

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

Advice Memorandum

DATE: December 1, 1997

TO : Gerard P. Fleischut, Regional Director
Region 26

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Frito Lay 530-6067-6001-3730
Case 26-CA-18235 (formerly 15-CA-14461) 530-6067-6001-3760
530-6067-6001-3780
530-6067-6001-7900

This case was submitted for advice as to whether the Employer's failure to comply with the Union's request for statistical wage, race and gender information concerning nonunit employees violated Section 8(a)(5).

The parties are in negotiations for a successor agreement at the Employer's Jackson, MS plant. The Union made various information requests, including a request for statistical information relating to race and gender and wages for employees at the Employer's forty other facilities. The Employer refused to supply this information contending that this non-bargaining unit information is not relevant to wages set according to the Jackson, Mississippi labor market.

The Union asserts it is attempting in its current economic proposal to bring the Jackson wages up within the top ten Frito Lay plants, and that the requested information is necessary to demonstrate whether or not there is a correlation at Frito Lay between low wages and high percentages of females and Blacks in the work force. In that regard, information already provided to the Union demonstrates that the Jackson plant has a 90 percent Black work force and an 80-85 percent female work force, while pay scale information from 1992 ranks the Jackson plant last out of the Employer's 40 facilities in pay rates. The Union contends further that it has evidence which demonstrates that whites at the Jackson plant tend to have higher paying positions, and that the plants outside of Jackson have smaller percentages of Black and female workers. Moreover, the Employer has been found liable in Federal Court for racial discrimination against Black employees at the Jackson facility. There is no evidence that employees at the other facilities possess skills or perform work different from those at the Jackson operation.

We conclude, in agreement with the Region, that the Union has established "the 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."¹

In Westinghouse Electric Corporation,² the Board reaffirmed the principle that elimination of race or sex discrimination practices is a proper subject of bargaining, and held that information requests for statistical race, gender and wage data of unit employees were presumptively relevant. However, the Board in Westinghouse also noted that with regard to requests concerning information outside the bargaining unit the union "must ordinarily demonstrate more precisely the relevance of the data requested."³ The Board then concluded that the union had failed to make the appropriate relevancy showing for the statistical information it had requested on nonunit employees, i.e., a breakdown by race, sex, and Spanish surname with respect to labor grade, classification and wage rate.⁴

The holding in Westinghouse, as it concerns nonunit employees, is based on factual circumstances which are readily distinguishable from the instant case. Thus, the union in Westinghouse was not requesting the information "in order to determine whether there is actual or apparent discrimination within [the relevant unit],"⁵ a circumstance which the ALJ indicated may have demonstrated relevance for the requested information. In sharp contrast, the Union's stated purpose for the information here is to address an asserted wage discrepancy within the unit, albeit as measured against wages paid for comparable work outside the unit. And the Union has information which lends some credence to an assertion that there is a connection between race and gender discrimination and this low wage scale,

¹ Ohio Power Co., 216 NLRB 987, 991 (1975), citing NLRB v. Acme Industrial Co., 385 U.S. 432 at 437 (1967).

² 239 NLRB 106, 107-110 (1978), enfd. as modified 648 F.2d 18 (D.C. Cir. 1980).

³ Id. at 110.

⁴ Id.

⁵ Id. at 136.

particularly given this Employer's past history of discrimination. In that regard, the Board has in the past required the provision of similar information with regard to nonunit employees where its relevancy has been shown.⁶

Nor may the Employer defend against the potential relevancy of this information by asserting that its policy is to set wages according to the local labor market, or that there are possibly other explanations for the apparent disparity in wages between the Employer's facilities. The first proposition was specifically rejected in E.I. Du Pont De Nemours, 264 NLRB 49, 50-51 (1982), where the Board concluded that nonunit wage information was relevant in order to help the Union formulate a wage policy which was different from the Employer's local labor market wage policy. As to the latter proposition, it may be true that other factors account for the disparity in wages.⁷ However, without the requested information, the Union would not be in a position to determine where the Jackson plant now ranks in wages among Employer facilities, and whether there is a correlation between wages and race and/or gender.

In all these circumstances, including the data already in the Union's possession establishing a potential linkage between race and gender and wages, as well as this Employer's past history of discrimination, we conclude, in agreement with the Region, that the Union has demonstrated more than a mere "suspicion" upon which to base its request, and, indeed, has presented an objective factual basis for its need for this information.⁸ Consequently,

⁶ See New York Post Corp., 283 NLRB 430, 430 n.2 (1987) (Board approved ALJ's finding that Respondent violated Section 8(a)(5) by its failure to provide information relating to equal employment opportunities of nonunit employees).

⁷ The Employer argues that since the wages at the Jackson facility were collectively bargained, the Union shares the responsibility for the low wages. This argument simply is not germane to the question of whether or not the Union has now made a relevant request for non-bargaining unit information.

⁸ Cf. Bohemia, Inc., 272 NLRB 1128 (1984) (employees' mere "suspicion" that work had been transferred, insufficient to get information on employer's nonunion facility where there

complaint should issue, absent settlement, alleging that the

was no "objective factual basis for believing such transfer occurred").

Employer's failure to respond to this request violates Section 8(a)(5).

B.J.K.