

The Duty to Furnish Information
Under the National Labor Relations Act

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I. INTRODUCTION

The duty to furnish information is an integral component of the collective bargaining process. An employer's disclosure of information provides the union with necessary information so that it can effectively carry out its statutory duty to represent the bargaining unit, both in bargaining a new contract and in policing administration of an existing collective bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Likewise, under certain circumstances, a union must provide information requested by an employer. This paper will provide a general overview of a party's duty to furnish information upon a proper request. Although the duty is a bilateral one, most information requests, and therefore most of the case law, involve requests made by unions to employers.

Keep in mind that while certain guidelines exist for the disclosure of information, the circumstances of each particular case must be examined to determine if the information a union seeks must be turned over by the employer. One useful guideline to offer at the outset, however, is that information clearly related to the employer/employee relationship will be presumptively relevant and subject to disclosure to the union. The parameters of both relevance and the standards of disclosure will be more clearly defined below.

II. THE GENERAL DUTY TO FURNISH INFORMATION

An employer's duty to furnish information is a statutory obligation that exists independent of any agreement between the parties. *American Standard, Inc.*, 203 NLRB 1132, 83 LRRM 1245 (1973). Violations of this duty arise under sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"). Enforcement of the NLRA falls on the National Labor Relations Board ("NLRB" or the "Board"). The relevant portions of the NLRA state:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this subchapter;

...

(d) Obligation to bargain collectively. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

29 U.S.C. § 158(a)(1), (a)(5) and (d).

The seminal case on the duty to furnish information, and starting point for any discussion on this topic, is *NLRB v Truitt Mfg. Co.*, 351 U.S. 149 (1956). In *Truitt*, the Supreme Court first recognized the general obligation of an employer to provide information that is required by a bargaining representative for the proper performance of its duties. One of the primary principles distilled from this case is that the duty to supply information under the NLRA turns upon "the circumstances of the particular case." *Id.*, 351 U.S. at 153 (1956).

In *Truitt*, the employer claimed that it could not afford to grant a wage increase requested by the union. To determine the validity of this claim, the union sought to learn about the employer's financial information with the help of a certified public accountant. The employer subsequently refused to reveal its financial information. The Supreme Court held that the claims of financial difficulty made by the employer must be honest and are subject to review by the NLRB. The Court further noted that if a claim of "inability to pay" is important enough to present in a bargaining context, it is important enough to require some sort of verification as to the truth of the claim.

A. Creation of the Duty

1. Union Must be the Bargaining Party

An employer's duty to bargain with respect to wages, hours, and other terms and conditions of employment is an obligation owed only to the certified bargaining representative. *See 29 U.S.C. § 159(a)*. For this duty to arise in the context of union negotiations, therefore, the union must first be identified as the proper representative.

Once a union is certified or voluntarily recognized as the bargaining party, it is free to delegate this authority to other parties. *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381 (9th Cir. 1985) (discussing the principle that a certified bargaining representative may delegate bargaining authority to "whomever it wants"). Certain cases have therefore found that the "right" to bargain with the employer is limited. *Howell Insulation Co., Inc.*, 311 NLRB 1355, 144 LRRM 1057 (1993) (determining that a third party beneficiary was not able to bargain with the employer).

2. The Nature of the Union's Request for Information

The duty to furnish information does not operate on its own, but is triggered only after a request or demand has been made for certain information held by the employer. *NLRB v Boston Herald-Traveler Corp.*, 210 F.2d 134 (1st Cir. 1954).

The NLRB and courts grant the scope or subject of the union's request substantial leeway. Accordingly, an employer must not ignore an ambiguous request received from a union. In *Azabu USA (Kona) Co.*, 298 NLRB 702, 134 LRRM 1245 (1990), the Board noted that an employer should not ignore or refuse to respond to a request by a union simply because it is ambiguous. *Beth Abraham Health Services*, 332 NLRB No. 113 (2000). Instead, the employer should request clarification from the union or produce the information to the extent possible.

Similarly, it has been held that a request for information as broad as seeking to look at the employer's "books" was not unclear or ambiguous such that the employer would have to supply this information. *NLRB v. Designcraft Jewel Industries, Inc.*, 675 F.2d 493 (2d Cir. 1982).

Moreover, a request by the union must be timely. In *Schaeff Namco, Inc.*, 280 NLRB 1317, LRRM 1058 (1986), the union made a request for financial information after the contractual negotiations had ended. Because of this untimely request, the Board held that the employer was justified in refusing to provide the requested information. *But see Stevens Int'l, Inc.* 337 NLRB 143, 172 LRRM 1396 (2001) (obligation continues after plant closing with respect to unit work performed pre-closing); *King Scoopers, Inc.*, 332 NLRB No. 4, 169 LRRM 1023 (2000) (duty to furnish information does not end when the grievance is taken to arbitration); *Jewish Federation Council*, 306 NLRB 507, 139 LRRM 1351 (1992) (obligation to furnish information relevant to grievance does not depend on whether union already decided where to seek arbitration). It should be noted that there is no rule requiring that a request for information be in writing. *See International Tel. & Tel. Corp. v. NLRB*, 382 F.2d 366 (3d Cir. 1967).

B. The Information Requested Must be Relevant and in Good Faith

Once the union has made a request, it must then show that the information it is seeking is relevant to the employer/employee relationship. Certain information is presumptively relevant, while other information must first be shown to be relevant before an employer must supply it. On the other hand, if the employer can show that the union's information request is made in bad faith, then there is no obligation to supply the requested information. *Compare NLRB v. Wachter Construction*, 23 F.3d 1378 (8th Cir. 1994), *rev'g* 311 NLRB 215, 143 LRRM 1181 (1993) (union requests for subcontracting information were made in bad faith to harass the employer into contracting only with unionized contractors) *with Island Creek Coal Co.*, 292 NLRB 480, 489, 130 LRRM 1292, 1300 (1989) (noting "good faith requirement is met if at least one reason for the demand can be justified."), *enf'd mem.*, 889 F.2d 1222 (6th Cir. 1990) *and Gruma Corp. d/b/a Mission Foods*, 345 NLRB no. 49, 178 LRRM 1504 (2005) (mere assertion of harassment).

The Supreme Court has described the relevance standard of information requested by a union as a liberal, "discovery-type" standard. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967). *See also Pfizer, Inc.*, 268 NLRB 916, 918, 115 LRRM 1105 (1984), *enf'd. sub nom. NLRB v. Electrical Workers (IBEW) Local 309*, 763 F.2d 887 (8th Cir. 1985) (applying the same "liberal, discovery type" standard of relevance when a union requests information concerning matters outside the bargaining unit); *SBC Midwest*, 346 NLRB No. 8, 178 LRRM 1441 (2005). As such, "the threshold for relevance is low." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000). Moreover, "[i]nformation related to the wages, benefits, hours, [and] working conditions" of unit employees is presumptively relevant. *Id.*

Despite the low relevancy standard defined in *Acme*, the information demanded must at least be relevant to the relationship between the employer and the union in its capacity as representative of the employees. *Transport of New Jersey*, 233 NLRB 694, 97 LRRM 1204 (1977). Accordingly, an employer must provide a union with information that is relevant to carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*,

385 U.S. 432, 437 (1967). Not all information relating to bargaining unit employees' terms and conditions of employment will be deemed presumptively relevant. *Disneyland Park*, 350 NLRB No. 88 (Sep. 13, 2007) (information about subcontracting agreements not presumptively relevant absent claim that specific provision of contract is being violated).

This duty to provide information includes information relevant to contract administration and negotiations between a union and the employer. *Schrock Cabinet Co.*, 339 NLRB 182, 172 LRRM 1347 (2003) (information needed for the purpose of assessing grievances); *Barnard Engineering Co.*, 282 NLRB 617, 619, 124 LRRM 1107 (1987). Additional information beyond the scope of negotiations must also be furnished if it is shown that it is relevant to bargainable issues. See *Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 n. 5 (D.C. Cir. 1979) (finding that the employer's request for data concerning the availability of straight-time workers was relevant to bargaining).

Requested information will be deemed relevant if it seems probable that the information will be of legitimate use to the union in carrying out its duties and responsibilities as bargaining agent. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437, 17 L. Ed. 2d 495, 87 S. Ct. 565 (1967). Put another way, requested information must be likely to be of material assistance in evaluating strategies that may be open to the union as part of its struggle to minimize the adverse effects of the employer's decision-making process on persons within the bargaining unit. See *Western Mass. Elec. Co. v. NLRB*, 589 F.2d 42, 48 (1st Cir. 1978).

On the other hand, however, merely asserting that the information is "necessary" to represent the employees intelligently, is insufficient to establish relevance. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1099 (1st Cir. 1981). Likewise, when a union has a vague or speculative explanation for its request of information, the NLRB has determined that an employer need not furnish the information requested. *Rice Growers Ass'n of Cal.*, 312 NLRB 837, 144 LRRM 1178 (1993) (denying the union's request for a copy of the employer's sales and distribution contract with its parent corporation). The union's explanation of relevance must be made with some precision as a generalized, conclusory allegation is insufficient. *Disneyland Park*, 350 NLRB No. 88 (Sep. 13, 2007).

Thus, the union's first hurdle for requesting information from an employer is establishing that the information sought is relevant. Certain information will have to be shown to be relevant, whereas information central to the employer/employee relationship is presumptively relevant.

1. Presumptively Relevant Information

Information intrinsic to the employer-union relationship, such as that pertaining to wages, hours, conditions, and other financial benefits, is considered presumptively relevant, with the employer having the burden of showing irrelevance. *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000); *NLRB v. Associated General Contractors of California, Inc.*, 633 F.2d 766, 770 n. 4a (9th Cir. 1980). Likewise, the NLRB will presume that union requests for presumptively relevant information are made in good faith, until the company can demonstrate otherwise. *Columbia Univ.*, 298 NLRB 941, 945, 134 LRRM 1191 (1990) (finding that the

employer violated the NLRA when it failed to timely respond to a subpoena seeking information about the employee job evaluation process).

For example, the NLRB determined that an employer has a duty to provide to the union, upon request, information such as seniority lists, insurance policies, rates of pay, information on holidays, and information on benefits. *See Dynacorp/Dynair Servs.*, 322 NLRB 602, 155 LRRM 1028 (1996). Furthermore, the fact that the information is available from another source does not normally alter an employer's duty to provide readily available, relevant information to the bargaining representative. *Asarco v NLRB*, 805 F.2d 194 (6th Cir. 1986) (ordering the employer to furnish photographs to the union that were taken at the site of an employee's death).

When the information requested concerns matters outside the bargaining unit, however, the burden is on the union to demonstrate relevance. *See Shoppers Food Warehouse Corp.*, 315 NLRB 258, 258, 147 LRRM 1179 (1994). Further, even for presumptively relevant information, a union may need to show the relevance of the information requested if the employer has established a proper rebuttal.¹ *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967).

A union can satisfy this burden by demonstrating a reasonable belief supported by objective evidence for requesting the information. *Knappton Maritime Corp.*, 292 NLRB 236, 238-239, 130 LRRM 1119 (1988). Similarly, when a union seeks information not clearly necessary to its performance as representative, but alleged to be relevant due to a certain situation, no presumption exists and the union must establish relevancy before the employer must produce the information. *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977) (denying the union's request for information on employee's hired to "shadow" workers in the event of a strike). The presumption of relevance is not rebutted by a showing that the union also seeks the information for a purpose unrelated to its representative function. *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

C. Information Requests Must not be Too Cumbersome for Either Party

The requests that a union makes for information must be reasonable. Courts and the Board will therefore balance the burden placed on the employer when considering the request made by the union, even if it is relevant. When the information sought would be too burdensome to compile, for example, the union's request may be denied.

By way of illustration, the court in *NLRB v. Wachter Constr.*, 23 F.3d 1378 (8th Cir. 1994), determined that the employer did not violate the NLRA when it refused to comply with union demands for voluminous records of nonunion employment for the express purpose of determining compliance with the collective bargaining agreement. The court also found that the union acted in bad faith because it was seeking the material for the purpose of harassing the employer. *See also Shell Oil Co. v. NLRB*, 457 F.2d 615 (9th Cir. 1972) (refusing to enforce the NLRB's order for the employer to disclose names and addresses of employees).

¹ See Section IV. below on employer defenses.

Likewise, the information returned to the union by the employer need not provide information in any particular form, so long as it is not unduly burdensome upon the union. *Cincinnati Steel Castings Co.*, 86 NLRB 592, 24 LRRM 1657 (1949). The employer need only provide such information to the union in a reasonably clear and understandable form. *Food Employers Council*, 197 NLRB 651, 80 LRRM 1440 (1972). It is also well established that the parties may bargain as to the allocation of costs for production of documents and, if no agreement is reached, the union is entitled at its own cost access to records from which it can reasonably compile the information. *Id.*

As with each issue presented in this chapter, the facts of each particular case will determine whether the information provided meets the “reasonably clear and understandable” threshold offered by *Food Employers*. Burdensome information requests and production are ultimately considered a hindrance to the collective bargaining process and the intention of the party in making the request or delivering the documents will be examined by the NLRB or a court.

D. Union’s Duty to Furnish Information

The duty to furnish information is not limited to the employer alone. A union also has a similar duty of good faith when bargaining with an employer or enforcing the terms of a contract. It has therefore been stated that "a labor organization's duty to furnish information is parallel to that of an employer." *Plasterers Local 346 (Brawner Plastering)*, 273 NLRB 1143, 1144, 118 LRRM 1246 (1984). See also *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB*, 598 F.2d 267 (D.C. Cir. 1979) (just as employers must supply information to a union, a union is also bound by an obligation to provide information to employers).

For example, the NLRB has determined that a union was in violation of the NLRA for refusing to furnish a grievant’s medical records. *Fireman & Oilers (IBFO) Local 288 (Diversity Wyandotte Corp.)*, 302 NLRB 1008, 137 LRRM 1153 (1991). The NLRB noted that the union should have at least made an effort to obtain the records in question, instead of failing to make any attempt whatsoever. Accordingly, there is a reciprocal obligation on the part of the union to provide the information that the employer is seeking. A union’s failure to furnish the requested information to its employer may therefore result in a violation of the NLRA.

E. Information Must be Provided in a Timely Manner

There is no *per se* rule as to when information must be provided. The Board looks at the totality of the circumstances to determine whether the parties have made a diligent effort to obtain or provide requested information reasonably promptly. *West Penn Power Co. d/b/a Allegheny Power*, 339 NLRB 585, 587 173 LRRM 1125 (2003). Compare *Pan American Grain Co.*, 343 NLRB 318 (2004), *enforced in relevant part*, 432 F.3d 69 (1st Cir. 2005) (3 month delay unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (delay of 2.5 months violates the Act); *Woodland Clinic*, 331 NLRB 735 (2000) (7-week delay unreasonable) with *Union Carbide Corp. Nuclear Div.*, 275 NLRB 197 119 LRRM 1077 (1985) (delay of 10 ½ months justifiable where there was no evidence employer could produce information faster and union was not prejudiced).

III. REQUESTS FOR SPECIFIC INFORMATION

A. Specific Instances of Relevant Information Requests

Both the NLRB and judicial decisions have continued to define precisely the type of information that is relevant to a bargaining dispute. Generally, however, it appears well settled that information such as names of employees, telephone numbers, addresses, hours worked, and other employment terms are relevant to the bargaining process. *See Bryant & Stratton Bus. Inst.*, 323 NLRB 410, 155 LRRM 1033 (1997). In addition, each of the following cases found that the type of information requested was relevant to the employer/employee relationship. These include information requests concerning time study results,² seniority lists,³ profit-sharing plan information,⁴ performance appraisals,⁵ and information about an affiliated business.⁶

Other information that has been requested by a union and produced by the employer under the NLRA includes information concerning benefit plans,⁷ worker's compensation policies,⁸ insurance plans,⁹ a planned business merger,¹⁰ and EEO data.¹¹ While this list is by no means exhaustive, it provides an overview of the various types of information that employers may have to produce to a union upon a proper request.

B. Financial Information of the Employer

The rule for disclosure of financial data of the employer is different than the relevancy considerations described above. Initially, financial data need not be revealed unless the union first establishes that it is especially relevant to the bargaining at issue. The union must therefore make a showing of relevancy to receive the information it desires. The union does not establish relevancy, however, merely by claiming that the data would be "helpful" in performing its tasks. *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 8 (1st Cir.1977).

When the employer itself makes its profitability an issue at the bargaining table, by asserting an inability to pay an increase in wages, the employer must substantiate such information. *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 8 (1st Cir. 1977). The Supreme Court has noted,

² *H.J. Scheirich Co.*, 300 NLRB 687, 135 LRRM 1256 (1990).

³ *NLRB v. Gulf Atlantic Warehouse Co.*, 291 F.2d 475 (5th Cir. 1961).

⁴ *NLRB v. Toffentti Restaurant Co.*, 311 F.2d 219 (2d Cir. 1962).

⁵ *New York Telephone Co.*, 299 NLRB 351, 135 LRRM 1051 (1990)

⁶ *Advance Construction Services, Inc. v. NLRB*, Case Nos. 00-1069 and 00-1393 (8th Cir. 2001).

⁷ *Gannett Rochester Newspapers*, 319 NLRB 215, 150 LRRM 1236 (1995).

⁸ *Anthony Motor Co.*, 314 NLRB 443, 147 LRRM 1004 (1994).

⁹ *IMTT-Bayonne*, 304 NLRB 476, 139 LRRM 1157 (1991).

¹⁰ *Providence Hosp. v. NLRB*, 93 F.3d 1012 (1st Cir. 1996).

¹¹ *Westinghouse Elec. Corp.*, 239 NLRB 106, 99 LRRM 1482 (1978), *modified and enf'd sub nom. Electrical Workers (IUE) v. NLRB*, 648 F.2d 18 (D.C. Cir. 1980); but affirmative action plans are not presumptively relevant. *Bendix Corp.*, 242 NLRB 1005, 101 LRRM 1459 (1979).

however, that a union would not necessarily be entitled to financial information in every case in which the employer raises economic inability. *NLRB v Truitt Mfg. Co.*, 351 U.S. 149 (1956). Instead, each case must turn on its particular facts to determine if there is a violation under the NLRA. Following the fact sensitive approach as laid out in *Truitt*, the NLRB and judicial decisions have addressed several issues related to financial disclosure.

For example, in *Lakeland Bus Lines, Inc.*, 335 NLRB 322, 168 LRRM 1126 (2001), the employer stated that it was “trying to bring the bottom line back into the black.” *Id.* at *14. This statement was made in the context of negotiations over a reduction in the amount of overtime compensation that employees could receive. It was held to be the functional equivalent of claimed inability to pay. As a result, the Board found that under *Truitt*, the employer had a duty to disclose relevant financial information.

One interesting distinction has developed between claims made by an employer that amount to an "inability to pay" or are merely a claim of competitive disadvantage. *Nielsen Lithographing Co.*, 305 NLRB 697, 138 LRRM 1441 (1991). The decision in *Nielsen* seems to open the door for protection of employers who claim that they are suffering from a competitive disadvantage as a result of agreements with or demands by the union. As such, when an employer makes a claim that it cannot compete with other business operations, as opposed to being unable to afford union demands, the employer would not have to furnish information to the union. A claim of “not being able to compete,” however, will not be allowed to conceal an employer’s true motivation for denying a union’s demands.

Furthermore, an employer may benefit from withdrawing an initial claim that it doesn’t have an inability to pay the union demands. *Fairhaven Properties*, 314 NLRB 763, 147 LRRM 1033 (1994). In *Fairhaven*, the NLRB determined that as soon as the employer ceased to claim an inability to pay, the duty to furnish information stopped with it. This decision relied on *Truitt*, and reiterated the policy that an employer’s claim of inability to pay serves to “open the employer’s books.”

The disclosure of financial information is therefore very sensitive to the statements made by the employer at the bargaining table. Should an employer argue that it cannot afford certain demands from a union, or attempt to conceal this fact, the union may be given access to the employer’s accounts. As noted above, *Truitt* made clear that claims of financial difficulty made by the employer must be honest and if a claim of “inability to pay” is important enough to present in a bargaining context, it is important enough to require some sort of confirmation as to the truth of the claim.

C. Witness Statement Disclosure

Any witness statements related to an employee’s grievance will not have to be furnished to a union. *Anheuser-Busch, Inc.*, 237 NLRB 982, 99 LRRM 1174 (1978). In *Anheuser-Busch*, the NLRB determined that the disclosure of witness statements involves “critical considerations which do not apply to requests for other types of information.” *Anheuser-Busch, Inc.*, 237 NLRB at 984. Thus, the NLRB found that the relevancy principles distilled from *Acme* do not

extend to statements obtained during the course of an employer's investigation of employee misconduct.¹² Notes taken during an investigation of employee misconduct can be protected as information prepared in anticipation of litigation under the attorney work product doctrine. *Central Tel.*, 343 NLRB No. 99, 174 LRRM 1488 (2004). In highly questionable dictum in *BP Exploration (Alaska), Inc.*, 337 NLRB 887, 170 LRRM 1289 (2002), the Board indicated that it would weigh the need for information otherwise covered by the attorney-client privilege.

Similarly, there is no NLRA violation for the refusal to provide an employer with the names of witnesses it intends to call at an arbitration hearing. See *California Nurses Assn.*, 326 NLRB 1362, 164 LRRM 1064 (1998). This follows from the well-settled rule that there is no general right to pretrial discovery in arbitration proceedings.¹³ *Tool & Die Maker's Lodge 78 (Square D Co.)*, 224 NLRB 111, 112, 97 LRRM 1204 (1976).

IV. EMPLOYER DEFENSES

A. Confidentiality

In certain circumstances, an employer may not have to provide information that it has a legitimate interest in protecting. Using the “defense” of confidentiality, an employer may therefore limit information that a union would otherwise find useful or helpful. The Supreme Court stated in *Detroit Edison Corp. v NLRB*, 440 U.S. 301 (1979) that a union's interest in arguably relevant information does not always predominate over other legitimate employer interests in non-production of the information. The court noted that the needs of a union must be balanced against the legitimate and substantial confidentiality interests of the employer.

An employer's mere denial of the relevance of the information that the union is seeking does not invoke a proper defense. A claim of confidentiality as a defense is limited to:

- (1) highly personal information, with promises or reasonable expectation of confidentiality (e.g., individual medical or psychological test results);
- (2) substantial proprietary information (e.g., trade secrets);
- (3) reasonable expectation that disclosure will lead to harassment or retaliation (e.g., identity of witnesses); or
- (4) traditionally privileged information (e.g., material prepared for pending lawsuit).

¹² An employer does, however, have a duty to furnish a union, upon request, the names of witnesses to an incident for which an employee was disciplined. *Transport of New Jersey*, 233 NLRB 694, 97 LRRM 1204 (1977).

¹³ See Section IV. D. for a discussion on deferral to arbitration generally.

Detroit Newspaper Agency, 317 NLRB 1071, 149 LRRM 1241 (1995). But even ordinarily confidential information can be subject to a disclosure requirement when warranted by the circumstances. Compare *Star Tribune Div.*, 295 NLRB 543, 131 LRRM 1404 (1989) (information about the identify of employees who underwent drug testing was relevant where union suspected program was administered in a discriminatory manner), with *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 136 LRRM 1225 (1991) (when drug testing program is triggered by "suspicion," employer need not reveal confidential informant's name or address). Any proposed restriction under the guise of confidentiality by an employer must also not have a spirit of bad faith. See *New Jersey Bell Telephone Co. v. NLRB*, 720 F.2d 789 (3d Cir. 1983).

Protection of an employer's confidential information may sometimes justify the refusal to provide the specific information required. In *Allen Storage & Moving Co., Inc.*, 342 NLRB 501, 175 LRRM 1388 (2004), the Board upheld the company's refusal to provide information containing customer specific data, where the employer instead supplied detailed financial information. See also *GTE California*, 324 NLRB 424, 156 LRRM 1113 (1997) (not unlawful for company to refuse to divulge complaining customer's unlisted phone number where company dialed customer and permitted union representative to speak to customer anonymously).

1. Trade Secrets

When an employer claims that the information sought is confidential because of its personal or sensitive nature, the union's needs are balanced against the "legitimate and substantial" confidentiality interests of the employer. *Detroit Edison Corp. v. NLRB*, 440 U.S. 301 (1979); *E.W. Buschman Co. v. NLRB*, 820 F.2d 206 (6th Cir. 1987); *NLRB v. United Technologies Corp.*, 789 F.2d 121 (2d Cir. 1986); *Washington Gas Light Co.*, 273 NLRB 116, 118 LRRM 1765 (1985). Furthermore, the party asserting confidentiality has the burden of establishing its claim. *Mary Thompson Hosp. v. NLRB*, 943 F.2d 741, 747 (7th Cir. 1991); *McDonnell Douglas Corp.*, 224 NLRB 881, 93 LRRM 1280 (1976).

When trade secrets are involved, restrictions on the disclosure of information will likely be warranted. *Oil, Chemical & Atomic Workers Local Union v. NLRB*, 711 F.2d 348, 362-63 (D.C. Cir. 1983). In *Oil Chemical*, the union sought disclosure of information that contained in part, trade secrets. The court upheld the determination of the NLRB and found that the information the union was seeking was relevant. Regardless of this fact, however, the employer had not violated the NLRA by failing to unconditionally disclose information containing trade secrets.

2. Information on Striker Replacements

With respect to the disclosure of information concerning replacement employees, the NLRB has consistently decided that the names and addresses of replacement workers are presumptively relevant information to which a union is entitled. See, e.g., *Georgetown Holiday Inn*, 235 NLRB 485, 98 LRRM 1162 (1978). This presumption is rebuttable, however, and an employer may withhold relevant information of replacement worker information if there is a "clear and present danger" that the union will misuse the information. See *Shell Oil Company v. NLRB*, 457 F.2d

615, 618-19 (9th Cir. 1972) (refusing to enforce the NLRB's order for the employer to disclose names and addresses of non-union employees).

In *Chicago Tribune Co. v. NLRB*, 79 F.3d 604 (7th Cir. 1996), for example, it was decided that an employer may protect home addresses of confidentiality-seeking permanent strike replacements, if the employer offers reasonable alternative means of communication. *Chicago Tribune Co. v. NLRB*, 79 F.3d 604 (7th Cir. 1996). See also *Grinnell Fire Prot. Sys. Co. v. NLRB*, 272 F.3d 1028 (8th Cir. 2001) (relying on *Chicago Tribune* to find that strike-replacements' addresses should be protected because of confidentiality concerns).

Other cases have held that asking for a list of names and addresses of striker replacements compels the employer to timely furnish this information. See *Fairhaven Properties*, 314 NLRB 763, 147 LRRM 1033 (1994). In this instance, the NLRB determined that the confidentiality and privacy concerns were not sufficient to overcome the union's right to the information.

3. Third-Party Disclosure

Employer concern about disclosure of information to third parties has also arisen in the context of an employer's duty to furnish information. Fear about disclosure, however, is not a valid reason for withholding relevant information from a union. See *NLRB v. New England Newspapers, Inc.*, 856 F.2d 409 (1988).

The court in *NLRB v. New England Newspapers, Inc.*, 856 F.2d 409 (1st Cir. 1988), for example, affirmed the NLRB's order compelling the employer to disclose an agreement stating that the employer was selling the business. The court determined that the agreement was relevant to the unions' performance of their duties and granted the NLRB's application for enforcement of its order despite the employer's concerns about the sale being revealed to third parties.

B. Restrictions on Use of the Information

An employer is not relieved of its obligation to turn over relevant information simply by invoking concerns about confidentiality. The employer may, however, placate both its concern and its bargaining obligations, by making an offer to release information conditionally or by placing reasonable restrictions on the use of that information. See, e.g., *East Tennessee Baptist Hosp. v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993); *E.W. Buschman Co. v. NLRB*, 820 F.2d 206, 208-09 (6th Cir. 1987); *Safeway Stores, Inc. v. NLRB*, 691 F.2d 953, 958 (10th Cir. 1982).

In *East Tennessee*, for example, the union sought to obtain wage and attendance information of non-union employees to validate that union and non-union employees were treated equally. The court concluded that the employer had "offered reasonable alternative solutions which would have allowed the union to ascertain whether the contracts were evenly applied while protecting the confidential records of non union employees." *East Tennessee Baptist Hosp. v. NLRB*, 6 F.3d at 1144-45. The court further determined that, it was incumbent upon the union to demonstrate that its need outweighed the hospital's interest in maintaining the confidentiality of its records. *Id.* at 1144.

The key to properly restricting the disclosure of information, therefore, appears to be the willingness of an employer to present alternatives to the initial demands made by the union. The alternatives offered likely affect the balance that must be established between a union's needs and confidentiality interests of the employer. See *Detroit Edison Corp. v NLRB*, 440 U.S. 301 (1979).

C. Privacy Interests

In *Detroit Edison Corp. v NLRB*, 440 U.S. 301 (1979), the Supreme Court considered the privacy interests of employees who had taken psychological aptitude tests. The union sought to find out the questions asked on this test and results achieved by employees. The Court determined, however, that the interest in protecting the privacy rights of employees who had taken the psychological tests outweighed the interest of the union in obtaining the information. Accordingly, the Court found that the employer should not have to turn over the test information to the union.

In *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 109 LRRM 1345 (1982), the NLRB deemed certain information subject to privacy concerns and determined that individual medical information should not be released. Consistent with the principles discussed above on restricting the use of information, the NLRB limited the use of the information to aggregate data that did not include individual medical records from which identifying data had not been removed.

Other decisions have also found that privacy concerns can trump the need of a union to receive certain information. *Chicago Tribune Co. v. NLRB*, 79 F.3d 604 (7th Cir. 1996) (finding that information about strike replacements was subject to a strong privacy interest). Such determinations will likely rely on the notion that relevant information may be withheld from a union where the interest in confidentiality outweighs the union's need for the information.

D. Deferral to Arbitration

An additional defense that employer's may attempt to utilize when confronted with a refusal-to-disclose claim is the deferral of any information requests to the arbitration and grievance procedure established in the collective bargaining agreement. In light of recent decisions, however, this defense will not likely be upheld. See *Daimler Chrysler Corp. v. NLRB*, 288 F.3d 434, 438 (D.C. Cir. 2002).

In *Chrysler*, the court determined that it was appropriate for the NLRB not to defer information requests from a union to the arbitration procedure established in the collective bargaining agreement. See also *Ormet Aluminum Mills Products Corp.*, 335 NLRB 788, 169 LRRM 1514 (2001). The court in *Chrysler* discussed *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971), and its holding that the NLRB will not pursue unfair labor practice claims until arbitration has been completed. The court found that such deferral is only appropriate in limited circumstances, and has continued to evolve since the *Collyer* decision was rendered. *Daimler Chrysler Corp. v. NLRB*, 288 F.3d 434, 438 (D.C. Cir. 2002). Relying on prior caselaw, the

Chrysler court noted that the exclusion of information requests from arbitration has remained consistent.¹⁴ In *Shaw's Supermarkets, Inc.*, 339 NLRB 871, 173 LRRM 1163 (2003), a divided Board ruled that a policy of non-deferral allows the parties to better analyze the merits of their claims before arbitration is pursued and thus promotes public policy favoring arbitration.

E. Waiver

Parties can waive the right to demand information if the waiver is clear and unmistakable. *Hearst Corp., Int'l News Serv. Div.*, 113 NLRB 1067, 36 LRRM 1454 (1955). A contract provision making a personnel file accessible to the union only with the employee's written consent was not a waiver of the union's right to obtain the employees home address and phone number. *Valley programs*, 300 NLRB 423, 135 LRRM 1208 (1990).

V. CONCLUSION

The duty to bargain imposes upon employers and employees alike, the responsibility of providing relevant information to the opposing side. Providing this information grants each side a better understanding of the state of affairs of the other and can potentially aid in reaching an agreement. This duty to furnish information extends to various subjects and is flexible enough to allow the facts of each particular case control what information should be revealed. Ultimately, the amount of disclosure will depend on the nature of the information requested, the manner in which the information is requested, and the legitimacy of defensive concerns such as confidentiality. Because information requests can be used as a significant burden on the parties, limitations on the scope and circumstances of disclosure must be carefully considered in each case.

¹⁴ The court cites the following cases for this proposition: *General Dynamics Corp.*, 270 NLRB 829 (1984); *United States Postal Serv.*, 276 NLRB 1282, 1285 (1985); *United States Postal Serv.*, 307 NLRB 1105, 1108 (1992); *Ormet Aluminum Mills Products Corp.*, 335 NLRB 788, 169 LRRM 1514 (2001).