the job descriptions for A/R Reps with those for current and 2005 Billing Specialists and for 2005 Senior Collection Provider Maintenance jobs and argued that they performed many of the same job duties. Moreover, like A/R Reps, Billing Specialists and BMTs have access to and use confidential banking, financial and customer information, according to the Union. Therefore, the Union argues, nothing about the A/R Reps’ job duties supports excluding them from the bargaining unit.

The Company’s position. The Company contends that the CBA’s exclusion of employees from the bargaining unit who “may have knowledge of confidential company information” covers A/R Reps because of their access to confidential information, including:

- lockbox data, including Company bank information, account balances, and payment remittances;
- cash posting in Company bank accounts;
- Company electronic funds transfers;
- month-end close reports; and
- year-end financial statements.

Co. brief, p. 11. In addition, the A/R Reps have access to “Netsuite,” the Company’s financial software, and bargaining unit members do not, the Company states. The A/R Rep position does

not appear in the CBA's listing of job titles and wage rates, indicating that the A/R Rep is not a bargaining unit position, according to the Company.

Although the earlier Senior Collection and Provider Maintenance employees in the negative balance team performed some of the same duties as the A/R Reps, they never had access to the lockboxes or Netsuite or similar financial recordkeeping data. Therefore, the Company argues, the two positions are not comparable and do not support the Union's argument that bargaining unit personnel used to perform A/R Rep functions.

The Company also noted in its brief:

Arbitral authority recognizes that in order for a union to claim that certain work belongs to the bargaining unit, the union must establish that the work has been performed exclusively by represented employees and has been recognized as unit work by all parties over an extended period of time.

Co. brief, p. 15. The Company cites to several arbitration awards in support of this contention.

Since non-bargaining unit employees and contractors have performed some or all of the A/R Rep's job duties for at least 15 years, those duties are not exclusive bargaining unit work and the A/R Rep is not part of the bargaining unit, according to the Company. The Company also notes that the hiring of A/R Reps did not lead to any reduction in bargaining unit jobs.

ANALYSIS AND FINDINGS

The dispute centers on the bargaining unit exclusion for confidential/support employees.

Section 1 of Article 2 of the CBA provides that the bargaining unit consists of:

all full-time and specific regular part-time hourly associates in [the] Latham, New York Customer Relationship and Information Technology Center [CRIT].

Jt. Ex. 1, Art. 2, § 1. Since the A/R Reps are full-time associates who work in the CRIT in Latham, they fit within the definition of the members of the bargaining unit. The only reason that they would not be part of the bargaining unit is if Section 2 of Article 2 of the CBA excludes

them. That section lists several specific job titles that are not part of the bargaining unit because they are managers or supervisors, are allied with management in any employment or labor relations interactions with the Union, who support, but do not perform customer relationship work, or who are not permanent employees.⁶ The CBA does not list A/R Reps in its specific exclusions.

After the listing of specifically excluded titles, the CBA adds, in the same sentence, the following description of other excluded employees: “and individuals that may have knowledge of confidential company information, whose sole purpose it is to support the operations of the [CRIT].” Jt. Ex. 1, Art. 2, § 2. The dispute in this case centers on whether the A/R Reps fall within that latter category of excluded employees, a category I’ll label as “confidential/support.”

Exclusivity of bargaining unit work is not at issue. The Union in this case is not claiming that the A/R Rep is performing exclusive bargaining unit work. Rather, it is claiming that the A/R Rep is part of the bargaining unit by virtue of the bargaining unit description in Article 2, Section 1 of the CBA. In contrast, in the cases the Company cited to support its argument that the A/R Rep work is not exclusive bargaining unit work, the unions alleged that the employers had transferred contractually protected bargaining unit work to non-bargaining unit employees. *AT&T Midwest and IBEW, Local 21*, 126 BNA LA 1345 (Abrams, 2009); *Cleveland Electric Illuminating Co.*, 105 BNA LA 817 (Franckiewicz, 1995); *Western Kraft Paper Group*, 74 BNA LA 13 (Allen, 1980); *Sloan Valve Co.*, 68 BNA LA 479 (Cohen, 1977).

⁶The excluded job titles are: “Company Officers, Department Managers, Supervisors, Information Systems and Human Resources associates, Trainers, Executive Secretaries, Corporate Receptionists, Payroll associates, temporary or seasonal associates.” Jt. Ex. 1, Art. 2, § 2. The contract defines “Temporary and seasonal associates” as “those individuals who work less than three (3) consecutive months, who are hired to work on specific pre-defined projects, or as otherwise defined in this Agreement.” Jt. Ex. 1, Art. 2, § 3.

In this case, the contract does not describe the type of work that only bargaining unit members may perform, nor does it list all the job titles included in the bargaining unit. The charts at the end of the CBA that lists job titles with their hourly pay rates as of October, 2023 is not linked to the recognition clause and does not purport to describe exclusive bargaining unit work. Rather, they are “wage range charts” referenced in Article 32 of the CBA, which concerns wages and raises. Jt. Ex. 1, Art. 32; Ex. A.

The 2006 or 2007 transfer of some work duties that the CRIT bargaining unit employees performed to non-unionized employees in Texas or to an outside contractor did not affect the definition or composition of the bargaining unit at the Latham CRIT. Once the Company created the full-time A/R Rep positions and decided to locate them in the Latham CRIT, they were presumptively bargaining unit members unless they fell into one of the exclusions. The creation of the A/R Rep position does not raise an issue with regard to the exclusivity of bargaining unit work. Rather, the question in this case is whether the CBA’s recognition article excludes the A/R Reps from the bargaining unit.

What the exclusion for confidential/support employees covers. Mr. Gauthier said that the creation of the A/R Rep positions arose from a Company decision to take back the banking and collections work the outside vendor had been performing. Before the vendor started doing that work, the Company’s in-house staff in Texas did the work. Before that, Mr. Johnson testified, bargaining unit members had performed much of the same work. This sequence of events is strong evidence that the A/R Reps perform many of the same job functions as the bargaining unit members had, which, in turn, is strong evidence that A/R Reps are bargaining unit employees.

Mr. Gauthier said that the main reason A/R Reps were excluded from the bargaining unit

was that they have credentials for and access to the Company's banking lockboxes. Bargaining unit members have never had that type of access to that particular type of confidential Company information. Nonetheless, bargaining unit members have had and still have access to lots of different types of Company and customer confidential financial information, including the information and authority to cut checks, effect EFT payments, make payment adjustments, create financial reports, and establish fee schedules.

Because the CBA does not have a hierarchy of confidential information nor does it say that it excludes employees with any knowledge of any particular type of confidential financial information, it is not clear why or whether access to lockbox information is the type of "confidential" information that would exclude an employee from the bargaining unit. Without any bargaining history or direct evidence of what the parties intended, the meaning of "confidential" is broad and ambiguous. Marci Nogueira, the Human Resources Representative who apparently was the person who decided that A/R Reps did not belong in the bargaining unit, did not testify, so there is no evidence in the record about the sources upon which she relied to make that determination.

The Union had argued that because there was no extrinsic evidence that helped to define "confidential," the exclusionary language should be interpreted consistently with the National Labor Relations Board's (NLRB's) definition of a "confidential" employee. "Confidential" employees under the NLRB's reading of the NLRA may be excluded from bargaining units because they have inside information about the employer's labor relations positions. *Los Angeles New Hospital*, 244 NLRB 960, 967 (1979). Since the A/R Reps do not have access to confidential labor relations information, they are not excluded from the bargaining unit, according

to the Union's argument.

The Union offers a plausible explanation for what the parties might have intended when they used the word "confidential" that also makes sense in light of the Company's operations and what the bargaining unit members do at work. It would not make sense for the parties to exclude employees who use confidential financial information from the bargaining unit because that is the type of information that many bargaining unit members use in their jobs on a daily basis. It would be logical to exclude employees with access to confidential labor relations information for the same reasons the NLRB considers them to be excluded from bargaining units. It would present a conflict of interest for a bargaining unit member to have access to an employer's labor relations strategy or other confidential labor relations information and at the same time benefit from and potentially participate in the union's contract negotiations and grievance and other labor relations activities.

Nonetheless, this interpretation of "confidential" is more of a theory than a proven fact; there is not enough evidence to conclude definitively that it is the appropriate way to interpret the contract. The CBA language itself does not tie the exclusion to interpretations of the NLRA and describes the excluded employees as those having knowledge of confidential company information rather than as "confidential" employees. Therefore, although it is certainly possible that the parties intended to use the term "confidential" in its technical labor relations sense, there is no positive evidence to support that theory.

A close reading of the confidential/support exclusion using traditional contract interpretation techniques helps to fill in the gaps that the CBA leaves. The CBA provides that a full-time Latham CRIT employee must meet two criteria to be excluded by the

confidential/support exclusion: 1) the employee “may have knowledge of confidential company information;” and 2) the employee’s “sole purpose” must be to “support the operations of the [CRIT].” Jt. Ex. 1, Art. § 2. The CBA does not define either of the two criteria, but the “and” between those terms means that excluded employees must meet both criteria.

In arguing that A/R Reps were not part of the bargaining unit, the Company had focused mainly on the first criterion of potentially having knowledge of confidential company information. However, reading the contract to exclude employees from the bargaining unit only because they have access to confidential company information would not only ignore the contract’s second exclusion criterion, it would violate the interpretive canon that bars contract interpretations that lead to “harsh, absurd or nonsensical results.” Kenneth May, ed. *Elkouri & Elkouri, How Arbitration Works* (8th ed. 2016) at 9-42. If the contract excluded from the bargaining unit any employee who had access to any confidential company information, it would eviscerate the bargaining unit because it would exclude recognized bargaining unit members from the bargaining unit.⁷

Senior Collection employees, Billing Specialists and BMTs, who were or are bargaining unit members, had or have access to “confidential company information” according to the Company’s response to the Union’s information request in this case. When the Company identified the “confidential company information” the A/R Reps would be able to access, it identified several types of confidential information and job duties that Senior Collection

⁷Adopting the NLRB’s more narrow definition of “confidential,” as the Union urged, would avoid this result because it would exclude from the bargaining unit only employees with access to confidential labor relations-related information. This interpretation would be consistent with the current makeup of the bargaining unit, and it would also include A/R Reps in the bargaining unit.

employees, Billing Specialists and BMTs also shared or share, including: 1) having access to Company and customer banking and financial information, including account numbers and routing numbers, in order to cut manual checks and process EFT payments; 2) bundling checks and filling out deposit slips for deposit into the Company's bank accounts; 3) running weekly, monthly and yearly financial reports for the audit team using reports generated from the Company's financial data; and 4) using their discretion to make payment adjustments. Union Exs. 2, 3, 5; Jt. Ex. 3.

The Company had argued that A/R Reps' unique access to Company lockboxes is what differentiated them from bargaining unit employees because it gave them access to the type of confidential company information that qualified them for exclusion from the bargaining unit. However, the lockbox information is not so different in nature or level of confidentiality from the financial information that Senior Collection employees handled or that Billing Specialists deal with every day to process and issue checks, compile financial reports or perform their other duties. In addition, the CBA does not differentiate between types of confidential information for purposes of the exclusionary language.

Therefore, the A/R Reps' access to the confidential company information listed in their job description and the Company's listing of confidential information to which they have access, is not enough, on its own, to oust them from the bargaining unit. If the contract excludes A/R Reps from the bargaining unit, they also must meet the second exclusion criterion: having a "sole purpose . . . to support the operations of the [CRIT]." This criterion is also undefined, broad and vague. There is no direct evidence concerning the parties' intent in agreeing to this criterion. Mr. Johnson thought it referred to people who managed the building operations in Latham and provided secretarial support to management based on his personal understanding, experience as

an employee for 26 years at Davis Vision and his role as a Union officer for many years, including the last seven years as Union President. However, this does not give us a definitive definition of this second criterion.

One way to discover the meaning of what the “support” criterion means is to look at the job functions of bargaining unit members, who, by definition, are not excluded from the bargaining unit. If we assume, for argument’s sake, that A/R Reps meet the first exclusion criteria of having access to “confidential company information,” then, at a minimum, Senior Collection employees and Billing Specialists must also have met or meet that first criterion. As discussed above, the Senior Collection employees’ and Billing Specialists’ lack of access to lockboxes does not negate their access to other “confidential company information.” There was no evidence introduced that only access to lockboxes meets the first exclusionary criterion. Therefore, in order for Senior Collection employees and Billing Specialists to have been or be part of the bargaining unit, they must not meet the second exclusion criterion of supporting the CRIT’s operations.

In general, Senior Collection employees and Billing Specialists carried or carry out part of the core “customer relationship” services that the Davis Vision Latham CRIT provides to its customers. Therefore, an excluded employee whose “sole purpose” is to “support the operations of the [CRIT]” must be performing different types of functions. The job titles specifically excluded from the bargaining unit give us some idea of what those functions are: managerial, supervisory, information technology, human resources, training and office support. These are support jobs that do not directly carry out the Company’s core insurance business, except, perhaps, for some managers and supervisors of members of the bargaining unit. Therefore, the contract language suggests that in order to meet the second exclusion criterion, an employee has

to either be a manager or supervisor or someone who provides support services to the people who carry out the core insurance and billing functions.

The A/R Reps do not meet the second exclusion criterion because they are not indirect support workers and they are not managers or supervisors. Like the Senior Collection employees and Billing Specialists, they do have customer-facing duties, dealing with bills, eligibility and claims, and perform related financial functions. The fact that some of the A/R Reps' duties overlap with Billing Specialists provides further support for finding that they are not excluded from the bargaining unit.

This reading of the contract is consistent with the results of reading the exclusionary language using an alternative method for interpreting ambiguous contract language: using the “*ejusdem generis*” interpretive canon. It provides that when “parties follow a list of specific items with a more general or inclusive term, it is assumed that they intend to include under the latter only items that are like the specific ones.” *Elkouri* at 9-40.

In this case, the confidential/support exclusion follows a “list of specific items” – excluded job types and titles. Those more specific terms limit the more “general or inclusive term” of “individuals that may have knowledge of confidential company information, whose sole purpose it is to support the operations of the [CRIT].” If we apply the *ejusdem generis* doctrine, the excluded “individuals” must be similar in nature to the specifically listed “Company Officers, Department Managers, Supervisors, Information Systems and Human Resources associates, Trainers, Executive Secretaries, Corporate Receptionists, Payroll associates, temporary or seasonal associates.” Those specifically listed excluded employees are managers or supervisors, human resources employees or people who provide services to those excluded employees.

The A/R Reps' job description and the evidence introduced about the A/R Reps' duties show that they do not perform work that is similar to the work of any of the specifically excluded job titles. A/R Reps' "primary job responsibilities" include "assisting clients with billing/statement problems, posting checks and wires, balancing/auditing accounts." Jt. Ex. 3. In contrast, the people the CBA excludes specifically do not work directly with clients on billing or statements or perform anything like the A/R Reps' jobs. Some are managers and supervisors and the rest do work that support other staff, including bargaining unit members. Therefore, applying the *ejusdem generis* doctrine results in a finding that the recognition clause's exclusions do not apply to the A/R Reps.

The fact that the A/R Reps do not appear in the pay rate chart at the end of the contract does not indicate that the A/R Reps are not part of the bargaining unit. The Company created the A/R Rep jobs on April 18, 2024, almost five months after the parties agreed to the current contract in November, 2023. Jt. Exs. 1, 3. It would not have been possible to list a job in the CBA that did not exist at the time the parties signed the contract.

In summary, A/R Reps are not excluded from the bargaining unit under any method of interpreting the terms of Article 2, Section 2 of the CBA. The fact that they have access to some financial information that other members of the bargaining unit cannot access does not mean that the A/R Reps are not bargaining unit members.

AWARD

The grievance is granted. The Company violated the collective bargaining agreement by designating the A/R Representative position as "non-union." In cooperation with the Union, the Company shall take all action necessary to recognize and treat the A/R Representatives as part of the bargaining unit pursuant to Article 2 of the collective bargaining unit as soon as practically

possible. I shall retain jurisdiction over this award through April 12, 2025 for the sole purposes of correcting any errors and to resolve any differences over the implementation of the remedy.



February 11, 2025
Amherst, New York

Lise Gelernter, Arbitrator

Acknowledgment and affirmation

I, Lise Gelernter, do hereby affirm upon my oath as an arbitrator that I am the individual described in and who executed the foregoing instrument, which is my Award, which was issued on February 11, 2025.



Amherst, New York

Lise Gelernter, Arbitrator