

John D. Nelson, Regional Director
Region 19

June 29, 1990

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| Harold J. Datz, Associate General Counsel | 530-6067-6001-3730 |
| Division of Advice | 530-6067-6001-3780 |
| | 530-6067-6067-6017 |
| Nordstrom, Inc. | 530-6067-6067-6400 |
| Case 19-CA-20696 | 530-6067-6067-7900 |

This case was submitted for advice as to whether the Employer must disclose to the Union information regarding the racial composition of the Employer's supervisory workforce.

FACTS

The United Food & Commercial Workers, Local 1001 (the "Union") has represented Nordstrom's (the "Employer") sales personnel for many years. The most recent collective bargaining agreement expired in July, 1989.¹ It contained a "non-discrimination clause that stated: "no employee or potential employee shall be discriminated against for reason of race, creed, color, age, sex, national origin, religion, or irrelevant physical or mental handicap." The parties are in the process of negotiating a new agreement.

The Union suspects that the Employer has been discriminating against black unit employees, in violation of the terms of the collective bargaining agreement and the Employer's obligations under law. In a letter to the Employer on September 1, in connection with the Union's investigation of a grievance alleging discriminatory wrongful discharge, the Union requested the following information:

1. A copy of the most recent report completed by the management consulting firm Myriad Systems and Services, Inc. regarding the status of minority recruitment, employment and promotion by Nordstrom.
2. A copy of Nordstrom's affirmative action plan, as well as dates and descriptions of any changes in the plan since September 1, 1986.
3. A list of all Nordstrom supervisory personnel currently employed in all represented stores and their "ethnic identifications."

¹ All dates hereafter are in 1989, unless otherwise indicated.

4. A list of all employees in bargaining units represented by the Union and the hire date, status, employing department, geographic location and race of each.

In a letter to the Employer on December 6, the Union reiterated its request for the Myriad Systems & Services, Inc. report (the "Myriad Report") and informed the Employer that the Report was "necessary to an evaluation of the parties' positions on a number of issues in the current [contract] negotiations, including non-discrimination, discipline and discharge, scheduling of work assignments, and other issues." The Employer did not respond to either the September 1 or December 6 letter.

Shortly after the Union mailed the December 6 letter, it acquired a copy of the Myriad Report from another source. The Report is the product of a consulting firm's evaluation, at the Employer's request, of the Employer's "minority relations problems," which had been evidenced most apparently by the large number of race discrimination complaints that had been filed by employees. Among its "observations" regarding the causes of the Employer's minority relations problems, the Report states that "there is a significant discrepancy between the percentage representation of minorities at entry level positions and at the management level" and that this result is "incongruous" given the facts that black frontline staff receive a disproportionately high number of "All-Star" program merit awards and that most promotions to management are from the ranks of frontline personnel.² The Report also states that Nordstrom managers have little experience and training in personnel policy, that the company does not maintain clear and objective personnel guidelines, and that inexperienced managers are vested with almost absolute authority to make hiring and promotion decisions. As a result, managers make decisions that "violate the due process and/or civil rights of employees."

On December 21, the parties held a contract negotiation session at which they discussed, inter alia, minority discrimination issues. The parties agree that at this meeting the Union orally reiterated its request for the balance of the information specified in the September 1 letter (i.e., for everything but the Myriad Report, which the Union had already obtained). In a January 12, 1990 written response to this latest request, the Employer agreed to provide racial information regarding unit employees but

² Although it is clear that Myriad had access to statistics regarding the numbers of minorities at each management level, the Report does not divulge these figures.

refused to provide any such information regarding non-unit personnel.³ The Employer has continued to claim that the Union is not entitled to demographic information regarding non-unit personnel.

The Union asserts that it needs to know the racial composition of the supervisory workforce in order to determine whether minority unit employees are being fairly promoted. The Union is also interested in knowing whether the "inexperienced and inadequately trained" Nordstrom managers (referred to in the Myriad Report), who have been responsible for making subjective personnel decisions, are predominantly Caucasian. The Union claims that it has suspected that Nordstrom is discriminating against racial minorities and that the Myriad Report has reinforced these suspicions by noting the Employer's poor record of minority representation in management and its decentralized, nonstandardized, and highly subjective personnel practices.

ACTION

We conclude that complaint should issue alleging that the Employer violated Section 8(a)(5) by refusing to furnish the Union with information regarding the racial composition of the supervisory workforce.

It is well established that an employer must provide a union with requested information "if there is a probability that such data is relevant and will be of use to the Union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative."⁴ The Board has said that information must be disclosed if it is probably or potentially relevant and useful, as judged by a liberal discovery-type standard.⁵

Information relevant to issues that affect the terms and conditions of employment for unit employees may be as

³ The Employer has also provided its one paragraph "Affirmative Action/Equal Employment Opportunity Philosophy" statement. The Employer has denied that it maintains a more detailed affirmative action plan and the Region, crediting this denial, has not submitted this issue to Advice. We note, however, that the Nordstrom-Myriad consulting agreement, dated June 26, 1987, states that Myriad will "review on a store-by-store basis the affirmative action plans and related policies." The Myriad Report also refers repeatedly to the "employer's affirmative action plan." Thus, the Region should determine whether the Employer has properly interpreted the Union's request (e.g., the Employer may have improperly interpreted the request as seeking only company-wide rather than store-by-store affirmative action plans).

⁴ Associated General Contractors of California, 242 NLRB 891, 893 (1979), quoting from NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967).

⁵ Westinghouse Electric Corp., 239 NLRB 106, 107 (1978), modified and enfd, 648 F.2d 18 (D.C. Cir. 1980); New York Post Corp., 283 NLRB 430 (1987).

necessary to a union's performance of its representational duties as is information about unit employees. The only difference in the Board's evaluation of requests for unit employee information and requests for other types of information is that information directly pertaining to employees in the bargaining unit is considered to be presumptively relevant, while the union must demonstrate the relevance of other types of information by reference to the circumstances of the case.⁶ The ultimate question to be addressed in every information request case is whether, under a liberal discovery-type standard, the information has some bearing on an issue between the parties and would be reasonably useful to the union in providing effective and intelligent representation of the employees.⁷ Furthermore, the Board has repeatedly held that a union need not demonstrate to the employer the "special relevance" of non-unit information so long as the union's rationale in seeking such information is evident from the surrounding circumstances.⁸

Where unions have requested non-unit information in order to explore suspicions that employers are discriminating in their hiring, treatment or promotion of unit employees, the Board has required disclosure so long as the union has some objective basis for its concern and the information sought would shed light on the union's claims.⁹

In New York Post, the union had requested race and sex information regarding the employer's managerial personnel as part of its effort to assess the employer's promotion record. The union claimed it was concerned about race and sex discrimination because there had been a decline in minority representation in the top pay groups and there had been several complaints by unit members regarding possible

⁶ Westwood Import Co., 251 NLRB 1213, 1226-27 (1980); New York Post, supra, at 435.

⁷ See United State Postal Service, 289 NLRB No. 123, slip op. at 3 (1988); Ironton Publications, Inc., 294 NLRB No. 73, slip op. at 2, ALJD at 5 (1989); Conrock Co., 263 NLRB 1293, 1294 (1982).

⁸ See Brazos Electric Power Cooperative, 241 NLRB 1016, 1018-19 (1979); Brooklyn Union Gas, 296 NLRB No. 85, ALJD at 9-10 (1989).

⁹ See New York Post, supra, at 430, fn. 2, 434-436; East Dayton Tool and Die Co., 239 NLRB 141, 142 (1978). See also Star Tribune, 295 NLRB No. 63, slip op. at 16-20 (1989) (discrimination in hiring vitally affects unit employees and therefore information the union requested regarding applicants to determine whether disparities in drug testing procedure had led to sex discrimination was presumptively relevant); Bendix Corp., 242 NLRB 62, 63 (1979). Cf. Brooklyn Union Gas, supra, ALJD at 9-11. Although Safeway Stores, 240 NLRB 836 (1979), on which the Employer relies, has not been expressly overruled, the Board's decision there that the union's representational role did not extend to policing promotions from the unit to management is directly inconsistent with more recent Board authority.

discrimination.¹⁰ The ALJ, affirmed by the Board, ordered disclosure because the union had some objective basis for its concerns and the information would shed light on the union's claims and would enable the union to evaluate potential grievances and prepare contract language designed to preclude future discrimination. In fact, the union had made an "excellent showing that data regarding non-unit employees is needed, for without it the existence of a pervasive pattern of discrimination is not likely to be verifiable."¹¹

Here, it is clear that the Union has an objectively based, reasonable concern that the Employer is discriminatorily denying promotion to minority unit employees. The Myriad Report - created by an independent third party on behalf of the Employer - concludes that minorities are underrepresented in the Employer's management hierarchy and that the Employer's personnel policies may allow discrimination by inexperienced junior management. The Union's request for supervisory demographic information is a narrowly-tailored request for information likely to shed light on the discrimination issue. Thus, the Union clearly needs the information in order to fulfill its statutory duties of protecting bargaining unit employees from unlawful discrimination, policing the non-discrimination clause of the collective bargaining agreement, and negotiating appropriate safeguards in the next agreement. Moreover, the rationale for the request should have been apparent to the Employer, as the parties are in the process of negotiating contractual terms regarding race discrimination in hiring and promotions.

Accordingly, the Region should issue an 8(a)(5) complaint, absent settlement, alleging that the Employer has unlawfully refused to provide information to the Union.

H.J.D.

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¹⁰ None of these complainants filed formal grievances alleging discriminatory denial of promotion.

¹¹ See also East Dayton Tool & Die, supra at 8. 142 (union's request for race and sex information regarding applicants was adequately based on its awareness that employer employed no women and only three blacks in a 105 employee unit).