

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-13

May 17, 2011

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Guideline Memorandum Concerning Parties' Obligation  
to Provide Information Related to Assertions Made  
in Collective Bargaining

I. Introduction

One of the obligations of good-faith collective bargaining is to provide, upon request, relevant information necessary for bargaining. In enforcing this obligation, two related lines of cases have developed: one addressing an employer's general claim of an inability to pay certain wages or benefits; and another addressing more limited bargaining claims and requests for specific information related to those claims. These two lines of cases may sometimes appear to be similar, and the analytical distinction between them has not always been recognized. Some cases have been litigated solely with regard to whether the employer's statements amount to a claim of an inability to pay, without any consideration of whether there were requests for information that were directly related to specific claims made in bargaining. This memorandum explains the appropriate analytical framework to be applied in all such cases.

Moreover, the analysis discussed below implicates the obligation to provide relevant and necessary information by both employers and unions. Thus, we have authorized complaints against both employers and unions where requested information was made relevant by a party's assertions in bargaining. For example, the Division of Advice recently found that an employer violated Section 8(a)(5) of the Act by refusing to provide information concerning its ability to compete for business. The employer stated in bargaining that it was having problems getting and keeping customers, given the significance of labor costs in pricing and bidding. Thus, the employer directly linked its difficulty getting and keeping customers and outbidding competitors to its bargaining unit labor costs. Similarly, the Office of Appeals recently found that a union violated Section 8(b)(3) of the Act by refusing to provide certain specific provisions in its

contracts with other employers that it had used to develop the bargaining proposals it made to the requesting employer. The requested contract provisions were relevant because the union had asserted in bargaining that its proposal was reasonable because other employers had agreed to the same provisions.

## II. Generally Applicable Principles

All parties engaged in collective bargaining have a general statutory obligation to provide, upon request, information which is relevant for the purpose of contract negotiations or the administration of a collective-bargaining agreement.<sup>1</sup> The duty to furnish information "stems from the underlying statutory obligation imposed on employers and unions to bargain in good faith with respect to mandatory subjects."<sup>2</sup> Thus, an employer is obligated "to furnish a union, upon request, information relevant and necessary to enable [the union] to intelligently carry out its statutory obligations as the employees' exclusive bargaining representative,"<sup>3</sup> including information related to contract negotiations.<sup>4</sup>

Information about bargaining unit employees' terms and conditions of employment is presumptively relevant.<sup>5</sup> In contrast, where the requested information concerns matters outside the bargaining unit, the union bears the burden of

<sup>1</sup> See, e.g., NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967); Shoppers Food Warehouse Corp., 315 NLRB 258, 259 (1994).

<sup>2</sup> Cowles Communications, Inc., 172 NLRB 1909, 1909 (1968).

<sup>3</sup> Florida Steel Corp., 235 NLRB 941, 942 (1978), enfd. in relevant part 601 F.2d 125, 129 (4th Cir. 1979).

<sup>4</sup> See, e.g., Day Automotive Group, 348 NLRB 1257, 1257, 1262 (2006); Newcor Bay City Division, 345 NLRB 1229, 1237 (2005); Public Service Electric & Gas Co., 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998).

<sup>5</sup> See, e.g., Boston Herald-Traveler Corp., 110 NLRB 2097 (1954), enfd. 223 F.2d 58 (1st Cir. 1955); ("[i]t is enough . . . that the information relate to the wages or fringe benefits of the employees. Such information is obviously related to the bargaining process, and the union is therefore entitled to ask and receive it"); Timken Roller Bearing Co., 138 NLRB 15 (1962), enfd. 325 F.2d 746, 750 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964); Pfizer, Inc., 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985).

showing the potential relevance of the requested information.<sup>6</sup> However, "that burden is not exceptionally heavy."<sup>7</sup> The standard for relevance is a "liberal discovery-type standard."<sup>8</sup> The requested information "need not be dispositive of the issue between the parties but must merely have some bearing on it,"<sup>9</sup> and the union need show only "potential or probable relevance . . . to give rise to an employer's obligation to provide information."<sup>10</sup>

A union's statutory duty to provide information is "commensurate with and parallel to an employer's obligation to furnish it to a union pursuant to Section 8(a)(1) and (5) of the Act."<sup>11</sup> Thus, for example, the Board has held that: (1) a "most favored nations" clause establishes both the necessity and relevancy of information regarding agreements that a union has with other employers;<sup>12</sup>

<sup>6</sup> See, e.g., Shoppers Food Warehouse Corp., 315 NLRB at 258-259; E.I. Du Pont de Nemours, 264 NLRB 48, 51-52 (1982), enfd. 744 F.2d 536 (6th Cir. 1984) (without information on wage rates of non-unit employees working at comparable employer facilities, union could not intelligently formulate its wage proposal); Leland Stanford Junior University, 262 NLRB 136, 145 n.13 (1982), enfd. 715 F.2d 473 (9th Cir. 1983) (union entitled to non-unit job description to enable the union to bargain over a related unit classification); Lamar Outdoor Advertising, 257 NLRB 90, 93-94 (1981) (union entitled to compensation data for other plants because the employer's proposals reflected its consideration of its other plants' wages and benefits).

<sup>7</sup> Leland Stanford Junior Univ., 262 NLRB at 139; Duquesne Light Co., 306 NLRB 1042, 1043-1044 (1992).

<sup>8</sup> Acme Industrial Co., 385 U.S. at 435-436; Pfizer Inc., 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985).

<sup>9</sup> Pennsylvania Power & Light Co., 301 NLRB 1104, 1105 (1991).

<sup>10</sup> Shoppers Food Warehouse, 315 NLRB at 259. See also, e.g., Acme Industrial, 385 U.S. at 437 n.6; Press Democrat Publishing Co., 237 NLRB 1335, 1338 (1978), enfd. 629 F.2d 1320 (9th Cir. 1980).

<sup>11</sup> Teamsters Local 500 (Acme Markets), 340 NLRB 251, 252 (2003); Iron Workers Local 207 (Steel Erecting Contractors), 319 NLRB 87, 90 (1995). See also Fireman & Oilers Local 288 (Diversy Wyandotte), 302 NLRB 1008, 1009 (1991); Teamsters Local 851 (Northern Air Freight), 283 NLRB 922, 925 (1987).

<sup>12</sup> Service Employees Local 144 (Jamaica Hospital), 297 NLRB 1001, 1002-1003 (1990).

(2) information relating to the operation of an exclusive hiring hall and its referral of employees is relevant;<sup>13</sup> and (3) an employer's "legitimate interest" in determining whether the union continues to exist may make related information relevant.<sup>14</sup>

### III. NLRB v. Truitt Mfg. Co.

In addition to the presumptive or demonstrated relevance of information related to unit members' terms and condition of employment, a party's statements and bargaining proposals may make other information relevant to negotiations. The Board has noted that, if a party asserts a claim and then refuses to provide requested information to substantiate the claim, collective bargaining is frustrated and rendered ineffective.<sup>15</sup>

In NLRB v. Truitt Mfg. Co.,<sup>16</sup> the Supreme Court held that an employer violated Section 8(a)(5) of the Act by refusing to provide the union with information requested to substantiate the employer's claim that it could not afford to grant its employees a wage increase sought by the union and that such an increase would put the employer out of business. The Court explained that:

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of accuracy.<sup>17</sup>

The Court noted, however, that it does not automatically follow that a union is entitled to substantiating evidence

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<sup>13</sup> Graphic Communications Workers Union, Local 13 (Oakland Press), 233 NLRB 994, 996 (1977), enfd. 598 F.2d 267 (D.C. Cir. 1979).

<sup>14</sup> Service Employees International, Local 715 (Stanford Hospital), 355 NLRB No. 65, slip op. at 3-4 (August 6, 2010).

<sup>15</sup> Leland Stanford Junior Univ., 262 NLRB at 145.

<sup>16</sup> 351 U.S. 149 (1956).

<sup>17</sup> Id., at 152-153.

in every case in which economic inability is raised as an argument against increased wages:

Each case must turn on its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.<sup>18</sup>

Thus, the Supreme Court in Truitt not only made it clear that an employer's assertion in collective bargaining of an inability to pay certain wages or benefits may require it to provide the union with information on its overall financial condition, but also emphasized more generally that, when either party in collective bargaining makes factual assertions, it may be obligated to provide the other party with information related to those specific assertions.<sup>19</sup>

#### IV. Employer Claims of an Inability to Pay

No "magic words" are required to establish an obligation to provide general financial information, but the obligation arises whenever the employer's statements and actions convey an inability to pay.<sup>20</sup> In determining whether there has been a claim of inability to pay, the Board evaluates an employer's claims "in the context of the particular circumstances in that case."<sup>21</sup>

In Nielsen Lithographing Co.,<sup>22</sup> the Board held that the Truitt requirement that an employer provide general financial information to verify a claim of an inability to pay does not apply to an employer's claim that maintaining

<sup>18</sup> Id., at 153-154.

<sup>19</sup> See, e.g., Leland Stanford Junior Univ., 262 NLRB at 145 n.13 ("the Truitt principle is 'not limited to cases in which the Company makes an actual plea of poverty, but [applies] to other situations in which the company possesses data 'relevant' to its bargaining position,'" citing NLRB v. Pacific Grinding Company, 572 F. 2d 1343, 1348 (9th Cir. 1978)).

<sup>20</sup> Atlanta Hilton & Tower, 271 NLRB 1600, 1602 (1984).

<sup>21</sup> Lakeland Bus Lines, 335 NLRB 322, 324 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003).

<sup>22</sup> 305 NLRB 697 (1991), affd. sub nom. Graphic Communications Local 50B v. NLRB, 977 F.2d 1169 (7th Cir. 1992).

existing employee benefits is necessary to avoid placing the employer at a competitive disadvantage in the future. Thus, in Nielsen, the employer acknowledged that it was still making a profit and was not pleading poverty or an inability to pay. Rather, it maintained that concessions were necessary in order to be competitive in the future. The union requested certain information it deemed necessary to evaluate the claim that the employer was losing its ability to compete, including the employer's balance sheets, bank loan documents, and analyses of working capital.<sup>23</sup> Although the Board initially found that the employer was required to provide the requested information,<sup>24</sup> after the Seventh Circuit refused enforcement of that decision,<sup>25</sup> the Board held that "an employer's obligation to open its books does not arise unless the employer has predicated its bargaining stance on assertions about its inability to pay during the term of the bargaining agreement under negotiation."<sup>26</sup> The Board emphasized that the obligation to provide general financial does not arise where the employer "is simply saying that it does not want to pay."<sup>27</sup>

As the Supreme Court did in Truitt, the Board in Nielsen also cautioned that an employer's claims must be evaluated in the context of the particular circumstances in that case. The Board stated:

We do not say that claims of economic hardship or business losses or the prospect of layoffs can never amount to a claim of inability to pay. Depending on the facts and circumstances of a particular case, the evidence may establish that the employer is asserting that the economic problems have led to an inability to pay or will do so during the life of the contract negotiated.<sup>28</sup>

<sup>23</sup> Id., 305 NLRB at 698.

<sup>24</sup> 279 NLRB 877 (1986).

<sup>25</sup> 854 F.2d 1063 (7th Cir. 1988).

<sup>26</sup> 305 NLRB at 700.

<sup>27</sup> Ibid. See also, e.g., AMF Trucking & Warehousing, 342 NLRB 1125, 1126 (2004) ("'[i]nability to pay' means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to nonsurvival in business").

<sup>28</sup> 305 NLRB at 700.

Since Nielsen, however, there has been no clear delineation as to what exactly constitutes a statement of an inability to pay. Indeed, the Board appears to have often come to differing conclusions on facts that are difficult to distinguish. For example, in Burruss Transfer,<sup>29</sup> the Board found that the employer did not claim inability to pay where it said it would "not be able to survive" if it increased wages or benefits. The following year, in Shell Co.,<sup>30</sup> the Board found that the employer did claim inability to pay where it characterized its financial situation as "a matter of survival." In Lakeland, above,<sup>31</sup> the Board found an inability-to-pay claim where the employer told its employees that acceptance of its offer would enable it to "retain your jobs and get back in the black in the short term," and that the "future of Lakeland depends on it" while, in AMF Trucking & Warehousing,<sup>32</sup> the Board found no inability-to-pay claim where the employer said it was "fighting to keep the business alive." More recently, in Stella D'oro Biscuit Co.,<sup>33</sup> the Board found an inability-to-pay claim despite the employer's clear indications during negotiations that its parent entity possessed ample funds to pay the Union's demands, but would be unwilling to do so without labor-cost concessions.

These seemingly inconsistent results as to what constitutes an inability-to-pay claim that would require the providing of general financial information have been echoed by Circuit Courts. Thus, for example, in Stroehmann Bakeries v. NLRB,<sup>34</sup> the Second Circuit denied enforcement and found no inability-to-pay claim where the employer conveyed to the union that it would go out of business but for its parent company willing to bail it out financially. In Lakeland Bus Lines v. NLRB,<sup>35</sup> the D.C. Circuit denied enforcement based on evidence that the employer explicitly stated that it was not asserting an inability to pay, but was only asserting the existence of short-term business

<sup>29</sup> 307 NLRB 226, 228 (1992).

<sup>30</sup> 313 NLRB 133, 133 (1993).

<sup>31</sup> 335 NLRB at 324-325.

<sup>32</sup> 342 NLRB at 1126.

<sup>33</sup> 355 NLRB No. 158, slip op. at 4 (August 27, 2010).

<sup>34</sup> 95 F.3d 218, 220 (2d Cir. 1996), denying enforcement in relevant part to 318 NLRB 1069 (1995).

<sup>35</sup> 347 F.3d 955, 963 (D.C. Cir. 2003), denying enforcement to 335 NLRB 322.

losses. On the other hand, in International Chemical Workers Union v. NLRB,<sup>36</sup> the Ninth Circuit granted review and remanded the Board's finding of no inability-to-pay claim where the employer had said it couldn't afford to pay for the Union's proposals and would "go broke," and failed to adequately disavow such statements by subsequent conduct.

Notwithstanding the above, we recognize that it may be difficult to fully articulate a clear bright-line test, given the necessarily fact-intensive nature of the Truitt analysis. Thus, as noted above, the Court in Truitt itself stated that each case must turn on its particular facts,<sup>37</sup> and the Board has similarly emphasized that the evaluation of the employer's claims must be made in the context of the particular circumstances in the case.<sup>38</sup>

#### V. Claims Other than an Inability to Pay

Other than broad requests for general financial information in response to alleged employer claims of an inability to pay, however, the Board has articulated a clear standard for determining parties' obligation to provide specific requested information related to more limited bargaining claims. In Caldwell Manufacturing Co.,<sup>39</sup> the employer asserted that concessions were necessary to make the facility a viable option to locate contemplated new products and justified its proposals by claiming a need to be more competitive in the industry. The Board ordered the employer to provide competitor data, labor costs, and other information that was relevant to the claims it had made during bargaining. The Board stated that while the information was not presumptively relevant, relevancy was established because it would have assisted the union in verifying the employer's claims regarding its proposals and allowed the union to make counter proposals.<sup>40</sup> Significantly, the Board also noted that while the employer did not claim an inability to pay, the union did not request general access to the employer's financial records. Instead, the union's request was tailored to allow the union to evaluate and verify specific assertions made by

<sup>36</sup> 467 F.3d 742, 749-754 (9th Cir. 2006), granting review to American Polystyrene Corp., 341 NLRB 508 (2004).

<sup>37</sup> 351 U.S. at 153.

<sup>38</sup> Lakeland, 335 NLRB at 324; Nielsen, 305 NLRB at 700.

<sup>39</sup> 346 NLRB 1159, 1160 (2006).

<sup>40</sup> Id.



the employer and assist the union in developing its own proposals.<sup>41</sup>

The standard articulated in Caldwell is consistent with earlier cases applying Truitt's general holding that good-faith bargaining necessarily requires that claims important enough to make in the give and take of bargaining are important enough to require proof of accuracy. For example, in E. I. du Pont & Co.,<sup>42</sup> the Board held that the employer unlawfully refused to furnish the union with specific financial information it had made relevant by its representations during bargaining, such as comparative production cost data for its other plants, even though the employer had not pled financial hardship.

More recently, the Board reached a similar result in A-1 Door and Building Solutions.<sup>43</sup> In A-1 Door, the employer justified its bargaining proposals by contending that it was not competitive with other companies because it was paying too much in wages and benefits which affected its ability to get and receive job bids.<sup>44</sup> The union requested specific information regarding job bidding by the employer, which the employer refused to provide.<sup>45</sup> The Board, citing Caldwell, above, found that the information was relevant because it would assist the union in evaluating the employer's claims, and that the union had requested specific information to evaluate the accuracy of the Respondent's specific claims, rather than general financial data.<sup>46</sup> Accordingly, the Board found that the union was entitled to the information that would either support or disprove the employer's representations. The Board in A-1 Door expressly noted that its holding was based on the employer's specific claim -- an inability to compete - and not on any asserted inability to pay.<sup>47</sup>

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<sup>41</sup> Ibid.

<sup>42</sup> 276 NLRB 335, 335 (1985)

<sup>43</sup> 356 NLRB No. 76 (2011).

<sup>44</sup> Id., slip op. at 3.

<sup>45</sup> Id., slip op. at 4.

<sup>46</sup> Ibid. The Board in A-1 Door also cited E. I. du Pont & Co., above, as well as several other cases, in support of its statement that it "has consistently required the production of similar information, including information concerning competitors, labor costs, production costs, restructuring studies, and income statements." Ibid.

<sup>47</sup> Id., slip op. at 4 n.13.

## VI. Conclusion

While both the obligation to provide general financial information after an employer claim of an "inability to pay" and the obligation to provide more specific information made relevant by other bargaining claims arise out of the good-faith bargaining obligation discussed in Truitt, it is important to distinguish the two doctrines and keep them analytically distinct. Although an employer's claim of an inability to pay uniquely requires the employer to furnish general financial information, because that is what is required to substantiate the employer's broad claim, the significance of other requested information directly related to more limited claims must not be overlooked. It must be remembered that any particular case may present one or the other issue or, in some cases, both -- care must be taken to make sure the appropriate analysis is applied in determining a party's obligation to provide information in response to any particular request. Indeed, within a single information request, both types of claims may be presented and both must be evaluated.

This problem is illustrated in North Star Steel Co.,<sup>48</sup> where the Board found that a union's request for information regarding the employer's competitors was not relevant because the employer had not made a claim of an inability to pay, but instead had only claimed a "competitive disadvantage" or an "inability to compete." The Board in North Star, however, restricted its analysis solely to whether or not the employer had claimed an inability to pay. It therefore did not even discuss whether the employer's specific claims regarding its competitors made relevant any of the requested information, despite the fact that the union there requested both general financial information and a list of the employer's competitors.<sup>49</sup> Having so limited its inquiry, the Board did not separately consider the relevance of the list of competitors.

In contrast, in E. I. du Pont & Co., above, the Board appropriately considered both of the contentions at issue. Thus, although the Board did "not find that the [employer] made a plea of financial hardship in bargaining over its proposal," and therefore found no violation as to the employer's refusal to provide general financial information, the Board nonetheless found that the employer violated Section 8(a)(5) by refusing to provide specific

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<sup>48</sup> 347 NLRB 1364, 1369-1370 (2006).

<sup>49</sup> Id., at 1390-1391.

information that was made relevant by the employer's bargaining proposals, including comparative production cost data.<sup>50</sup> As in Caldwell and A-1 Door, the Board made it clear that an employer may be required to provide relevant information in response to specific information requests, regardless of whether or not it is found to have actually made an inability-to-pay claim.

Thus, in evaluating information requests related to claims made during bargaining, Regions should consider both general claims of an inability to pay and other more limited claims that could be subject to specific verification. Regions should examine the particular information requests at issue and determine whether they are targeted to the bargaining claims made by the other party and are specifically tailored to those claims. Any questions should be directed to the Division of Advice.

/s/  
L.S.

cc: NLRBU  
Release to the Public

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<sup>50</sup> 276 NLRB at 335, 341.