United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 15, 2018

TO: Paul Murphy, Regional Director
Region 3

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Nexstar Media Group, Inc.
Case 03-CA-220094

530-6067-6000
530-6067-6001-3720
530-6067-6001-3780
530-6067-6067-2800

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) by refusing to provide the Union with information concerning the financial benefit the Employer obtained from the Tax Cuts and Jobs Act of 2017 and the Employer's plans for that money. We conclude that the Employer did not violate Section 8(a)(5) by withholding the requested information because the Union failed to establish that the information was relevant and necessary to the Union's performance of its statutory function. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

Nexstar Media Group, Inc. (the "Employer") owns television stations across the United States. The National Association of Broadcast Employees & Technicians – Communications Workers of America, AFL-CIO (the "Union") represents bargaining units at six of the Employer's stations.

The instant controversy arose from the late-2017 passage of the federal Tax Cuts and Jobs Act ("TCJA"), which, among other things, lowered the federal corporate tax rate. In January 2018,[1] the Employer issued a memorandum to all employees announcing that "the new corporate tax rate will produce a financial benefit for Nexstar, and the Company wants to extend that benefit to our employees via a one-time bonus and an increase to the 401k plan company match." The memorandum then stated the amounts of the bonus and increased matching benefit. The memorandum clarified, however, that the Employer was not, at that time, granting the bonus and increased match to union-represented employees whose collective-

[1] All subsequent dates are in 2018.

bargaining agreements were open for negotiation, which included the Union's bargaining units at six stations.[2]

In March, while the parties were bargaining for successor contracts at multiple stations, the Union sent the Employer a written information request. The Union prefaced the request by asserting that Congress intended the TCJA's corporate tax cut to trickle down to workers' paychecks and return jobs to the United States. The Union invited the Employer to join it in implementing those goals through bargaining, and specifically requested "bargaining regarding bonus payments and increased §401(k) employer contributions." The Union then laid out its information request:

> In preparation for such bargaining, to ensure the tax cut raises wages and stops the offshoring of jobs, we need to understand the total benefit from the tax legislation inuring to the company; the extent to which that benefit is reserved or not to increase workers' wages, create jobs, or bring jobs back to the United States; and the extent to which that money has already been diverted or is planned to be diverted to anything other than raising wages or increasing employment for American workers, particularly those within our represented bargaining units. We therefore request the following information, relevant to all of the foregoing:
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> a. Please provide the estimated gains to the corporation and its subsidiaries and affiliates from the Tax Cuts and Jobs Act over each of the next five years.
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> b. Please provide the amount of planned capital investment in the United States over each of the next five years, and any documentation showing the extent to which this planned capital investment has changed since passage of the Tax Cuts and Jobs Act. Please provide the same for any planned capital investment outside of the United States.

[2] The Employer subsequently granted the bonus and 401(k) match increase on a unilateral basis to bargaining unit employees at two stations where the parties had already completed bargaining for their successor agreements. The Union has not filed a charge alleging these benefits to be unlawful unilateral changes.

c. Please provide a headcount of jobs, by job title, which will be created in the United States over each of the next five years.

d. Please provide the number of jobs previously outsourced that will be returned to the bargaining unit and the schedule for their return.

e. Please provide the total compensation for executives for the year before and the current year after passage of the Tax Cuts and Jobs Act.

f. Please provide the amount spent on any stock buybacks and dividends to shareholders since passage of the Tax Cuts and Jobs Act. Please provide the same amount anticipated for the current year after passage of the Tax Cuts and Jobs Act.

g. Please provide copies of your Fourth Quarter 2017 and First Quarter 2018 reports.

h. Please provide the amount spent on lobbying or public relations campaigns, including contributions to other entities engaging in such, in support of the Tax Cuts and Jobs Act or its underlying policies in general, since January 1, 2017.

i. Please provide an accounting of the total amount of profits held overseas, the amount to be repatriated, and the total tax to be paid on that repatriation over each of the next five years.

j. Please provide an accounting of the amount of any work contracted out domestically or offshore which is substantially similar to work performed by bargaining unit employees, and the amount of such work which will be returned to bargaining unit employees over each of the next five years.

The Union asked to receive the requested information by April 23.

On April 22, the Employer refused to provide the requested information. The Union thereafter filed the instant charge.

ACTION

We conclude that the Employer did not violate Section 8(a)(5) by withholding the requested information because the Union failed to establish that the information was relevant and necessary to the Union's performance of its statutory function.

Section 8(a)(5) requires an employer to bargain in good faith with the representative of its employees. An employer's duty to bargain in good faith includes a duty to provide to a union, upon request, relevant information necessary for the union's proper performance of its statutory duties as collective-bargaining representative.[3]

An employer's obligation is triggered by a request for relevant information.[4] Where the requested information concerns bargaining unit employees or their terms and conditions of employment, the Board has generally presumed that the information is relevant and producible unless the employer rebuts the presumption of relevance.[5] Where no such presumption applies, the union bears the burden to establish relevance.[6] Regardless of any presumption of relevance, where (1) the Union expressly communicates reasons for its information request; (2) all such reasons are invalid; and (3) the employer lacks constructive notice of a legitimate reason, the employer has no duty to provide the requested information.[7]

Here, the Union articulated to the Employer two purposes for its information request. The first purpose was to ensure, through bargaining, that the Employer's financial benefit from the TCJA goes to increasing workers' paychecks and returning jobs to the United States. The second purpose was to aid the Union in bargaining about bonus payments and increased 401(k) contributions. The evidence discloses no constructive notice of another legitimate purpose. Thus, whether the Union is entitled to the requested information turns on the legitimacy of the specific purposes provided.

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[3] *See, e.g.*, *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Disneyland Park*, 350 NLRB 1256, 1257 (2007) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Indus. Co.,* 385 U.S. 432, 435-36 (1967)).

[4] *IronTiger Logistics, Inc.*, 366 NLRB No. 2, slip op. at 1 (Jan. 9, 2018).

[5] *See Disneyland*, 350 NLRB at 1257; *IronTiger Logistics*, 366 NLRB No. 2, slip op. at 1.

[6] *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994).

[7] *See Emery Industries*, 268 NLRB 824, 824-25 (1984).

Neither articulated purpose entitles the Union to the information it requested. To establish the relevance of the requested information, the Union must show "that the information [is] directly related to the union's function as a bargaining representative and … appear[s] 'reasonably necessary' for the performance of that function."[8] The Board uses a broad discovery-type standard in determining relevance for information requests.[9] However, the "theory of relevance must be reasonably specific; general avowals of relevance such as 'to bargain intelligently' and similar boilerplate are insufficient."[10]

The Union's purpose of ensuring that the Employer's tax savings increase workers' paychecks and return jobs to the United States created no duty to furnish information because that purpose goes beyond the Union's statutory role. Although the Union is free to pursue its stated goals with respect to the TCJA, those goals are not sufficiently related to its collective-bargaining relationship with the Employer to be considered directly related to the Union's statutory function as bargaining representative.[11] Notably, the Union has failed to identify any provision in the TCJA obligating the Employer to spend its tax savings toward the Union's preferred objectives or granting the Union a role in enforcing such a requirement.[12]

Moreover, the fact that the Union seeks to achieve its TCJA-related goals through bargaining does not entitle the Union to the information because the

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[8] *Chapin Hill at Red Bank*, 360 NLRB 116, 120 (2014) (citing *Acme Indus.*, 385 U.S. at 437).

[9] *Shoppers Food Warehouse,* 315 NLRB at 259.

[10] *Super Valu Stores, Inc.*, 279 NLRB 22, 25 (1986), *affirmed mem.*, 815 F.2d 712 (8th Cir. 1987); *see also F. A. Bartlett Tree Expert Co.*, 316 NLRB 1312, 1313 (1995) (union's theory that it needed to see employer's contracts with customers to make a reasonable wage proposal was too general to establish relevance).

[11] *See Southern California Gas Co.*, 342 NLRB 613, 614-15 (2004) (information union sought exclusively for purpose of pursuing safety-related complaint against employer before state agency was irrelevant to collective-bargaining relationship and union's role as collective-bargaining representative).

[12] *Cf. Uniontown County Market*, 326 NLRB 1069, 1069 n.2, 1071-72 (1998) (employer's sales agreement with third-party buyer was relevant to union's duties as collective-bargaining representative where agreement contained information union needed to assess employer's liability under WARN Act in order to make informed judgment about filing contractual grievance or lawsuit), *enforced*, 184 F.3d 949 (8th Cir. 1999).

Employer's decisions about how to spend its tax savings are not a mandatory subject of bargaining. The "duty to furnish … information stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory subjects of bargaining."[13] Thus, there is no duty to furnish information concerning nonmandatory subjects of bargaining.[14] Mandatory bargaining subjects are limited to "issues which settle an aspect of the relationship between the employer and the employees."[15] There is no obligation to bargain over "managerial decisions, which lie at the core of entrepreneurial control," such as "[d]ecisions concerning the commitment of investment capital,"[16] particularly when they "focus on matters apart from the employment relationship and that have only 'an indirect or attenuated impact' on that relationship."[17] Here, the Employer's decisions about how to allocate its tax savings do not settle an aspect of the Employer's relationship with employees and are akin to those matters within its core entrepreneurial control. Therefore, the Union is not entitled to information concerning its use of the tax savings.[18]

The Union's request to bargain about bonus payments and increased 401(k) matching also does not make the information relevant because the Union has failed to show that the requested information is "reasonably necessary" to engage in meaningful bargaining. Information may be relevant to bargaining where it would be reasonably necessary in framing the union's proposals,[19] or in evaluating and

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[13] *Pieper Electric, Inc.*, 339 NLRB 1232, 1235 (2003) (quoting *Cowles Communications, Inc.*, 172 NLRB 1909, 1909 (1968)).

[14] *Id.* at 1232, 1235 (employer had no duty to furnish information about employee participation in its stock purchase plan because the plan and a related collective-bargaining agreement provision were permissive subjects of bargaining).

[15] *KIRO, Inc.*, 317 NLRB 1325, 1326 (1995) (quoting *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)).

[16] *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

[17] *KIRO*, 317 NLRB at 1326-27 (quoting *First Nat. Maint. Corp. v. NLRB*, 452 U.S. 666, 677 (1981)).

[18] *See Pieper Electric*, 339 NLRB at 1235.

[19] *See, e.g.*, *Beverly Enterprises*, 310 NLRB 222, 226-27 (1993) (information about cost to employer of using temporary employees relevant because union was attempting to bolster a proposed wage increase, which employer had previously rejected, by persuading the employer to reduce its demand for temporary employees by attracting and keeping regular staff with increased wages), *enforced in relevant part sub nom.*

responding to the employer's proposals.[20] Relatedly, when an employer makes specific factual assertions in support of its bargaining positions, information needed to verify those assertions becomes relevant.[21]

None of the foregoing bases for relevance apply here. According to the Union, the information it ultimately sought through its information request was the size of the Employer's financial benefit from the TCJA and the Employer's plans for the money. The Union contends that the Employer made this information relevant through its announcement that it was granting benefits to employees because it would benefit financially from the new corporate tax rate. But the Employer did not, through its announcement, contend that its ability to grant benefits to unit employees was limited by the amount of its tax savings or its plans for the money. Nor did it assert that it could not fund increased benefits for unit employees, or that the value of the benefits it announced for nonunit employees bore any particular relationship with the amount of its tax savings. More generally, the Union has failed to explain how the

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Torrington Extend-A-Care Employee Ass'n v. NLRB, 17 F.3d 580 (2d Cir. 1994); *Ironton Publications*, 294 NLRB 853, 853, 856 (1989) (details of profit-sharing plan adopted for nonunit employees relevant to bargaining because they would be of use to the union in, among other things, framing its wage and retirement benefit proposals). *Cf. F. A. Bartlett Tree Expert*, 316 NLRB at 1313 (union's contention that it needed to see employer's contracts with customers to make a reasonable wage proposal was too general to establish relevance).

[20] *See Management & Training Corporation*, 366 NLRB No. 134, slip op. at 3 (July 25, 2018) (where employer cited government contract as reason for refusing to raise unit employees' wages or benefits, information about raises to nonunit employees was relevant to assessing the employer's forthrightness and bargaining position); *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 7 (May 31, 2018) (union was entitled to information about payments employer received from the state where employer had predicated proposals on changes to state reimbursement rates and parties' competing proposals suggested they disagreed on whether those rates allowed for wage increase); *Hendrickson Trucking Co.*, 365 NLRB No. 139, slip op. at 2, 17-18 (Oct. 11, 2017) (union entitled to financial information to examine how employer, which claimed to be losing money, reached estimated cost savings totals for its proposals).

[21] *See Caldwell Mfg. Co.*, 346 NLRB 1159, 1159-60, 1166, 1169 (2006) (employer's claim that it needed to make facility more competitive obligated it to provide union with requested competitor data and labor costs, among other things); *Law-Den Nursing Home, Inc.*, 361 NLRB 119, 121 (2014) (union was entitled to limited financial information to verify employer's claim that it could not reopen wage negotiations because its financial situation had not improved).

Employer's announcement rendered the requested information reasonably necessary to frame or support any Union bargaining proposals. Likewise, the Union has failed to identify any Employer bargaining positions or factual assertions that rendered the information relevant. Accordingly, the Union has failed to establish that the requested information was relevant and necessary to bargaining over bonuses and increased 401(k) matching.[22]

The Union has articulated one additional basis for the information request to Board agents, but not to the Employer. Specifically, the Union has asserted that the requested information is relevant to arbitration of a grievance. Even assuming the Union had said as much to the Employer, its contention lacks merit. Certainly, a union is entitled to relevant information it needs to process a grievance.[23] However, the Union has failed to establish the information's relevance to the grievance in question. According to the Union, the crux of the grievance is that one of its contracts provides that the covered bargaining unit employees shall receive all benefits granted to nonunit employees, but the Employer failed to extend the recent nonunit bonus and 401(k) match increase to those unit employees. However, that grievance will turn entirely on contract interpretation, and the amount and uses being made of the tax surplus are not relevant to that contract interpretation.[24]

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[22] While some Board decisions, including *Beverly Enterprises*, 310 NLRB at 226-27, and *Management & Training*, 366 NLRB No. 134, slip op. at 2-3, could be read to support a finding that the amount of the Employer's expected gains from the TCJA (Request (a)) is relevant to the parties' bonus and 401(k) negotiations, the General Counsel views such reading of the decisions as inconsistent with other Board law and with correct principles.

[23] *Disneyland*, 350 NLRB at 1257.

[24] *See United Parcel Service*, 362 NLRB No. 22, slip op. at 3-4 (Feb. 26, 2015) (where union sought information to process grievance, employer had no duty to provide information that was not, in fact, relevant to grievance).

Accordingly, the Employer did not violate the Act by refusing to disclose the requested information.[25] The Region should dismiss the charge, absent withdrawal.

/s/
J.L.S.

ADV.03-CA-220094.Response.Nexstar (b) (6), (b) (7)

[25] The result is the same even if some of the requests are considered presumptively relevant, because any presumption of relevance has been rebutted. *See United Parcel Service*, 362 NLRB No. 22, slip op. at 3-4. The General Counsel is of the view, though, that information should not be considered presumptively relevant where the union has articulated specific reasons for an information request and those reasons do not support a finding of relevancy. In other words, where the union provides the employer with the intended purpose of the requested information, the employer's obligation to comply with the request depends on the legitimacy of the reasons provided, or constructive notice of a legitimate reason, and there should be no need to "rebut" a presumption of relevancy.