UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-60703

FRITO-LAY, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER
OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the September 5, 2001 petition of Frito-Lay, Inc. ("the Company") to review an order issued against it by the National Labor Relations Board ("the Board"). The Board had jurisdiction over the unfair labor practice proceedings below under Section 10(a) of the National Labor Relations Act, as amended ("the Act"). *See* 29 U.S.C. § 160(a). Its Decision and

Order, issued on May 3, 2001 and reported at 333 NLRB No. 154,[1] is a final order with respect to all parties under Section 10(f) of the Act. *See* 29 U.S.C. § 160(f). This Court has jurisdiction over the Company's petition to review the Board's order pursuant to Section 10(f) of the Act, because the unfair labor practice at issue in this case occurred in Jackson, Mississippi.[2] The petition was timely filed, as the Act imposes no time limit for such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to

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[1] "D&O" references are to the Board's Decision and Order. "ALJD" refers to the administrative law judge's decision, which is appended to the Board's Decision and Order. "Tr" refers to the hearing transcript. "GCX," "RX," and "CPX" refer to the exhibits introduced at the hearing by the General Counsel, the respondent Company, and the charging-party Union, respectively. References preceding a semicolon are to the Board's findings; those following one are to the supporting evidence.

[2] On January 9, 2002, the Board filed a Statement Regarding Factual Developments Potentially Affecting Jurisdiction. The jurisdictional statement set forth in the text is therefore dependent on a finding by the Court that the facts described in the Board's Statement do not render this case constitutionally moot, which would deprive the Court of jurisdiction. Because neither the Company nor the Union brought these facts to the Board's attention, the Board did not consider them in its Decision and Order, and does not take a position on the jurisdictional issue. However, because these factual developments diminish the practical import of its Order, the Board moved on November 19, 2001 to withdraw its October 15, 2001 cross-application for enforcement of its order. The Court granted the Board's motion on November 21, 2001.

provide the Union with relevant, requested information pertaining to average wage rates and racial compositions at its other plants.

STATEMENT OF THE CASE

This unfair labor practice case came before the Board on a consolidated complaint issued by the General Counsel pursuant to charges filed by Local 149 of the Bakery, Confectionery and Tobacco Workers International Union ("the Union"). (D&O 1, ALJD 2.) Following a hearing, an administrative law judge issued a decision on July 29, 1998, finding merit in one complaint allegation and dismissing others.[3] The Company and the General Counsel both filed exceptions to the judge's findings. On May 3, 2001, the Board (Chairman Truesdale and Member Liebman; Member Hurtgen, concurring in part and dissenting in part) issued a Decision and Order affirming the judge's rulings and finding that the Company had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (D&O 1.)

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[3] Specifically, the judge dismissed allegations that the Company violated Section 8(a)(5) and (1) by failing to provide information pertaining to employees' gender and to job classifications, and violated Section 8(a)(5) by unilaterally ceasing to deduct union dues from its employees and to remit them to the Union. (D&O 1, ALJD 6.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

1. Collective-bargaining history

The Company produces snack foods at about 40 factories in the United States. Employees at 10-12 of these facilities are represented by labor organizations. (D&O 1, ALJD 3; Tr at 33, 44.) For years, the employees at the Company's Jackson, Mississippi production plant ("the Jackson Plant") were represented by the Union, which negotiated a successive series of collective-bargaining agreements with the Company. (D&O 1, ALJD 3; RX 1, RX 2, RX 3.) In some of these agreements, the Jackson employees accepted lump-sum payments in lieu of overall pay-rate increases. (D&O 1, ALJD 4; Tr at 388.) The last collective-bargaining agreement ran from January 16, 1994 to January 18, 1997. (D&O 1, ALJD 3; GCX 2.)

2. Longstanding racial tensions at the Jackson Plant

In the early 1990s, issues arose at the Jackson Plant regarding both alleged and adjudicated incidents of racial discrimination by the Company. Two former employees won a racial discrimination suit against the Company for discriminatory discipline. (D&O 1, ALJD 3; Tr at 299-300.) In 1993, employee Ervin Bradley wrote a letter to the Company, which was copied to the NAACP,

congressmen, and others, and signed by a substantial number of his co-workers, accusing the Company, among other things, of discrimination at the Jackson Plant with regard to wages, the treatment of black workers by white managers, and the non-representative composition of the plant's management. (D&O 1, ALJD 3; CPX 4, Tr at 162.) In response to the letter, the Company met with Bradley, representatives of the NAACP, and others, and "made a start" towards resolving the issues raised in Bradley's letter. (D&O 1, ALJD 3; Tr at 162, 300.)

Also in the 1990s, the Union received information indicating both that the Jackson Plant had the highest percentage of black employees of the Company's 40 U.S. factories and that the Company paid employees at the Jackson Plant less than it paid employees at its other facilities. Specifically, the Union came into possession of a document purporting to report the average hourly wage at each of the Company's 40 plants ("national wage list"), with the Jackson Plant employees earning the lowest wages nationwide. The Union presented the national wage list to the Company during contract negotiations in 1993, and the Company did not dispute its accuracy. (D&O 1, ALJD 3; Tr at 131, 159.) Regarding the demographics of the Company's various factories, Jackson Plant employees who visited other facilities reported to the Union that the Company's other plants appeared to have a much lower percentage of black employees than the Jackson Plant. (D&O 1, ALJD 4; Tr at 200-06, 218-31.)

B. During 1997 Contract Negotiations, the Company Refused to Produce Relevant Information Requested by the Union in Furtherance of Its Duty to Negotiate Wages

1. Both the Company and the Union sent new representatives to the 1997 collective-bargaining sessions

In January 1997, Jackson Plant employee Ervin Bradley became the Union's new business agent. (D&O 1, ALJD 3; Tr at 125-26.) To accommodate the Union's new leadership and allow time for negotiations, the Company and the Union extended their existing contract. (D&O 1, ALJD 3; GCX 3, GCX 4, Tr at 361.) Regional Business Manager Harold Moore led the Union's negotiating committee, which included Business Agent Bradley. (D&O 1, ALJD 3; Tr at 46, 126-27, 280.) The Company's principal negotiator was Adam Sussman, its Senior Group Manager for Labor Relations, assisted by Jackson Plant Human Relations Manager Al Kirksey and others. (D&O 1, ALJD 3; Tr at 77, 318, 320.)

In January 1997, before the start of negotiations, the Union sent the Company a partial list of proposals, including a request for a "substantial across the board wage increase" and one to bring the Jackson Plant's wages "up within the top ten (10) Frito-Lay plant wages." (D&O 1, ALJD 3; GCX 6, Tr at 48-49, 128.) When negotiations got underway in February 1997, the parties agreed to discuss non-economic items first and did not exchange their first economic proposals until May. At that point, the Union proposed a five-dollar-per-year

increase over the contract's three-year term and the Company offered a 20-cent-per-year raise. (D&O 1, ALJD 3-4; Tr at 46, 88, 361-62, 370.)

2. The Union requests, and the Company repeatedly refuses to provide, wage and race information

The disputed information request in this case arose in connection with the wage issue, and played out principally through a series of letters during a hiatus in face-to-face negotiations which lasted from early June until August 25, 1997. (D&O 1, ALJD 4; Tr at 56, 131, 376-77.) Early in June, Business Agent Bradley requested orally that the Company provide the Union with the national pay-rate average for all of the Company's factories and the racial breakdown of each factory. (D&O 1, ALJD 3; Tr at 131.) On June 16, 1997, Business Manager Moore wrote Sussman a letter stating that the Union still needed and had not yet received "the racial breakdown for [the Jackson Plant] nor the national pay rate average for all Frito-Lay plants." (D&O 1, ALJD 3; GCX 7.)

On June 23, Sussman responded in writing. In that letter, the Company provided Moore with a racial breakdown of the Jackson Plant but declined to provide the wage data requested by the Union, stating:

> We do not routinely calculate or maintain a national average pay rate, nor in any event do we see the relevance of this figure. As we have explained at the bargaining table, the wage scale in Jackson is the result of many years of collective bargaining at the local level. Our view is that the wage scale at the Jackson plant should be competitive with wages available for comparable work in the same general geographic area. Labor market

> conditions that may influence wage rates in other states would not appear to be relevant to our negotiations in Jackson.

(D&O 1, ALJD 3; GCX 8, Tr at 53.)

Also on June 23, Moore requested "the racial breakdown for all Frito-Lay facilities." (D&O 1, ALJD 4; GCX 9, *see also* RX 11.) Sussman declined to provide the requested race data, noting that the Company had already provided a racial breakdown of the Jackson Plant and asserting that "[t]he racial composition of other facilities which you do not represent would not appear to be relevant to our negotiations in Jackson." (D&O 1, ALJD 4; GCX 9.) On July 8, 1997,[4] Moore responded that "[t]he relevancy of information that the Union needs for negotiations is not determined by you or anyone else, except the [union bargaining] committee," and reiterated his request for the Company's national racial breakdown. (D&O 1, ALJD 4; RX 11.)

3. The Company maintained its refusal to provide the data, even after the Union explained the data's relevance, derailing the contract negotiations

When negotiations resumed with an August 25, 1997 bargaining session, the Union renewed its request for the national wage and race information. The Company declined to comply with this request, reiterating its position that the information was irrelevant to the parties' negotiations. (D&O 1, ALJD 4; Tr at

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[4] The judge mistakenly found that this letter was dated July 11, 1997.

136-37.) On August 26, the Union's attorney, Chokwe Lumumba, joined its negotiating team, but very little face-to-face bargaining occurred that day. Instead, the parties exchanged letters on the subject of the Union's still unfulfilled request for wage and race data. (D&O 1, ALJD 4; GCX 11, GCX 12, GCX 13, Tr at 61-62, 283, 300-01.)

The Union began the August 26 exchange by presenting the Company with a letter asserting its right to the information under the Act, pursuant to *Westinghouse Elec. Corp.*, 239 NLRB 106 (1978), which case the letter described in some detail. (D&O 1, ALJD 4; GCX 11, Tr at 283-84.) The Company replied in writing that same day, asserting that it had no obligation to provide the Union with the requested information under *Westinghouse*. (D&O 1, ALJD 4; GCX 12, Tr at 286.) Towards the end of the day, the Union responded with a final letter contending that *Westinghouse* required only that it demonstrate the relevance of the wage and race data it was seeking and asserting:

> In the present case we are prepared to demonstrate precisely the relevance of the data ["statistics about the wages and racial make-up of other Frito-Lay plants" (GCX 13)] requested. Enclosed is an outline of Frito-Lay national pay rate average [the national wage list]. The outline in question shows the Jackson Frito-Lay plant at the bottom of the list. In other words the Jackson plant which has about a 90% black workforce and a workforce which is over 80% female is dead last in pay. Given Frito-Lay's recently documented history of invidious discrimination in hiring management personnel, disciplining workers and in other areas it is reasonable to suspect that the lowly position of the Jackson workforce with respect to pay rate average is at least in part based on race and or sex.

(D&O 1, ALJD 4; GCX 13). A retyped copy of the national wage list was attached to this letter and the Company, after reviewing the list, did not indicate that the information was inaccurate. (D&O 1, ALJD 4; Tr at 67-69.) At some point over the course of the 1997 contract negotiations, the Union also informed the Company that some unit members had visited other company plants and had observed that they employed a lesser percentage of black employees than the Jackson Plant. (Tr at 204, 230-31.)

On August 27, when the Company's representatives arrived for a scheduled bargaining session, Sussman noticed many people were present who were not involved in the negotiations. Suspicious, he asked to speak with Moore, who approached him accompanied by union attorney Lumumba and several other individuals. (D&O 1, ALJD 4; Tr at 259, 386.) Lumumba informed Sussman that the Union was recessing contract negotiations until the Company provided the outstanding requested information. In this conversation, Lumumba also referred to the history of racial discrimination at the Jackson Plant, the national wage list showing Jackson Plant employees to be the lowest paid on average, and the impression of Jackson Plant employees that other company factories they visited were predominantly white. After Sussman left, Lumumba repeated these comments to the news media. (D&O 1, ALJD 4-5; Tr at 259-62, 268-69.)

The Company never provided the requested national wage and race data to the Union, and the 1997 contract negotiations never resumed. On April 15, 1998, pursuant to the terms of the parties' extension agreement, the Company wrote a letter terminating the existing collective-bargaining agreement, effective April 28, 1998. (D&O 1, ALJD 5; RX 5.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act by failing to provide requested national wage and race information to the Union. (D&O 1, ALJD 6.) To remedy this unfair labor practice, the Board's order requires the Company to cease and desist from engaging in the unfair labor practice found and from, in any like or related matter, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O 1, ALJD 6.) Affirmatively, the Board's order requires the Company to provide the Union with the requested information and to post a remedial notice. (D&O 1, ALJD 7.)

SUMMARY OF ARGUMENT

This is a typical refusal-to-bargain case involving an employer's failure to provide information to its employees' bargaining representative. The Board here applied its longstanding, court-approved analytical structure for such cases to determine whether this failure was a violation of the Act and concluded that it

was. The Company's effort to present the Union's information request as extraordinary, and the Board's determination as an unsubstantiated departure from precedent, is unavailing.

An employer's refusal to provide its employees' union with requested information relevant to contract negotiations may constitute a refusal to bargain in violation of Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)). In cases involving information pertaining to non-unit employees, such as the wage and race data at issue in this case, a union must show the relevance of the requested data to trigger the employer's duty to produce it, and the Board's standard for analyzing whether the employer's duty was triggered is well settled. Accordingly, the Board here analyzed whether the Union had a rational basis related to its representational duties for requesting the information and whether the Company had notice of this basis. The Board answered both questions in the affirmative and found the Company in violation of the Act.

There is not any serious dispute that the Board applied the correct test in determining relevance. Instead, the Company's argument focuses on the Board's allegedly erroneous application of this standard to the facts of this case. To the contrary, ample evidence supports the Board's finding that the information requested in this case met the liberal, discovery-type relevancy standard which has

long governed such determinations, and that the Company had sufficient notice of the basis for relevance to be held accountable for its failure to produce the data.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. USPS*, 128 F.3d 280, 283 (5th Cir. 1997). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477; *see also Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). Likewise, a reviewing court must accord substantial deference to the Board's application of law to facts. *See USPS*, 128 F.3d at 283. Furthermore, with respect to the contested issue here, "[t]he Board's determination of relevance of the information sought in a particular case must be given great weight by the courts." *USPS*, 128 F.3d at 283 (quoting *NLRB v. Brazos Elec. Power Coop.*, 615 F.2d 1100, 1101 (5th Cir. 1980) and citing *E.I. Du Pont de Nemours & Co. v. NLRB*, 744 F.2d 536, 538 (6th Cir. 1984) (per curiam)).[5]

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[5] *See also NLRB v. New England Newspapers, Inc.*, 856 F.2d 409, 414 (1st Cir. 1988); *Oil, Chemical & Atomic Workers Union, Local 6-418 v. NLRB*, 711 F.2d 348, 360 & n.31 (D.C. Cir. 1983); *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863 (9th Cir. 1977).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY'S REFUSAL TO PRODUCE RELEVANT REQUESTED INFORMATION VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

Relevance is a threshold issue in any Section 8(a)(5) and (1) case involving the failure to provide requested information and the principle issue in the present case. The following discussion will first describe the well-established standard for determining the relevance of requested information, then demonstrate that ample evidence in the record supports the Board's finding that, based on facts known to the Company, the non-unit wage and race data at issue here meet this relevancy standard. In so doing, it will show that the Company's various arguments to the contrary are unavailing, and that one such argument is barred due to the Company's failure to raise it before the Board.

A. The Board's Longstanding Information-Relevancy and Employer-Notice Standards

Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5). An employer's refusal to provide its employees' union with requested information relevant to negotiations may constitute a breach of this statutory duty to bargain. *See NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. Leonard B. Hebert, Jr. & Co.*, 696

F.2d 1120, 1124 (5th Cir. 1983); *Pub. Svc. Elec. & Gas Co.*, 323 NLRB 1182, 1186 (1997), *enf'd*, *NLRB v. Pub. Svc. Elec. & Gas Co.*, 157 F.3d 222 (3d Cir. 1998).[6]

In the present case, there is no dispute that the Company has refused, and continues to refuse, to provide requested information to the Union, and the only defenses to production which the Company argued to the Board were that the information was not relevant and the Union did not explain the information's relevance to the Company. The instant case thus turns on whether, based on information available to the Company, the non-unit wage and race data the Union requested from the Company was relevant to the parties' 1997 contract negotiations.

Information pertaining to the terms and conditions of bargaining-unit members' employment is subject to a presumption of relevance. *See Press Democrat Publ'g Co. v. NLRB*, 629 F.2d 1320, 1324 (9th Cir. 1980); *Pub. Svc. Elec.*, 323 NLRB at 1186. Although no similar presumption applies to non-unit information, like the wage and race information at issue in this case, a union need only show relevance to trigger an employer's burden to produce the non-unit information. *See id*. Moreover, the union's burden is light because the applicable

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[6] A Section 8(a)(5) violation results in a "derivative violation" of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

information-relevancy standard is liberal and "discovery-like," rather than trial-like. *Acme*, 385 U.S. at 437 & n.6; *NLRB v. New England Newspapers, Inc.*, 856 F.2d 409, 414 (1st Cir. 1988); *Hebert*, 696 F.2d at 1124.[7]

More specifically, to establish non-unit information's relevance, a union must demonstrate "a 'probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" *Pub. Svc. Elec.*, 323 NLRB at 1186 (quoting *Acme*, 385 U.S. at 437); *see also Brazos Elec. Power Coop.*, 241 NLRB 1016, 1018 (1979), *enf'd, NLRB v. Brazos Elec. Power Coop.*, 615 F.2d 1100 (5th Cir. 1980).[8] Therefore, while a union's "mere suspicion" or "general theory" linking the requested information to a representational duty is insufficient, a union satisfies its relevancy burden if it demonstrates that it had a "reasonable basis," in the form of facts supporting its suspicion or theory, for believing the information relevant. *Hertz*

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[7] The Company quotes Member Hurtgen's statement that "the mere fact that a party wishes to make a certain contention in bargaining does not necessarily mean that the party is entitled to nonunit information to support the contention." (Br at 24, D&O 2). To the extent the Company understands this statement to place a higher burden on a union requesting information in pursuit of its duty to bargain than the demonstration of relevance described below, it provides no authority in support of this interpretation.

[8] *Cf. Press Democrat Publ'g Co. v. NLRB*, 629 F.2d 1320, 1325 (9th Cir. 1980) ("The argument that necessity constitutes a separate guideline has been squarely rejected.").

Corp. v. NLRB, 105 F.3d 868, 874 (3d Cir. 1997) (stating union had "to do more than state the reason and/or authority for its request," it had to inform employer of "*facts* tending to support its suspicion that [employer] might be discriminating"); *San Diego Newspaper*, 548 F.2d at 868-69; *Hebert*, 696 F.2d at 1124; *Pub. Svc. Elec.*, 323 NLRB at 1186-87.[9] The facts underlying a union's reasonable basis need not be accurate, reliable, or admissible at trial, and they need not be sufficient to prove the union's theory or suspicion correct. *See Hebert*, 696 F.2d at 1125; *Pub. Svc. Elec.*, 323 NLRB at 1186.

Finally, while unions are not required to articulate the precise relevancy rationale underlying their information requests, a boilerplate explanation that

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[9] The Company suggests (Br at 20, 24) that *San Diego Newspaper* and *Westinghouse*, 239 NLRB 106, require the Union to make an initial showing that the Company discriminated in wage-setting to transform its "suspicion" of such discrimination into a valid relevancy theory. In fact, as discussed above, the required factual basis for a union's relevancy theory is "minimal." *Hertz*, 105 F.3d at 874 (stressing union "did not need to demonstrate actual discrimination," but "needed only to communicate some reasonable basis for its *suspicion* that the employer *might* be engaging in discrimination") (emphasis in original); *cf. San Diego Newspaper*, 548 F.2d at 869 (no relevancy showing when no facts at all to support suspicion of violation). *Westinghouse* applies this same discovery-like relevancy standard. 239 NLRB at 106. More importantly, the Union's request was not made to aid the investigation or grievance of a contract violation, so there was no violation to prove. Rather, as demonstrated below (*see* p.19-23), the Union's relevancy theory centers on its preparation for contract negotiations. *Compare San Diego Newspaper*, 548 F.2d at 868 (requested information "could only be relevant . . . for purposes of determining if the Company had violated the

requested information is needed "to bargain intelligently" does not, in isolation, trigger an employer's duty to produce the information. To trigger this duty, either the requesting union or surrounding circumstances must provide the employer with knowledge of facts underlying the information's relevance. *See Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1099 (1st Cir. 1981) ("[W]here the relevance of the requested non-unit information is obvious in the context of the negotiations, the company cannot resist disclosure simply because the union has failed to make a formal presentation of its theory of relevance."); *Island Creek Coal Co.*, 292 NLRB 480, 490 & n.19 (1989), *enf'd*, *Island Creek Coal Co. v. NLRB*, 899 F.2d 1222 (6th Cir. 1990) ("[T]he adequacy of the requests to apprise the [employer] of the relevance of the information must be judged, not from the communications alone, but in the light of the entire pattern of facts available to [it]."). Once such actual or constructive notice is presented, the employer's failure to produce relevant, requested, non-unit information violates the Act. *See Brazos Elec. Power Coop.*, 241 NLRB at 1018 ("[W]here the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out, the employer is obligated to divulge the requested information.").

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collective bargaining agreement" because it concerned non-unit employees and the parties were not conducting any negotiations).

As discussed in detail below, the Union in this case requested the information at issue to prepare itself for wage negotiations. Specifically, the Union sought the wage and race data in an effort to confirm or disprove its suspicion, grounded in anecdotal evidence, that the Jackson Plant workforce was both the most predominantly black and the lowest paid of those working at the Company's production plants nationwide and to bargain for consideration of company-wide wage parity. Thus, its intent was to use the data better to define reasonable wage expectations and more clearly to understand its representational duties. Although the Union may not have articulated its relevancy rationale as well as possible, its communications, combined with the circumstances of the parties' negotiations, ensured that the Company was in possession of sufficient information to understand the "reasonable basis" of relevance underlying the Union's information requests no later than the end of August 1997.

B. Substantial Evidence Supports the Board's Finding That the Requested Information Was Relevant and that the Company Had Notice of the Union's Relevancy Theory, and of the Reasonable Basis Underlying It

From the outset of negotiations, the Union made clear to the Company its intent to bargain for a new wage-setting policy, based on wages at the Company's other plants rather than local market conditions. (D&O 1, ALJD 5.) Specifically, in January 1997, shortly before the parties' formal negotiations began, the Union sent a list of proposals to the Company that included a proposal for a "substantial

across the board wage increase" and one to bring the Jackson Plant's wages "up within the top ten (10) Frito-Lay plant wages." (GCX 6, Tr at 48-49). Consistent with this intent, when the parties first exchanged specific economic offers in May, the Union proposed a five-dollar-per-year increase over the future contract's three-year term. (D&O 1, ALJD 4; Tr at 49, 370.)

Thereafter, in August, the Union sent the Company a letter that unequivocally linked its interest in the race data to its interest in the wage data. (GCX 13.) Specifically, this letter both explained the concerns underlying the Union's information requests to the Company and informed the Company of some of the factual basis for these concerns. It explicitly spelled out the Union's suspicion that the Jackson Plant's workforce was the Company's worst-paid nationwide, in part because the workforce was predominantly black. It also reiterated the Union's intent to bargain for the inclusion of some element of national, inter-plant parity into the Company's wage-setting policy.

Thus, the Union's intent to bargain for a measure of wage parity with the Company's other plants rendered the requested non-unit wage information relevant to the Union's duty to negotiate wages. *See E.I. DuPont de Nemours & Co. v. NLRB*, 744 F.2d 536, 538-39 (6th Cir. 1984) (wage data on other Du Pont textile plants relevant to union representing workers at one Du Pont textile plant "for the avowed purpose of seeking a new method for setting wages," despite Du

Pont's declared policy of negotiating each plant's wages according to local market); *E.I. Du Pont de Nemours & Co.*, 264 NLRB 48 (1982).[10] Likewise, the Union's reasonable, factually based concern about a correlation between wage and race disparities at company plants nationwide further contributed to the relevance of the wage data while also rendering the race data relevant.

Specifically, if the requested wage and race data had confirmed the Union's suspicion of a correlation between wage and race disparities at the Company's plants nationwide, the Union would have had a particular – and persuasive – reason to oppose continuing application of the Company's longstanding wage-setting policy. Such information would also arguably have obliged the Union to refuse wage offers perpetuating racially disparate compensation unless the Company provided some proof that the wage differential stemmed from non-discriminatory causes. Moreover, confirmation of the Union's suspicion might have placed certain pressures on the Company – to provide such proof to the

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[10] *Westinghouse* does not, as the Company suggests (Br at 22), "illustrate[] . . . that nationwide statistics can be o[f] no use to a local union bargaining a local contract." This issue did not arise in *Westinghouse*, which involved an information request by a national union committee – as the Company itself points out – and in which the requested information was alleged to be relevant to the investigation of possible violations of the Company's contractual obligation not to discriminate.

Union, or to reexamine its policies to ensure any plant-to-plant wage disparities in fact resulted solely from nondiscriminatory factors.

Conversely, the requested information could have definitively *disproved* the Union's suspicion of a race correlation to wage disparities between plants, which could have facilitated wage negotiations by allowing the Union more flexibility to agree to reasonable wages without worrying about the implications of such agreement on its duty to guard against discrimination. *See Westinghouse*, 239 NLRB at 107 (unions have duty to protect members against discrimination by employers). The Company's apparent assumption that this would not in fact have been the case does not undermine the data's potential to prove this negative, and corresponding relevance.

The Union's August 26th and 27th communications to the Company fully apprised the Company of the factual basis for the above-described relevancy theories. The second August 26th letter asserted the Jackson Plant's workforce was 90 percent black, referenced and attached the national wage list showing the Jackson plant to be the worst-paid of the Company's plants nationwide, and alleged that the Company had recently engaged in discriminatory practices. Union attorney Lumumba then further explained this factual basis in the course of reiterating the Union's relevancy rationale to company negotiator Sussman on August 27th. Specifically, Lumumba referred to a recent court judgment finding

that the Company had engaged in a pattern of racial discrimination. He also noted that on visits to company plants elsewhere in the country, union members had observed that the other plants had fewer black employees than the Jackson Plant – a fact which the Union had also mentioned to the Company during negotiations.

In sum, the Union's written and verbal communications to the Company before and during the 1997 negotiations fully set forth the Union's theories as to why the non-unit wage and race data were relevant, and provided the Company with adequate notice of the factual basis underlying the information requests, thereby triggering its duty to produce the information. Accordingly, the Company violated Section 8(a)(5) and (1) of the Act by failing to provide the requested information.

The Company's reliance on the Sixth Circuit's footnote number 3 in its effort to distinguish *Du Pont* is misplaced. That footnote merely highlights the Board's discretion in determining the relevance and appropriate scope of information requests. *See DuPont*, 744 F.2d at 538-39 n.3 (enforcing Board order to disclose non-unit wage information for all company plants with similar production, but stating that this "is not to say that the Board might not reasonably have limited its requirement of information production to fewer textile fibers plants nearest to [the unit plant] in size and geographic location *if it had believed that course to be warranted*") (emphasis added).

Indeed, contrary to the Company's suggestion (Br at 30), the Board decision enforced by the Sixth Circuit in *Du Pont* found non-unit wage information relevant to unit wage negotiations irrespective of geographic proximity. The Board cited the *apparent* similarity of work, based in part on unit-member observation of a couple of plants, and the union's need for the information to formulate an intelligent alternative to Du Pont's wage proposal. *See Du Pont*, 264 NLRB at 50, 52 (similarity of work adequately established by evidence that "some of the other nine textile fiber plants have similar steps of product manufacture" to the unit plant, requiring similar worker skills and experience); *see also DuPont*, 744 F.2d at 538-39 (accepting the Board's relevancy finding).[11]

C. The Company's Efforts to Demonstrate the Irrelevance of the Requested Wage and Race Data Are Unavailing

The Company makes two principal arguments in an attempt to challenge the Union's relevancy theories for the wage and race data. First, it asserts that the Union could not draw any legitimate conclusions from the requested data, analyzed in isolation. Second, it contends that its undisputedly local focus in

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[11] Likewise, despite the Company's focus on geography in its discussion of *Press Democrat* (Br at 30), both the Board and the Ninth Circuit actually found the similarity of the work performed by unit and non-unit employees to be the "determinative factor" in that case. 629 F.2d at 1325-26.

setting wages renders national information irrelevant.[12] Both of these contentions are unavailing.

1. There is no merit to the Company's argument that the requested information is irrelevant because it might give the Union an incomplete picture of the Company's wage-setting policy

The Company asserts (Br at 21, 23, 27-29) that the requested wage and race data are not relevant absent proof that the Jackson Plant workforce is similarly situated to its other workforces. Specifically, it argues that without such proof, confirmation that the Jackson Plant employees are "more black" and lower paid would be meaningless because it would not allow the Union to draw a definitive conclusion about whether racial discrimination played any role in setting the Jackson-Plant wages. In essence, the Company asks this Court to find that because the requested data would provide only some of the pieces to a puzzle, they

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[12] The Company also contends (Br at 31) that the judge erred in reasoning that the requested national data were relevant because the Company had presented the Union with national performance data to prove a point during negotiations. The judge is better understood, however, as opining that the Company's assertion that non-local data are irrelevant is disingenuous in light of its own willingness to use such data when convenient rather than as a finding that the Company's use of non-local data rendered the Union's request relevant. *See* D&O 1, ALJD 5 ("When it suited [the Company's] purposes, as when criticizing performance at the Jackson [P]lant, [the Company] used statistics for comparison."). In either case, ample evidence in the record – unrelated to the Company's use of non-local data – supports the Board's relevancy finding.

are irrelevant to the Union's effort to solve that puzzle.[13] This argument is both legally and factually unsupported.

Legally, the Company's argument is flawed because it depends on a trial-like, rather than the applicable discovery-like, relevancy standard described in detail above (*see* p.16-17). This flaw is highlighted by the Company's attempt to analogize (Br at 23) the Union's relevancy burden to a Title VII plaintiff's *trial* burden of showing that a favored co-worker was similarly situated to the plaintiff aside from membership in the same protected class.[14] However, as the Company itself acknowledges (Br at 20-21), it is well settled that requested information need not be dispositive of the issue underlying the request in order to be relevant. *See Holiday Inns, Inc.*, 317 NLRB 479, 481 (1995); *see also Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983) ("[A] union 'need not demonstrate that the information . . . is certainly relevant or clearly dispositive of the basic . . . issues between the parties. The fact that the

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[13] The Company spends considerable energy explaining (Br at 21-23, 28-31) that many factors – e.g., local costs of living, demographics, and labor markets – affect wages and racial composition at a particular plant. To the extent that the requested data could, alone, lead the Union incorrectly to conclude that the Company's wage-setting policies are discriminatory, the Company is of course free to supply the Union with additional information, such as local costs of living, to aid the Union in analyzing the wage and race data.

information is of probable or potential relevance is sufficient to give rise to an obligation . . . to provide it.'") (quoting *Westinghouse*, 239 NLRB at 107 (footnote omitted)).

More importantly, in its application of this overly stringent relevancy standard, the Company has not used the actual facts of this case. Thus, the Company's analysis presumes that the wage and race data were requested to aid an investigation of a suspected discrimination violation. On the contrary, as described above (*see* p.21-22), the information is relevant because of its potential to aid the Union's wage-negotiation preparations by tending to confirm or disprove its suspicion of a correlation between inter-plant wage and race disparities. It could also cause the Company to reexamine its wage-setting policy. In other words, the requested data need not prove that the Company engages in discriminatory pay practices in order to be relevant, or meaningful to the Union in the fulfillment of its representational duties.

2. The Company's policy of determining wages based on local market conditions and local bargaining history does not render the requested data irrelevant

The Company has consistently maintained that the wages at the Jackson Plant are based solely on local market conditions and local bargaining history, and

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[14] While a Title VII plaintiff must show at trial that her comparators are similarly situated to her, she need not demonstrate such similarity to discover

the Union has not contested the existence of this avowed policy. Therefore, the Company asserts (Br at 21, 23, 27-29) that information pertaining to its other plants is irrelevant to Jackson Plant wage negotiations. As described above (*see* p.19-20), however, the Union's communications relative to its information requests and during negotiations were sufficient to put the Company on notice that the Union was not satisfied with the Company's policy of setting wages according to those paid by certain local comparator employers and sought the wage and race data in an effort to call this policy into question and change it. The Company presents no authority for its contention that its longstanding local-market wage policy insulates or renders irrelevant information sought by the Union in an effort to change the policy or call it into question.

Moreover, the Company's related argument (Br at 32), that the Union is not entitled to the requested information because it does not need the data to advocate a change in the Company's wage-setting policy, is equally unavailing. Although the Union could have challenged the Company's policy without the wage and race data, there is no question that, as described above (*see* p.21-22), the data would have aided the Union's evaluation of its negotiating position – by helping its decision whether *or not* it wanted to, or was required to, pursue its challenge to the

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information about potential comparators during the discovery phase of her case.

wage-setting policy – and could have given the Union ammunition in its battle to change the policy.

D. The Company's Efforts to Demonstrate the Inadequacy of the Union's Factual Basis Fail

The Company contests both the sufficiency and the reliability of the evidence underlying the Board's finding of a reasonable basis for the relevancy theories supporting the Union's information requests. Of course, as detailed above (*see* p.17), the factual basis for the relevancy theory underlying an information request need not be either sufficient to prove the theory at trial or accurate. As detailed below, each of the Company's challenges to the Union's relevancy basis is either legally or factually incorrect.

First, regarding the Union's basis for suspecting disparate pay between plants, the Company points out (Br at 25) that the national wage list is both unauthenticated and out of date, and that the Union created the actual wage list attached to its second August 26th letter. On the contrary, despite its age, the national pay list is probative insofar as it indicates that the Jackson Plant was, at the time of the list's creation, the lowest-paid company production facility. Given the absence of any evidence showing a dramatic pay raise at the Jackson Plant since then, the list provides the Union with a reasonable basis to suspect its members are still among the Company's lowest-paid plant employees.

As to the list's authenticity, the evidence underlying a union's information request need not be iron-clad, as discussed above. Moreover, the Company was presented with the list on at least two occasions – during the 1993 and 1997 contract negotiations – and never challenged its validity. This repeated failure to challenge the list may not constitute an admission of its ultimate authenticity or accuracy, but did give the Union reason to rely on the list.

Second, with respect to the facts underlying the Union's belief that other company plants were "mostly white" (Tr at 204), the Company notes (Br at 24-25) that only two union members made observations in plants in a single geographic region, and argues that, in any case, this anecdotal evidence of disparate racial compositions is unreliable, given that similar estimates regarding the Jackson Plant's gender composition were inaccurate. As a matter of law, the Board and several courts have considered employee observations when analyzing bases for information-relevancy theories. *See, e.g., Pub. Svc. Elec.*, 157 F.3d at 229 (observations of the number, job duties, and supervision of contract workers at job site gave union reasonable basis to suspect they were doing unit work); *Hebert*, 696 F.2d at 1123-24 (reasonable basis included job site observations); *Du Pont*, 264 NLRB at 52 (observations of manufacturing process on walk-through basis for belief that job duties and skill requirements were similar). Factually, the record here indicates that more than two employees observed inter-plant racial-

composition disparities, though only two witnesses testified on the subject at the administrative hearing.[15]

Finally, the Company argues (Br at 25-26) that the evidence of recent discrimination at the Jackson Plant is not probative because some incidents mentioned by the Union were not particularly recent and none involved wage discrimination. In support of this proposition, however, it relies exclusively on two individual employment-discrimination, not labor, cases analyzing the admissibility of evidence at trial. *See Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986) (Title VII and §1981); *Blount v. Alabama Co-op Extension Svc.*, 869 F.Supp. 1543 (M.D. Ala. 1994) (Title VII). As discussed above (*see* p.16), the standard for information relevance – and certainly for determining whether given facts may reasonably contribute to a union's relevancy theory – is substantially more relaxed than the standard for admitting evidence at trial. In light of the liberal standard of relevance applicable here, and the fact that the Union's information request constituted a search for a more informed bargaining stance rather than an attempt to prove a particular violation, there is no merit to the

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[15] *See* Tr at 200, 204, 218-31. There is also evidence that the race-composition observations were not all made in close proximity to the Jackson Plant. *See* Tr at 201, 219-20, 226, 229-30, 289 (noting visits to plants in Michigan, Florida, Kentucky, North Carolina, Texas, Ohio, and Georgia). In any case, geographic proximity would only have added to their significance, as the Company argues (Br at 29-30) in another context.

Company's contention that the various incidents of alleged and adjudicated discrimination at the Jackson Plant do not properly figure in the analysis of the requested information's relevance.[16]

E. The Court Does Not Have Jurisdiction to Consider the Company's Argument, Not Raised before the Board, That the Allegedly Unreasonable Scope of the Information Requests at Issue Justify Its Failure to Produce Relevant Information

In its brief (Br at 34-36), the Company argues that even if the wage and race data requested by the Union are relevant, and even if it had notice of this relevance, its failure to produce the information did not violate the Act because, it baldly asserts, "[t]he request requires the production of an enormous amount of substantive data." (Br at 35.) This argument is barred and it fails on the merits.

Under Section 10(e) of the Act, this Court does not have jurisdiction to consider issues not raised before the Board, absent extraordinary circumstances. 29 U.S.C. § 160(e); *see also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Houston Bldg. Svcs., Inc.*, 128 F.3d 860, 863 (5th

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[16] Likewise, the fact that the Union has not filed a Title VII claim is irrelevant both under the facts of this case – in which the Union's relevancy theory stems from its duty to negotiate wages rather than its duty to investigate suspected discrimination – and as a matter of law. *Cf. Hebert*, 696 F.2d at 1125 (union need not file unit clarification petition with Board in order for related information request to be relevant); *Westinghouse*, 239 NLRB at 111 (availability of remedies for discrimination under Title VII does not restrict union's right under the Act to relevant information about possible discrimination by employer).

Cir. 1997) (bar is "mandatory not discretionary") (quotations omitted). In this case, the judge found that the Company's failure to produce the requested information violated the Act. In its exceptions to the judge's findings, filed with the Board, the Company challenged the judge's findings that the information was relevant and that the Company had notice of this relevance. However, it did not argue in the alternative that even if these findings were correct, it had no duty to comply with the Union's information requests because "[t]here is no per se rule requiring disclosure even if relevance can be shown" and "relevance does not necessarily predominate over other legitimate interests." (Br at 34.) The Company's failure to raise this issue before the Board and to afford the Board an opportunity to consider it cannot be considered exceptional circumstances under *Woelke*. 456 U.S. at 666 (Section 10(e) bar applies to issues decided by the Board if not raised in exceptions to the judge's decision or motion for reconsideration).

In any event, the Company's argument fails on the merits. First, there is no evidence that the Union's information requests were extraordinary. Moreover, the Company never told the Union that it had any objections to the requests other than on relevancy grounds, nor did it propose – or give the Union the opportunity to propose – any sort of accommodation to address its concerns regarding the requests' magnitude. *Cf. Safeway Stores, Inc. v. NLRB*, 691 F.2d 953, 957-58 (10th Cir. 1982) (employer's failure to produce relevant information violated Act

when requesting union offered to cover only cost objected to by employer and confidentiality concern could be resolved by deleting complainants' names when producing complaints). Having failed to raise these concerns to the Union in a timely manner, the Company cannot now complain.

CONCLUSION

For the foregoing reasons, the Board respectfully asks that the Court enter a judgment denying the Company's petition for review.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 37(a)(7)(c), the Board certifies that its brief contains 8,162 words of Times New Roman (14 point) proportional type.

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Dated at Washington, D.C.
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