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

DATE: October 7, 2015

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: KGW-TV
Case 19-CA-148474

530-6067-6001-0000
530-6067-6001-3780
530-6067-6067-2000
530-6067-6067-2800
530-6067-6067-3100

The Region requested advice as to whether the Employer violated Section 8(a)(5) by failing to furnish specific financial, industry, and corporate information that the Union requested during contract negotiations. We conclude that the Employer was required to provide the Union with the requested information under *Caldwell Manufacturing Company*[1] so that the Union could meaningfully evaluate and respond to the Employer's specific economic claims. In addition, although we conclude that the Employer's refusal to provide the information violated Section 8(a)(5) under current Board law, the Region should also use this case as a vehicle to urge the Board to adopt a new approach to "inability to pay" cases as set forth in the *Rotek, Incorporated* Advice Memorandum.[2] The Region should therefore issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) under both legal theories.

## FACTS

KGW-TV ("the Employer") is a local NBC affiliate in Portland, Oregon. The Employer was one of 20 broadcast television stations formerly operated by Belo Corporation. In 2013, Gannett Company purchased Belo but, because of Federal Communication Commission ("FCC") antitrust regulations, is required to manage the Employer through a separate operator, Sander Operating Company III, LLC.

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[1] 346 NLRB 1159 (2006).

[2] Cases 08-CA-099704, et al., Advice Memorandum dated November 26, 2013.

Recently, Gannett created a separate company called Tegna to manage its digital and broadcast operations.

IBEW, Local 48 ("the Union") has long represented the Employer's broadcast operators, maintenance engineers, and directors. The parties' most recent contract is dated October 24, 2011 to July 31, 2014[3] but remains in effect.[4] In June, the parties began bargaining for a successor contract. The Employer's initial July 16 bargaining proposal contained numerous concessions, such as: eliminating certain jurisdictional language, removing restrictions on subcontracting, requiring the disclosure of information on the use of temporary employees only if requested, replacing certain job classifications with a new classification and pay scale, changing overtime eligibility, and removing successors' requirement to assume the contract. The Employer also wrote that it wished to discuss "Belo benefits converting to Gannett benefits." The Employer has consistently told the Union that its proposal is based on its need for flexibility in a changing marketplace, including the expansion of internet-based media competition, new and different customers of the millennial generation, and the changing forms and media of advertising.

On July 30, the Union gave the Employer a multi-page request for information. Included therein, under a heading labeled "Broadcast Trends," the Union requested information, dating back to October 24, 2011, about: (a) the Employer's market share, ratings, and viewership; (b) Employer revenue; (c) Employer expenses; (d) competition from internet-based media outlets; and (e) changes in advertising placement and revenue. Additionally, under a section titled, "Effect of Recent Corporate Restructuring," the Union asked for: (a) documents concerning the Employer's relationship with Sander; (b) documents concerning Gannett's operation of the Employer through Sander or others; (c) bylaws and articles of incorporation for the Employer, Gannett, and Sander; (d) shareholder information for the Employer, Gannett, and Sander; (e) valuation documents detailing the effect of the corporate sale and restructuring on the three companies; (f) correspondence describing the effect of the corporate sale and restructuring; (g) minutes of board of directors meetings since the corporate sale; (h) minutes of shareholder meetings since the corporate sale; and (i) SEC and state filings.

In response, the Employer refused to provide the Union with any information concerning broadcast trends, claiming the information was confidential and the Employer was not obligated to provide it because it was not asserting an "inability to pay." Regarding the Employer's corporate restructuring, the Employer provided the Union with a publicly-available SEC document for Gannett and a copy of the Employer's FCC license held in Sander's name. In August, the Employer provided the

[3] All remaining dates are in 2014.

[4] Neither party gave the required ten-day written contract termination notice.

Union with some additional documents detailing prior Belo and Gannett benefit plans.

On November 18, the Union renewed its July 30 request and asked for additional information concerning the Employer's "economic disadvantage" and need for flexibility to remain competitive in a changing media market, including: (a) a list of primary media competitors; (b) a description of the Employer's advertising pricing structure; (c) the Employer's current advertisers; (d) a list of advertisers who have ceased contracting with the Employer since October 24, 2011; (e) a list of advertising prospects since October 24, 2011 that did not ultimately choose to contract with the Employer; (f) documents, reports, and analyses concerning Employer ratings, television viewership, and internet and mobile reader/viewership; (g) all consumer comments and complaints concerning Employer programming and service since October 24, 2011; and (h) all advertiser comments and complaints concerning Employer programming and service since October 24, 2011. The Employer responded that it was not asserting an inability to compete with other television and radio stations, but later clarified that it needed to remain relevant, attract viewers, and develop its brand to acquire advertisers. The Employer has refused to provide the Union with any further information.

ACTION

The Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by refusing to provide the Union with the requested information under *Caldwell Manufacturing* and the General Counsel's new approach to "inability to pay" cases set forth in *Rotek, Incorporated*.

## I. The Employer Committed a *Caldwell* Violation Under Current Board Law

We conclude that the Employer violated Section 8(a)(5) under *Caldwell Manufacturing Company*.[5] In *Caldwell*, the Board held that when an employer makes specific factual assertions in support of its bargaining positions, information needed to verify those assertions becomes relevant and must be provided upon request.[6] As the

[5] 346 NLRB 1159.

[6] 346 NLRB at 1159-60 (employer's claim that it needed to make facility viable and more competitive required it to provide union with competitor data, labor costs, and other relevant information). *See also National Extrusion & Mfg. Co.*, 357 NLRB No. 8, slip op. at 2 (July 26, 2011) (although employer did not assert an inability to pay, it "violated the Act by failing to supply the [u]nion with … requested information relevant to the [employer's] claim of uncompetitiveness"), *enfd. sub nom. KLB Indus., Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012).

Board explained, the union needs such information not only to verify the employer's claims but also to respond intelligently to them during bargaining.[7] Moreover, the Board's liberal relevancy standard[8] requires an employer to furnish information that would aid the union in fully understanding and assessing other, more directly relevant information as long as the union demonstrates its potential relevance.[9]

In *A-1 Door & Building Solutions*,[10] for example, the employer justified its bargaining proposals by contending it was not competitive with other companies because it was paying too much in wages and benefits. The union requested information regarding the employer's job bids, which the employer refused to provide.[11] The Board, citing *Caldwell*, found that the information was relevant because the union had requested specific information tailored to evaluate the accuracy of the employer's claims.[12] Similarly, in *National Extrusion & Manufacturing Company*,[13] the employer asserted that the union should accept certain bargaining concessions to improve the facility's competitiveness. In response, the union requested information about the employer's current and former customers, a calculation of projected savings under the employer's proposals, and market

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[7] *See Caldwell*, 346 NLRB at 1160 (finding cost, productivity, and competitor data requested by union relevant "because it would have assisted the [union] in assessing the accuracy of the [employer]'s proposals and developing its own counterproposals").

[8] *See, e.g., Chapin Hill at Red Bank*, 360 NLRB No. 27, slip op. at 5 (Jan. 10, 2014) (Board's relevance standard "requir[es] only that the information be directly related to the union's function as a bargaining representative and that it appear 'reasonably necessary' for the performance of that function"), *citing NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967); *E.I. du Pont de Nemours*, 264 NLRB 48, 51 (1982) (once union establishes that requested information "bears a reasonable relation to [its] role as bargaining representative … the union need not prove actual relevance, but may simply demonstrate a probability that the data is useful for the purpose of bargaining intelligently") (internal quotation marks, emphasis, and citations omitted), *enfd.* 744 F.2d 536 (6th Cir. 1984).

[9] *See, e.g., Litton Sys.*, 283 NLRB 973, 974-75 (1987) (requiring employer who sought to relocate operation to provide, inter alia, "market share and profit-and-loss information" because this was "additional relevant information with which [the union] could determine the meaning of the information already provided and develop reasonable bargaining proposals"), *enforcement denied* 868 F.2d 854 (6th Cir. 1989). *See also E.I. du Pont de Nemours*, 264 NLRB at 51 (describing union's burden for establishing potential relevance of wage information regarding non-unit employees).

[10] *A-1 Door & Bldg. Solutions*, 356 NLRB No. 76, slip op. at 3 (Jan. 11, 2011).

[11] *See id.* at 3-4.

[12] *See id.*, slip op. at 4.

[13] 357 NLRB No. 8, slip op. at 1.

studies.[14] The Board found the union's request relevant because the information would allow the union to evaluate the employer's claims and develop appropriate counterproposals.[15]

Here, the Union requested specific information that would enable it to verify the Employer's asserted need for flexibility to compete and attract advertisers in an evolving market including, on July 30, "broadcast trend" information regarding the Employer's expenses, revenue, and market share; competitor information; and advertising changes, since 2011.[16] The Union also sought relevant information on November 18, including competitor information; advertising pricing, history, and prospects; and customer and advertiser comments and ratings. Although the Union sought information from 2011, the request for the earlier information corresponds to the term of the parties' prior contract and would aid the Union in understanding and assessing how, if at all, the marketplace has changed since the parties' last contract.[17]

We conclude that the Employer was also required to provide the Union with the information it requested on July 30 concerning the "effect of recent corporate restructuring." First, information about Gannett's recent purchase of Belo Corporation (and the Employer) and the effect of that purchase and restructuring, if any, on the value and operation of the companies is directly relevant to the Employer's intention to discuss converting "Belo benefits … to Gannett benefits." Further, it is reasonable for the Union to assume that the recent corporate restructuring has had some effect—negative or positive—on the Employer's asserted need for flexibility and contractual concessions to attract advertising revenue and remain competitive in a changing media market. Indeed, at the beginning of the parties' contract term in 2011, the Employer was operated by Belo, a relatively small

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[14] *See id.*, slip op. at 1-2.

[15] *See id.*, slip op. at 2. *Cf. F. A. Bartlett Tree Expert Co.*, 316 NLRB 1312, 1312-13 (1995) (employer not required to provide union with copies of customer contracts because information would not aid union in evaluating employer's specific claims regarding competitiveness).

[16] Despite claiming that some of this information was confidential, the Employer has neither established its confidential interest in the requested information nor sought an accommodation with the Union. *See, e.g.*, *Jacksonville Area Ass'n for Retarded Citizens*, 316 NLRB 338, 340 (1995) (asserting party has burden of establishing confidentiality); *Borgess Med. Ctr.*, 342 NLRB 1105, 1106 (2004) (employer that has established confidentiality interest must still seek to accommodate union's need for information).

[17] *See, e.g.*, *National Extrusion & Mfg. Co.*, 357 NLRB No. 8, slip op. at 1-2 (ordering employer to provide requested information, some of which pertained to previous five years); *A-1 Door & Bldg. Solutions*, 356 NLRB No. 76, slip op. at 1-2, 5 (same; previous three years).

company that operated 20 broadcast television stations; the Employer is now owned by Gannett, an international media corporation, and is part of Tegna, Gannet's media and digital business, that describes itself as "the largest independent station group of major network affiliates in the top 25 markets."[18] The Union is entitled to information concerning how this substantial corporate change has affected, if at all, the Employer's claimed need to remain relevant, attract viewers, and develop its brand. In these circumstances, we conclude that the Employer was required to provide the Union with the requested information that was "narrowly tailored in response to the [Employer's] own claims."[19]

## II. The Region Should Also Urge the Board to Adopt a New Approach Under *Truitt*

Although current Board law supports finding a *Caldwell* violation in this case, the Region should also argue in the alternative that the Board should adopt a different approach under the "inability to pay" line of cases that better serves "the central purpose of the Act: to promote good-faith bargaining."[20] Specifically, as explained in detail in the *Rotek*[21] Advice Memorandum, the Board should recognize that an employer's general finances are relevant to negotiations not just when the employer says it will go broke immediately, but also whenever "the [e]mployer puts in issue its ability to *afford* the [u]nion's demands."[22] Put differently, "an employer claims an 'inability to pay' for particular labor costs . . . when the employer asserts in the course of bargaining that its operations are *unprofitable* given those costs."[23] It is

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[18] *See* http://www.tegna.com/our-company/.

[19] *Caldwell Mfg. Co.*, 346 NLRB at 1160.

[20] *Coupled Products, LLC*, 359 NLRB No. 152, slip op. at 2-3 n.6 (July 10, 2013) (recess Board) ("In an appropriate case, we would consider how the Board has distinguished between 'inability to pay' and 'competitive disadvantage' claims in post-*Nielsen* cases and whether these distinctions best serve the central purpose of the Act: to promote good-faith bargaining.").

[21] *Rotek Inc.*, Cases 08-CA-099704, et al., Advice Memorandum dated November 26, 2013.

[22] *SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281, 297 (2d Cir. 2013) (Cabranes, J., concurring) (emphasis in concurrence) (quoting *N.Y. Printing Pressmen v. NLRB*, 538 F.2d 496, 501 (2d Cir. 1976)); *see id.* at 296 (citing Board cases formulating the issue as whether the employer can "afford the cost" of a union's demands).

[23] *Id.* at 296 (emphasis in original). Indeed, Judge Cabranes suggests that the *Nielsen* Board itself meant to equate unprofitability with inability to pay, and that its imprecise conflation of the terms "losses of business to competitors" and "business losses" has resulted in an unduly narrow application of the case's holding. *Id.* at 296-97.

undoubtedly true that if an employer "'[does not] make a reasonable profit so [it] can be a viable competitive business, [it] won't stay in business, and no one will have jobs.'"[24] As Judge Cabranes explained in his concurring opinion in *SDBC Holdings, Incorporated v. NLRB*, "[i]f a union faced with an employer's claim of unprofitability would 'give serious consideration to making the concessions the employer is demanding, or at least to making some concessions,' the duty to substantiate can, and generally should, apply."[25] An employer may make claims during bargaining that call into question its ability to meet union wage demands "*without injury to [its] business,*" and not just its ability to survive the next contract term.[26] Information permitting a union to verify those claims will often be relevant to collective bargaining, as indeed it would have been in this case.

Applying these principles, the Region should argue that, under the broader "inability to pay" standard proposed in *Rotek*, the Employer claimed an inability to pay the terms contained in the parties' existing contract and the Union was therefore entitled to the information it requested on July 30 and November 18. The Employer claimed that it needed contractual concessions and flexibility to attract advertisers in an evolving market with a new viewer demographic. The Union, in response, sought to verify this claim by requesting access to some of the Employer's financial records, market information, advertisers and competitors, and corporate restructuring documents pertaining to the Employer's past and current position in the changing broadcast industry. Had the Employer substantiated its concerns regarding its need for flexibility, relevance and ability to attract advertising revenue, the Union may have considered some of the Employer's proposed concessions or made counterproposals, and bargaining could have progressed. In these circumstances, the Employer's refusal to provide the requested information undermined the parties' collective-bargaining process and violated Section 8(a)(5).

Accordingly, based on the foregoing, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5), under both legal

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[24] *NLRB v. Harvstone Mfg. Co.*, 785 F.2d 570, 576-77 (7th Cir. 1986) ("[s]tatements such as this one are . . . nothing more than truisms[]"), *denying enforcement in part of* 272 NLRB 939 (1984).

[25] *SDBC Holdings, Inc.*, 711 F.3d at 298-99 (Cabranes, J., concurring) (quoting *Nielsen Lithographing Co. v. NLRB (Nielsen I)*, 854 F.2d 1063, 1065 (7th Cir. 1988)) (brackets omitted).

[26] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956) (emphasis added).

theories described above, by refusing to provide the Union with information that is relevant and necessary for bargaining.

/s/
B.J.K.

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