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EMPLOYER'S OBLIGATION TO PRODUCE DATA FOR COLLECTIVE BARGAINING

By HERBERT L. SHERMAN, JR.*

I. Introduction

TO what extent is a labor union entitled to wage and other data from the employer? Or, putting it another way, what obligation does the company owe to a labor union to produce data for collective bargaining? The answers to these questions require a consideration of the problem that confronts the union. What types of information does the union want? Why does the union want it? What are the employer's objections to disclosing such information? From what other sources is the information available? What are the difficulties with such existing sources insofar as the institution of collective bargaining is concerned? Obviously the problem must be defined and evaluated before a survey of the decided cases is in order.

In the last few years more and more demands have been made by labor unions for a "look at the books." Although many types of data have been sought in connection with bargaining for higher wages, one of the most popular is income data. Many spokesmen for both management and labor believe that financial information should be used more widely as a basis for intelligent wage negotiations. If a "take it or leave it" attitude is to be avoided in the collective bargaining process, certain information must be available to both parties and must be used. Yet the relevancy of comparable wages elsewhere, the rate of productivity, the cost of living, and the company's ability to pay is often challenged in wage negotiations. Where income is large, for example, most companies argue that that is not a proper basis for the granting of wage increases. On the other hand the union may contend that net income is irrelevant if it is small. It is not willing to support a "weak sister" at the expense of the wage-earners.¹ "Either party may use one of these arguments today and repudiate it tomorrow as a factor in wage determination under a different set of circumstances."² It would seem, however, that the more information available to both

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1. Owens, *Use of Income Data in Wage Negotiations*, Geo. Wash. U. Bull.: "Confidential from Washington," Feb. 1950, p. 1, 4.

2. Dunlop, *The Economics of Wage-Dispute Settlement*, 12 Law & Contemp. Prob. 281 (1947).

parties, the more intelligent and the more rational will be the final decision.

Moreover sharing economic and company information with employees and their chosen representatives will stimulate their trust and confidence in management. The informed worker is certain to be a better worker, which will redound to the betterment of the entire organization.³ Any information given to the members should be given to the union officers. Thus they can fulfill their obligations as leaders. Collective bargaining negotiations provide an excellent opportunity for fostering good relations by voluntarily enlightening the other party as to matters of common interest.

Despite the benefits to be gained from producing and sharing certain economic and company information with the union, many employers are reluctant to disclose such data. Thus a number of cases have come before the NLRB in the past few years involving a determination of the employer's legal obligation to produce data for collective bargaining. But before the union's right to certain information (with its correlative limitations) is considered, it is proper to ascertain the nature of the union's problem.

II. The Union's Problem

A. *Types of Data Desired by the Union*

Obviously the particular kind of information desired by the union will vary with the circumstances. Data has been demanded which pertains to the company's policy as practiced in the plant in respect to seniority;⁴ requests have been made for job classification lists⁵ including the names of employees, the nature of the jobs and the wage history of employees to whom increases had been granted. Other information sought by unions has involved incentive plans,⁶ production records of employees,⁷ the number of employees hired

3. "The sharing of company information with employees can result in better cooperation and a greater degree of satisfaction in the day's work by all members of the organization. A firm which sincerely shares this type of information with its employees recognizes them as individuals and shows its appreciation of their intelligence. The greater the need for understanding, watchfulness, and initiative on their part, the more there is to be gained by the endeavor." Riegel, *Giving Economic and Company Information to Employees*, 26 Personnel 335 (Mar. 1950).

4. Singer Mfg. Co., 24 N.L.R.B. 444 (1940), *modified and enforced*, 119 F. 2d 131 (7th Cir. 1941).

5. Aluminum Ore Co., 39 N.L.R.B. 1286 (1942), *modified and enforced*, 131 F. 2d 485 (7th Cir. 1942); Young Engineering Co., 57 N.L.R.B. 1221, 14 L.R.R.M. 270 (1944).

6. Crompton-Highland Mills, Inc., 70 N.L.R.B. 206, 18 L.R.R.M. 1347 (1946); Dixie Mfg. Co., Inc., 79 N.L.R.B. 645, 22 L.R.R.M. 1433 (1948).

7. Pool Mfg. Co., 70 N.L.R.B. 540, 18 L.R.R.M. 1364 (1946).

to replace economic strikers,⁸ the basis for individual merit wage increases or the names of employees who had received increases with the amounts disclosed,⁹ a list of employees' names with their wage rates,¹⁰ production requirements of government orders,¹¹ the amounts of sales and orders,¹² and the amount and rate of dividends.¹³

Representatives of labor have indicated their interest in a breakdown of the item "cost of goods sold."¹⁴ Such a breakdown could show the cost of materials and supplies, the total salaries of officers and supervisors, the compensation of wage earners, the depreciation of fixed properties, the amortization of patents, the costs of maintenance of plant and equipment, the costs of research and the costs of advertising and distribution.¹⁵ Appended statements explaining the company's reserves and the procedure followed in inventory evaluation would be helpful.¹⁶ Labor expenditures could be itemized in some detail so as to show the amounts paid for hours worked, the amounts paid for time not worked (paid holidays, vacations, sick leave, meal periods, etc.), and the cost of pensions, employee insurance, and medical services.¹⁷

8. Oklahoma Rendering Co., 75 N.L.R.B. 1112, 21 L.R.R.M. 1115 (1948).

9. J. H. Allison & Co., 70 N.L.R.B. 377 (1946), *enforced*, 165 F. 2d 766 (6th Cir. 1948), *cert. denied*, 335 U. S. 905 (1949); *cf.* General Controls Co., 88 N.L.R.B. No. 242, 25 L.R.R.M. 1475 (1950).

10. National Grinding Wheel Co., 75 N.L.R.B. 905, 21 L.R.R.M. 1095 (1948); Electric Auto-Lite Co., 89 N.L.R.B. No. 145, 26 L.R.R.M. 1092 (1950); Yawman & Erbe Mfg. Co., 89 N.L.R.B. No. 108, 26 L.R.R.M. 1052 (1950).

11. Dixie Mfg. Co., Inc., 79 N.L.R.B. 645, 22 L.R.R.M. 1433 (1948).

12. Jacobs Mfg. Co., 26 Lab. Rel. Rep. (LRRM) 187 (1950). (Trial Examiner's Report.)

13. *Ibid.*

14. See Address by Lane Kirkland, member of AFL research staff, before an accounting conference at University of Georgia, *What Financial Information Does Labor Want?*, 87 J. Accountancy 368, 372 (1949).

15. Owens, *supra* note 1, at 2.

16. Kirkland, *supra* note 14, at 372.

17. See Statement by Solomon Barkin, TWUA research director, *What Financial Information Does Labor Want?*, 87 J. Accountancy 368, 376 (1949).

John W. Riegel, Director of the Bureau of Industrial Relations at the University of Michigan, has suggested a fairly comprehensive list of topics which could be covered by a company in a voluntary program of sharing company and economic information with its employees. He says:

"... the following can be mentioned as examples: current sales and the backlog of orders on hand, the short-term outlook for sales if that can be forecasted with safety; new products, new markets, and new customers; challenges presented by competitors; interruptions of supplies of raw materials; improved methods and their significance; conditions such as excess scrap which can be reduced by employee cooperation; the distribution of the ownership of the company, this is, the number of stockholders who hold blocks of stock within stated size classifications; net profit per sales dollar

One unusual proposal is that the intercorporate relations between officers and directors of various companies be made known to the union since such relations affect sales, purchases, and other policies.¹⁸ Management personnel have arranged corporate structures to suit business and personal needs, and it may be contended that the intercorporate relations are confidential. Nevertheless it cannot be denied that such relations do influence considerably the policies of the companies involved.

Labor leaders have also demanded that the company's pricing policies and methods be disclosed.¹⁹ In suggesting that large corporations be required to make available certain information about their price and production policies, one union representative has characterized industry's present reluctance to open the books to labor as a criminal assault upon the welfare of our whole society. He said:

"If we recognize that the public interest in wage-price-profit decisions . . . conflicts with the interests of those who now make them, it is not enough merely to admonish the private business groups which control our economic life. We do not rely solely on admonition to prevent burglary or mayhem which, after all, are crimes affecting only individuals. All the less reason for us to do no more than stand on the sidelines and deplore while industry perpetrates acts which, in a very real sense, are criminal assaults upon the welfare of our whole society."²⁰

Certainly some of the basic implications of this observation are subject to dispute and would be challenged by industry. However, it does disclose the deep-seated desire of labor to have a look at the books. (Of course it is not necessary to go to the extent of characterizing a refusal to open the books in the terms of the criminal law—even if one believes that industry should be required to make them accessible to labor organizations.)

and net profit on investment; dollars of investment per job; distribution of gross income to investors, to tax authorities, to suppliers, to employees, and to others; an explanation of depreciation; trends in wage rates and dividend rates; and the cost of the services of top management in relation to the total payroll.

"Also the statements can tell the employees about the cost of vacations, paid holidays, group insurance, private pension plans, and social insurance taxes. Information can be given employees regarding the cost of services for their benefit, such as the loss incurred in the operation of a cafeteria. Without this information the employees can readily take such services for granted." Riegel, *supra* note 3, at 336.

18. Barkin, *supra* note 17.

19. *Id.* at 377.

20. See Address by Nat Weinberg, UAW-CIO research and engineering department director, before the Third Annual Public Affairs Conference at Yale Law School, Dec. 10, 1948, *What Financial Information Does Labor Want?*, 87 J. Accountancy 368, 375 (1949).

Why is it that unions assert the need for the data mentioned above? If grievances are to be prosecuted intelligently by the union, it is essential that it have all pertinent information regarding the company's seniority practices, job classification lists, individual wage rates, production records of employees, bases for merit increases, etc. Often these details must be in the hands of the union in order for it to ascertain if an employee has a valid complaint. Much of this information will be at the disposal of the union anyhow, but it is not always.

Various income, cost, and other data are demanded by union representatives primarily for use in wage negotiations rather than for use in the administration of the collective bargaining agreement. Details are requested in order that a comparison may be made with other companies. By stating items in terms of a percentage of total cost or as a percentage of sales, the efficiency of the particular company may be evaluated. Possibly the union will be able to suggest some eliminations, the benefits of which would accrue to the employees. Furthermore, the union wants to keep abreast of the trends in the various items in order to detect any padding that may have taken place.²¹ Finally the union wants to know whether the company is earning a fair return on invested capital; whether the company can afford to pay a wage increase now; or whether the company could absorb a wage increase through increased productivity, by raising prices, or by the introduction of new methods.²²

Generally these are the reasons underlying labor's demands for such data. Industry's reasons for refusing to divulge it (where it is not already available) will be explored in Part III.

B. *Difficulties with Existing Sources of Information*

Although some of the existing sources of information are helpful, they are inadequate and do not fully meet labor's demands. For example, the Bureau of Labor Statistics of the Department of Labor provides general information in the form of surveys. In 1949 the Bureau started a series of wage case studies of key employers. The first exhibit was the history of wage changes and wage practices of the American Woolen Company.²³ Of the twenty-

21. Owens, *supra* note 1, at 2.

22. See Address by Otis Brubaker, research director of the United Steel Workers (CIO), before the Michigan Accounting Conference, October 22, 1948, *What Financial Information Does Labor Want?*, 87 J. Accountancy 368 (1949).

23. See 23 Lab. Rel. Rep. (LRRM) 137 (1949).

five wage case studies some involved a specific company and a union; others covered a group of companies and a union, such as the Northern Cotton Textile Association and the Textile Workers Union of America (CIO);²⁴ still others reported the wage adjustments of a company and a group of unions, such as Armour and Company and the United Packinghouse Workers of America (CIO) and Butcher Workmen of America (AFL).²⁵ Although the research and the compilation of the chronologies are a valuable service rendered by the Bureau, it is admitted that virtually all the information used is a matter of public knowledge anyhow. The studies do not show the cost to the company of wage increases and fringe benefits in terms of percentages of total cost; nor is other data desired by the union disclosed. And the survey is limited to a few key companies.

Other helpful aids provided by the Bureau of Labor Statistics are reports of rises and declines in the Consumers' Price Index, cost-of-living data for large cities, and the latest strike figures. Of course such statistics are interesting and of some benefit, but by no stretch of the imagination do they begin to fulfill the needs of labor for informed collective bargaining.

Some employers have produced the necessary details upon demand; a few have even agreed to the insertion of a provision in a collective bargaining agreement calling for the submission of limited types of data to the union upon request. An example of the latter is the following:

"Wage Information: Upon the request of the Union, the Employer agrees to submit the low, high and average hourly earnings, exclusive of overtime and bonus payments, of piece and incentive rate employees by job classifications and the number of employees in each job classification. Such requests shall not be made more frequently than once each quarter.

The Employer will provide the Union, and keep up to date, a list of all rates, classifications and job descriptions in effect at the mill. . . ."²⁶

24. See 23 Lab. Rel. Rep. (LRRM) 209 (1949).

25. See 24 Lab. Rel. Rep. (LRRM) 114 (1949).

26. Article III (C) (5) of the 1947 agreement between Fall River Textile Manufacturers' Association, New Bedford Cotton Manufacturers' Association and Textile Workers Union of America (CIO). Cf. the 1949 agreement between the Ford Motor Company and United Automobile Workers (CIO), as reported in Selekman, Selekman, and Fuller, *Problems in Labor Relations* 355, 356 (1950). In this latter agreement, the company agreed to make production standards available for inspection by union committeemen and, in case of disputed work standards, data is to be given to qualified union representatives. On the other hand the union agreed not to attempt to organize employees who have access to confidential information pertaining to labor relations matters.

To the extent that the employer is willing to agree to the production of data, and to comply with the agreement, the union encounters no difficulty on that score. Unfortunately for labor, not all industry is similarly minded. And the provisions of this nature on which there has been agreement are extremely limited in scope. For other types of data, especially income and cost data, alternative sources must be relied on.

How about financial reports which are published? In the first place some companies are under family control and are exempt under the law with respect to the publication of financial reports.²⁷ Thus the securities may not be listed on a securities exchange. Even if the union subscribes to investor's services such as Moody's and Standard and Poor's and avails itself of SEC reports, still it will be uninformed about many small corporations, unincorporated enterprises and corporations whose stock is closely held.²⁸

On the other hand let us assume that the union has obtained the income statement of the company. Is it adequate so far as collective bargaining is concerned? No, says the union. It may not be up to date; in an era of rapidly changing prices and profits, the preceding year's financial statement may not be meaningful for this year's wage negotiations. Also, it is usually so general that a breakdown is necessary in order for it to be useful for labor's purposes.²⁹

Then the accounting profession has been taken to task because of the accounting conventions followed by the companies. The procedures which have been developed are adapted primarily to the needs of management and the stockholders without much regard for their informational value to representatives of employees.³⁰ Any one of a number of accounting practices may be adopted by a particular company. Not only is this confusing but it is also contended that the income statement which should present an accurate report of the results of operations does not, in fact, paint a true picture. Some of the accounting devices which labor claims have been grievously abused have been listed by Otis Brubaker, Director of the Research Department of the United Steelworkers of America.

27. In the negotiations preceding the 1949 agreement between Ford Motor Company and the UAW-CIO, President Walter P. Reuther (in a letter dated March 10, 1949 and addressed to Mr. Bugas) referred to Ford's exemption from publishing financial reports under the law. Selekman, Selekman, and Fuller, *op. cit. supra* note 26, at 328.

28. Kirkland, *supra* note 14, at 371.

29. Owens, *supra* note 1, at 1.

30. Kirkland, *supra* note 14, at 370.

They are as follows:

"... (1) the setting up of exorbitant inventory reserves for possible inventory losses; (2) institution of Lifo during periods of rising prices; (3) the setting aside of grossly inflated reserves for income and excess profits taxes during the war; (4) establishment of large general contingency reserves unrelated to any specified or expected contingency; (5) the reserving of moneys for postwar rehabilitation costs in amounts out of all relation to expected or probable costs; (6) use of inflated depreciation reserves in financial reports which are not in accordance with the depreciation expense reported to the Bureau of Internal Revenue."³¹

If the union negotiators are to bargain rationally over demanded wage increases, they assert that the details behind the financial statement must be made available for a proper analysis. And the mere disclosure of the amount of a sum of money with a given accounting label is not sufficient, labor contends, because the same sum of money may be designated by different names, depending on the particular accountant employed by the company.

In the event that the desired information is not accessible either through the medium of public reports or pursuant to the company's agreement to produce it for the union upon demand, are there any other means open to the representatives of the workers? Suppose an employee becomes a stockholder in the corporation. Does he then have the right to inspect the books and records of the company for the purpose of obtaining information to be used in wage negotiations by the union? The existence of such a right is extremely doubtful, even if the employee fulfills other requisites such as owning a certain percentage, or more, of the stock. Although a stockholder has a right to be informed as to the financial affairs of the business, the courts have said that the stockholder's purpose in inspecting the books must be germane to his interest as a stockholder.³² That is not only the common law rule but the majority of the courts also say that the purpose and motive of the stockholder still limit the right to inspect the books under a constitutional or statutory provision.³³ Dicta may be found, too, that a corporation is not without remedy if a stockholder seeks to use in an improper manner the information he obtains. However, exactly what use is improper appears to be moot and no definite remedy is clearly set forth.³⁴ Nevertheless it has been said numerous times that there is

31. Brubaker, *supra* note 22, at 369.

32. 13 Fletcher, *Cyclopedia Corporations* § 5746; 5 *id.* § 2219.

33. 5 *id.* § 2220.

34. 5 *id.* § 2245.

no right to inspect the books where the purpose of the stockholder is to vex, annoy or harass the corporation, or where the motive is other than to protect the stockholder's interest.³⁵ Whether or not the intention of using the information for collective bargaining purposes would be declared improper is a question which cannot be answered with certainty.³⁶ Suffice it to say that this method of obtaining the desired details is not a very promising one at most.

If all the sources of information heretofore discussed fail the union, is it helpless? If necessary, resort may be had to the services of the National Labor Relations Board. A survey of the union's legal right to certain data under federal labor legislation and a notation of the current trends are now in order.

III. Extent of Company's Duty Under the Law

Where the union files an unfair labor practice charge with the NLRB against an employer for the latter's failure to produce the desired information, the result depends usually on an interpretation of Section 8(a)(5) of the Taft-Hartley Act.³⁷ This section makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . ." No change was made by the Labor Management Relations Act of 1947 when it reenacted the corresponding subsection, 8(5), of the Wagner Act.³⁸ However, Section 8(d) of the Taft-Hartley Act does define the obligation of bargaining collectively in the following words:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives 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. . . ." ³⁹ (Italics added.)

Although this language will not be found in the original National Labor Relations Act, it does not introduce any new concept;

35. 5 *id.* § 2226.

36. *But cf.* the unusual recent case of an attempt by a union member who was also a member of a nonprofit corporation owned by the union to examine the corporation's books. The plaintiff's purpose—to determine if irregularities existed in connection with the use of funds obtained by the corporation from union sources—was held to be a proper one. *Belman v. Automotive Workers Bldg. Corp.*, 25 Lab. Rel. Rep. (LRRM) 339 (Ohio Ct. App., Lucas Co. 1950).

37. 61 Stat. 141 (1947), 29 U. S. C. § 158 (Supp. 1949).

38. 49 Stat. 453 (1935), 29 U. S. C. § 158 (1947).

39. 61 Stat. 142 (1947), 29 U. S. C. § 158 (Supp. 1949).

it merely codifies the law as it developed during the twelve years between the enactment of the Wagner Act and its amendments by the Taft-Hartley Act. The idea, for example, that bargaining must be *in good faith* was well established in the law by 1947.⁴⁰

Despite the identity of the wording of the unfair labor practice in issue, in both the original and the amended statutes, the extent of the employer's duty to produce data for collective bargaining purposes has never been fully determined. The United States Supreme Court has never passed on the question, and very few Circuit Courts of Appeals have been faced with the problem. However, in view of the relatively large number of recent cases raising the issue, a clarification by the appellate courts of the employer's duty in this respect is to be expected in the near future.⁴¹

A. *Various Situations and the Union's Right to Certain Information*

A number of different factual situations may be envisaged. Does it make any difference if the employer pleads an inability to pay a demanded wage increase and then refuses to permit a look at the books? Is the type of data sought material? Is the stage of collective bargaining—negotiation or administration of the contract—significant? Does an employer have a duty to produce data exclusively within his control if the union does not demand an opportunity to study it? These, and other factors, should be taken into account in evaluating the arguments pro and con which have been raised.

First, let us assume that a wage increase is requested by the union at the negotiation of the contract stage of collective bargaining. The employer answers that he is financially unable to afford increased labor costs at this time; to which the union replies, "Open up your books and we will show you that you are able to pay higher wages." "No," says the company, "such matters are the exclusive prerogative of management and do not concern the union." "Well," queries the union, "how can we test the validity of your position unless you make available some information on your financial condition?" "Sorry," murmurs the company representative, "but our policy is not to divulge such information."

The union's question has been answered by the NLRB. In a

40. NLRB v. Montgomery Ward & Co., 133 F. 2d 676 (9th Cir. 1943).

41. During the past year almost as many cases on this point were decided by the NLRB as were reported throughout the entire life of the Wagner Act.

recent case⁴² the principal topic of negotiation was higher wages. The union scaled down its demands, but the company steadfastly pleaded its inability to raise wages. Then the union pointed out that the company had regularly paid dividends to its stockholders and asked for data concerning the amount of dividends paid and the rate of dividends in relation to the company's capitalization. The only information that the company would disclose was that dividends had been small during the previous ten years. Requests for a financial statement and a breakdown of manufacturing costs were rejected. After a hearing pursuant to an unfair labor practice charge, the trial examiner recommended that the employer be required to produce financial data showing the amount of capitalization, the amount and rate of dividends since 1946 and a breakdown of manufacturing costs including wages, raw materials, salaries for officials, depreciation, and overhead.⁴³ But the NLRB did not make so detailed an order; it merely required in general terms that the employer furnish the union with sufficient information to enable it "to understand and discuss intelligently" the objections raised by the company.

Employers have advanced several different arguments in behalf of their position in this situation. One has already been mentioned, *i.e.*, the "exclusive domain of management" argument. It is contended that financial matters are the sole concern of management and none of the union's business. Furthermore, even if the books are opened to the union, that will only lead to more arguments over what is a proper reserve, what is a fair return, etc. And a determination of the latter is a management prerogative. The union's counter-argument is that attaching a given label to a function does not advance us. Then, after freely acknowledging that there may be a difference of opinion over the interpretation of the facts and figures made available, the union asserts that that is no reason why a peaceful settlement cannot be reached by good faith cooperation and compromise at the bargaining table. At least the facts could be produced so that the union could take a rational and realistic position during negotiations. Otherwise the union must adopt a "take it or leave it" approach so much deplored by management.

42. Southern Saddlery Co., 90 N.L.R.B. No. 176, 26 L.R.R.M. 1322 (1950). *Cf.* a still more recent recommendation of a trial examiner of the NLRB that a company which pleaded its inability to pay be required to produce information on its incoming and outgoing orders and other data bearing on its financial condition. Jacobs Mfg. Co., 26 Lab. Rel. Rep. (LRRM) 187 (1950).

43. Southern Saddlery Co., 26 Lab. Rel. Rep. (LRRM) 187 (1950).

Another contention of the employers is more serious. Objection is made to the disclosure of certain "cost" information on the ground that it is highly confidential and might be used by competitors to advantage. This is especially valid where the union representatives are dealing with several competitors in the same industry. Nevertheless this difficulty can be obviated where there is mutual respect and confidence in the integrity of both sides. Confidential information has been made accessible to a limited number of union representatives on the latter's promise that it will not be disclosed and will only be used at the bargaining table of that particular company. And, of course, much of the data requested does not fall in this category anyhow.

Where the employer raises the issue of his ability to pay, it seems proper to require him to substantiate his claim in some manner. Sufficient data should be furnished to enable the union to bargain rationally and to fulfill its appointed function during negotiations. To allow the company to make and stand on a flat assertion without providing any information as to its basis would stultify the whole collective bargaining process. The question of bargaining in bad faith would not even be reached if wages were the only subject of negotiation; there would just not be any bargaining at all. If the national policy of settling labor disputes through the collective bargaining process is to be effectuated, such an anomaly cannot be permitted to exist.

A second and more complex problem is presented by the situation where the union injects the issue of the company's ability to pay. Suppose, for example, that the union demands additional monetary benefits for the employees and says, "Open up your books and we will show you that you can afford such benefits." "No," rejoins the employer, "we will not open up our books to you because whether or not we can afford to pay is not the question." This would not seem to be as strong a case for a finding of an unfair labor practice as the situation where the company pleads poverty but refuses to document its position. Especially is this so in view of a common attitude assumed by labor unions that a company's ability to pay, or the lack of it, is not the sole criterion on which the answer to a wage question should be based. Representatives of labor argue that evidence of a company's prosperous financial condition is pertinent in order to remove the basis for any claim of hardship which might result from a wage increase. But they would not agree that evidence of a bad financial condition would neces-

sarily justify depressing the wage rates. Although the union will take into account the financial problems of an individual company, still it will not ask the employees to subsidize an inefficient management.⁴⁴

Any claim by an employer that the financial condition of his company is irrelevant would quite probably only be made at a time when the record would provide ammunition to support the requested wage increase. But since the union is often unwilling to go along completely with the company where the latter injects the issue of poverty and relies on its financial condition, it is more difficult to characterize this refusal to produce financial data as an unfair labor practice. Moreover, in this situation collective bargaining can take place because the company is not standing on an assertion that blocks further negotiation. Other arguments (based on cost of living statistics, for example) may be brought to the bargaining table. Of course an employer who does take the position that evidence of his ability to pay is irrelevant and need not be produced in a time of increasing profits will hardly be given any consideration by the union in a bad period when the company might desire the union to modify its demands because of the financial outlook.

On the other hand it may well be contended that a refusal to produce financial data is a refusal to bargain collectively in good faith—even where the company claims that its ability to pay is not the issue. The rationality of the union's demand would depend on the availability of such information. Furthermore, the courts have said that a sincere and genuine effort must be made to find a common basis of agreement. The affirmative nature of the obligation is expressed in the following words:

"The respondent . . . was legally bound to confer and negotiate sincerely with the representatives of its employees. It was required to do so with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation. The cases setting forth this obligation are many, and it is well settled that a mere pretence at collective bargaining with a completely closed mind and without this spirit of cooperation and good faith is not a fulfillment of this duty. (Cases cited.)"⁴⁵
Various devices have been adopted by industry in order to

44. William Howard Taft (Chairman of the first National War Labor Board during World War I) told the Federal Electric Railways Commission that the financial condition of the public utilities was not controlling in the Board's determination of fair wage rates for the employees.

45. *NLRB v. Reed & Prince Mfg. Co.*, 118 F. 2d 874, 885 (1st Cir. 1941).

comply with its obligation to bargain in good faith in this respect. One company submitted its income tax reports to substantiate its claim that it was losing money and could not afford a proposed wage increase.⁴⁶ Another company explained its financial status and offered to show its books to corroborate its statements.⁴⁷ Still another company went one step further; it not only offered its books for examination but it also said that it would pay the fees of auditors selected by the union.⁴⁸

Where a company has refused to disclose information other than income data, the NLRB has also come to the rescue of the union. Sometimes explanatory details are sought during the negotiation of a new contract; other times they are requested during the term of the contract in order that the union may properly police it. Employers have been required to produce the following information for collective bargaining purposes: facts underlying the seniority policy as practiced in the plant,⁴⁹ a list of employees' names and their rates of pay,⁵⁰ the wage histories of employees,⁵¹ wage rate data of other plants in the industry where the company has such statistics in its possession,⁵² job classification lists,⁵³ means used to compute individual earnings and incentive bonuses,⁵⁴ production requirements on government orders,⁵⁵ and production standards used by the company in determining merit ratings.⁵⁶

46. *NLRB v. Lightner Publishing Corp.*, 12 N.L.R.B. 1255 (1939), *modified and enforced*, 113 F. 2d 621 (7th Cir. 1940).

47. *Julius Breckwoldt & Son, Inc.*, 9 N.L.R.B. 94, 3 L.R.R.M. 243 (1938); *cf. Crompton-Highland Mills, Inc.*, 70 N.L.R.B. 206, 18 L.R.R.M. 1347 (1946) (where the company invited the union to make its own engineering studies. It was held that the company's refusal to supply data concerning an incentive wage plan was not an unfair labor practice).

48. *Ferguson Bros. Mfg. Co.*, 9 N.L.R.B. 189, 3 L.R.R.M. 256 (1938).

49. *Singer Mfg. Co.*, 24 N.L.R.B. 444 (1940), *modified and enforced*, 119 F. 2d 131 (7th Cir. 1941).

50. *National Grinding Wheel Co., Inc.*, 75 N.L.R.B. 905, 21 L.R.R.M. 1095 (1948); *accord, Vanette Hosiery Mills*, 80 N.L.R.B. 1116, 23 L.R.R.M. 1198 (1948); *Electric Auto-Lite Co.*, 89 N.L.R.B. No. 145, 26 L.R.R.M. 1092 (1950).

51. *Aluminum Ore Co.*, 39 N.L.R.B. 1286 (1942), *modified and enforced*, 131 F. 2d 485 (7th Cir. 1942).

52. *Sherwin-Williams Co.*, 34 N.L.R.B. 651, 9 L.R.R.M. 27 (1941).

53. *Young Engineering Co.*, 57 N.L.R.B. 1221, 14 L.R.R.M. 270 (1944).

54. *Dixie Mfg. Co.*, 79 N.L.R.B. 645, 22 L.R.R.M. 1433 (1948); *cf. NLRB v. J. H. Allison & Co.*, 70 N.L.R.B. 377 (1946), *enforced*, 165 F. 2d 766 (6th Cir. 1948), *cert. denied*, 335 U. S. 905 (1949) (where an employer was ordered to show the basis for individual merit wage increases or the names of employees who had received increases with the respective amounts).

55. *Dixie Mfg. Co.*, 79 N.L.R.B. 645, 22 L.R.R.M. 1433 (1948).

56. *Montgomery Ward & Co.*, 90 N.L.R.B. No. 180, 26 L.R.R.M. 1333 (1950). In another recent case a company was found guilty of refusing to bargain collectively by withholding "the name, classification, rate of pay, and merit rating score of each employee . . . and full information with respect

Insofar as wage data is concerned the employer's obligation upon the demand of the union is well established. The existence of the obligation is no longer a matter of doubt; only the limits on his duty remain to be settled. (These will be discussed in the next section.) Of the numerous court and Board decisions on the question a passage from the opinion of Judge Lindley in *Aluminum Ore Co. v. N.L.R.B.*, is often quoted. It is as follows:

"Again we do not believe that it was the intent of Congress in this legislation that, in the collective bargaining prescribed, the union, as representative of the employees, should be deprived of the pertinent facts constituting the wage history of the employees."⁵⁷

And then Judge Lindley goes on to refute a common objection on the part of employers to the disclosure of such information, *i.e.*, that it is confidential. He says:

"We can conceive of no justification for a claim that such information is confidential. Rather it seems to go to the very root of the facts upon which the merits were to be resolved. In determining what employees should receive increases and in what amounts, it could have been only helpful to have before the bargainners the wage history of the various employees, including full information as to the work done by the respective employees and as to their respective wages in the past, their respective increases from time to time and all other facts bearing upon what constituted fair wages and fair increases. And if there be any reasonable basis for the contention that this may have been confidential data of the employer before the passage of the Act, it seems to us it cannot be so held in the face of the expressed social and economic purposes of the statute."⁵⁸

Among other reasons advanced by company representatives for failing to produce demanded wage data is the contention that the union could obtain the information from the employees themselves. In the case of the *Electric Auto-Lite Company*⁵⁹ the union requested the current salary rates of twenty-seven employees in the unit in order to prepare themselves for pending wage negotiations and to police the contract. Because of the smallness of the unit and the

to individual periodic merit wage increases or decreases, including the names of employees who received such increases or decreases, and the dates on which such increases or decreases were put into effect." General Controls Co., 88 N.L.R.B. No. 242, 25 L.R.R.M. 1475 (1950).

57. 131 F. 2d 485, 487 (7th Cir. 1942).

58. *Ibid.* Of course this quotation must be read as applying to wage and other closely related data to which the union is entitled. That some information is confidential would certainly be recognized. Cf. the Wood Bill which would permit discharge of a worker expelled from the union for disclosure of confidential union information. H. R. 4290, 81st Cong., 1st Sess. (1949).

59. 89 N.L.R.B. No. 145, 26 L.R.R.M. 1092 (1950).

fact that twenty-five of the twenty-seven employees belonged to the union, the employer argued that the union could go directly to the employees for their salary rates. This argument boomeranged. These circumstances, said the Board, only emphasize "the reasonableness of the union's request and the ease with which the respondent can comply." In fact, during oral argument counsel for the company admitted that it would only take a few minutes to furnish the information.

Furthermore, the premise of the employer's contention is unsound. Not only non-union members but even union members might well be reluctant to tell the union what their salary rates are. Yet the union must be informed of those details if it is to represent adequately all of the employees in the unit. Incidentally this defense of the company in 1950 must have been born of desperation since it had been raised in two earlier cases and in neither was it upheld.⁶⁰

Another ground on which the same company relied was that it had no authority from the individual employees (principals) to disclose the salary rates to the union (their agent). This legalistic objection was given short shrift by the Board which pointed out that the bargaining agent's authority is derived from the statute and that no individual authorization is necessary. The statutory representative is thus entitled to receive such information in order that it may intelligently bargain on behalf of its principals, the employees. Dictum is also expressed to the effect that even if some of the employees had directed the employer to withhold their salary rates from the union, it would have been to no avail since the union's statutory authority cannot be revoked by the acts of some individuals.⁶¹

One other factual situation remains for consideration. Already discussed are company pleas of poverty coupled with union demands for documentation, union requests for income data in the absence of a company defense of inability to pay a proposed wage increase, and union demands for wage and other data to enable it to prosecute grievances under an existing contract or to prepare for the negotiation of a new contract. A survey of the union's right to this information has been made with a presentation of the

60. Aluminum Ore Co., 39 N.L.R.B. 1286 (1942), *modified and enforced*, 131 F. 2d 485 (7th Cir. 1942); J. H. Allison & Co., 70 N.L.R.B. 377 (1946), *enforced*, 165 F. 2d 766 (6th Cir. 1948), *cert. denied*, 335 U. S. 905 (1949).

61. Electric Auto-Lite Co., 89 N.L.R.B. No. 145, 26 L.R.R.M. 1092 (1950).

defenses usually relied on by industry. It should be noted, however, that in all these situations a demand had been made by the union. Suppose that the company has prepared data in its possession which it would be willing to submit to the union for examination upon request. The union knows of its existence but fails to demand to see it. Is a demand necessary?

This question has been raised before a trial examiner of the NLRB by the *D & R Machine Supply Company* case.⁶² In answer to a proposed wage increase the company asserted its inability to pay. The employer's attorney reported at several meetings that the financial statements of the company were in his possession and that an examination of them would confirm his position. But no interest was shown on the part of the union committee and the company never actually revealed the information contained in the statements. The argument of the General Counsel of the NLRB was that the company's failure to document its claim by offering the statements for inspection constituted a breach of duty to bargain in good faith. This theory was not accepted by the trial examiner who based his recommendation largely on the absence of a union demand.

Nevertheless the contrary has been held in similar circumstances. The New York Labor Relations Board recently ruled that a company's failure to use financial data showing the cost of the wage demands made by the union was evidence of bad-faith bargaining.⁶³ Instead of exhibiting the statement prepared by his accountant for bargaining, the employer merely declared that it would be impossible to meet the union's monetary demands. There was no proof of a union request to study the material; the New York Board reached its decision on the reasoning that mere assertions gave the union no basis for evaluating the company's position. "Collective bargaining hardly exists," the Board said, "if assertion is resorted to when documentation is readily available."⁶⁴

Although it is not clear whether the union knew of the existence of the prepared statement, presumably it did since the employer asked for time to allow his accountant to study the cost of the wage proposal and at a later meeting stated that the cost was too great. Anyhow the New York Board would probably have arrived at the same decision by applying the above reasoning.

A like result could be reached by the National Board by emphasizing the affirmative nature of the duty to bargain collectively.

62. 26 Lab. Rel. Rep. (LRRM) 176 (1950).

63. Court Cafeteria, 26 L.R.R.M. 1207 (N.Y. LRB 1950).

64. *Ibid.*

A mere negative attitude is not sufficient; rather, active cooperation with an open mind and a genuine desire to find some basis for agreement is required. Statutory support for this position may be found in Section 204(a) (1) of the Taft-Hartley Act. It reads as follows:

"In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) *exert every reasonable effort* to make and maintain agreements concerning rates of pay, hours, and working conditions. . . ."⁶⁵ (Italics added.)

On the other hand it may be urged that "every reasonable effort" has been exerted by the employer once the existence of the data has been disclosed. If the union representatives have full knowledge of the existence of the prepared statements and fail to request an opportunity to examine them, have they exerted "every reasonable effort" to find some basis for agreement? And should not the conduct of the bargaining agent be considered in determining whether the employer has bargained in good faith? It may well be contended that the union has impliedly waived whatever right it had to the information until such time as a demand is made. Of course this analysis would not control the situation where the company has explanatory details at its disposal but conceals their existence from the union.

B. *Limitations on the Union's Right to Information*

Labor organizations have not obtained all the information they desire upon petitioning the NLRB for relief; nor, when it is held that they are entitled to the information, have they always received it in the form requested. Since there are only a few decisions setting forth the limitations on the union's right to collective bargaining data, no definitive conclusions can be reached. Still, the rulings to date may be noted with some prognostication as to what may be expected in the future.

Apparently the union must be prepared to show that the demanded information is necessary in order to bargain effectively on behalf of the employees whom it represents. In a recent case⁶⁶ the

65. 61 Stat. 154 (1947), 29 U. S. C. § 174 (Supp. 1949). Cf. Section 8 of the Norris-LaGuardia Act: "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make *every reasonable effort* to settle such dispute. . . ." 47 Stat. 72, 29 U. S. C. § 108 (1946). (Italics added.)

66. B. F. Goodrich Co., 89 N.L.R.B. No. 139, 26 L.R.R.M. 1090 (1950).

union requested that the employer furnish certain data bearing on wages; four detailed purposes for which the material was to be used were given. Since the NLRB was convinced that a lack of such details would seriously hamper the union's function, the company was ordered to produce them. The Board said:

"... we are convinced and find that the information requested of the Respondent was needed by the Union if it was to exercise effectively its legitimate function of representing the employees in contract negotiations and of protecting its proper interest in the manner in which the Respondent administered the existing contract."⁶⁷

By way of contrast, in an earlier decision⁶⁸ under the Wagner Act the Board found no unfair labor practice in an employer's refusal to furnish the union data on the employees' earnings and production records because there was no evidence that negotiations were thereby impeded. Thus it is incumbent upon the union to demonstrate the necessity of having such information for collective bargaining purposes—either to enable it to police its contract intelligently or to negotiate a new contract.

The amount of data to which the union is entitled is controlled by the same considerations. During negotiations early in 1949 the union requested wage data from the Yawman and Erbe Manufacturing Company for the years 1946, 1947, and 1948. Although the trial examiner ruled in favor of the union, the majority of a three-member panel of the Board only ordered the company to produce wage data for the year preceding the contract negotiations, but not for 1946 and 1947.⁶⁹ Since the company's position was that the wages paid under the old contract were proper, disclosure of the 1948 rates was essential for the union to bargain intelligently. The 1946 and 1947 information was held not to be relevant to the pending negotiations. Board Member Murdock dissented as to the latter and said:

"I would not substitute my judgment for that of the union as to what information is necessary to enable it to bargain effectively. So long as wage information of this character cannot be said to be patently irrelevant, I believe the Union is entitled to it, subject, of course, to the qualification that an employer should not be compelled to provide information the furnishing of which would impose an impossible or unreasonable burden. There is no such claim here.

"Moreover, it should be noted that if Respondent had not im-

67. 26 L.R.R.M. 1090, 1091.

68. Pool Mfg. Co., 70 N.L.R.B. 540, 18 L.R.R.M. 1364 (1946).

69. Yawman & Erbe Mfg. Co., 89 N.L.R.B. No. 108, 26 L.R.R.M. 1052 (1950).

properly refused the 1946 and 1947 information requested in connection with the negotiations for the earlier contracts, the Union would not have been in the position of having to ask for 3 years' information at the time of the 1949 negotiations."⁷⁰

Hence the Board considers such factors as the relevancy of the information and the reasonableness of the request in determining the extent of the employer's obligation. Since each case will have to be decided on its own merits in respect to these general factors, the finding in any given situation is difficult to predict. Applying these tests in the *Yawman and Erbe* case, the trial examiner and one member of the NLRB reached one result, the majority of the panel of the Board another result. Therefore the precedents must be studied carefully for factual differences.

Two other recent decisions by the NLRB should be compared on the question of how much information the company must supply. In the first⁷¹ the company agreed to give the classifications and wage rates of all employees *specifically named* by the union. In the second⁷² the employer offered to furnish information on individual merit increases in regard to specific grievants. In both of these cases the respective data had been demanded by the union for all the employees in the unit. The first employer was absolved of any violation of the statute because of his position; the second was found to have committed an unfair labor practice. It will be noted that the offer of the latter company was much narrower than that of the former, *i.e.*, a specific employee had to have a grievance before the employer would submit the information to the union. Even though management was authorized under the contract to determine merit increases, the Board held it was still under a duty to inform the union upon request how they were granted, to whom, and the merit rating of each employee. Such partial compliance with the union's demands as was contained in the company's offer was not found to be sufficient to fulfill its statutory obligation.

But the requests of the union were not entirely satisfied in the first case either. The union wanted a *written* list of the names of the employees in the unit with their classifications and wage rates. Although the employer was willing to disclose this information as to each employee specifically named, he would only agree to do so orally. Data on seventy per cent of the employees was furnished

70. 26 L.R.R.M. 1052, 1053.

71. Cincinnati Steel Castings Co., 86 N.L.R.B. 592, 24 L.R.R.M. 1657 (1949).

72. General Controls Co., 88 N.L.R.B. No. 242, 25 L.R.R.M. 1475 (1950).

in this manner. Since there were only ninety-eight employees in the unit and the union had a list of the employees, it could have obtained the rest of the information it desired without too much difficulty. In any event another limitation on the union's right may be found in the following language of the Board:

"... we have not held, nor do we now hold, that the employer is obligated to furnish such information *in the exact form* requested by the representatives. It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining."⁷³ (Italics added.)

Even though the company representatives are not required to produce the information in the exact form demanded, they would be wise not to attempt to make things unnecessarily difficult for the union. Witness what happened to the B. F. Goodrich Company.⁷⁴ Its position ignored the qualification in the above passage about impeding the process of bargaining. During negotiations the union requested that the company furnish a list of all employees in the unit (identified by name, department and pay-roll number) with data as to salaries, salary ranges and merit ratings. Although the company partially complied with the union's demands, it failed to disclose the names in a manner which would permit the union to correlate the data with a particular employee in the unit. Two lists were supplied: data related to the department number of the employee (each employee in a given department receiving the same number) and a separate alphabetical listing of employees. But the two lists were presented in such a form that the union could not determine what the standing of an individual employee was. This offer was characterized by the union as inadequate. By way of defense the company said that the union could correlate the wage data with the particular employees in the unit by the "peculiar circumstances and earmarks" of each member of the union. As to nonmembers, it was suggested that the union question those employees for the purpose of building up a card index to identify them. This defense was rejected and the employer was found to have violated the law by refusing to bargain collectively. Since there were 1154 employees located in 144 departments, the remedy outlined by the company would have entailed great difficulty and loss of time. Management was therefore under a duty to supply the

73. Cincinnati Steel Castings Co., 86 N.L.R.B. 592, 593, 24 L.R.R.M. 1657, 1658 (1949).

74. 89 N.L.R.B. No. 139, 26 L.R.R.M. 1090 (1950).

information "in a manner not so burdensome or time-consuming as to impede the process of bargaining."⁷⁵

One more possible limitation on the union's right to information should be mentioned. It would seem that the representative of the employees could voluntarily restrict the nature of the employer's duty by agreeing to the inclusion of a provision in the collective bargaining agreement to that effect. Consider an analogy: an employer has a duty to bargain with the statutory representative concerning individual merit increases;⁷⁶ nevertheless it has been held that the union may bargain away its right to be consulted before merit pay increases are granted during the term of the contract.⁷⁷ Therefore it is submitted that the union may likewise limit its right to certain information during the term of the contract by an express waiver in the agreement. But the provision should be specific since the NLRB has said, "We are reluctant to deprive employees of any of the rights guaranteed them by the Act in the absence of a clear and unmistakable showing of a waiver of such rights."⁷⁸

IV. Conclusion

It is apparent that the precise nature of the employer's obligation to produce data for collective bargaining cannot be defined by sweeping generalizations. The type of data sought, the need for such data, the context in which the issue arises, other sources of information—all these and numerous other factors must be taken into account in determining the extent of the company's duty. Only a start has been made along the road towards clarification of the correlative rights and duties. Since there are so few decisions on the question, each must be examined closely to ascertain the crucial facts on which the Board or court relied. The precedents should also be studied for their possible significance as to future trends. Some of the opinions contain helpful hints with respect to issues that have not yet been litigated. But an employer or the representative of his employees would be unwise to rest his position on statements of the Board or the courts unless they are considered in their con-

75. *B. F. Goodrich Co.*, 89 N.L.R.B. No. 139, 26 L.R.R.M. 1090, 1091 (1950).

76. *J. H. Allison & Co.*, 70 N.L.R.B. 377 (1946), *enforced*, 165 F. 2d 766 (6th Cir. 1948), *cert. denied*, 335 U. S. 905 (1949).

77. *General Controls Co.*, 88 N.L.R.B. No. 242, 25 L.R.R.M. 1475 (1950).

78. *Tide Water Associated Oil Co.*, 85 N.L.R.B. 1096, 1098, 24 L.R.R.M. 1518, 1519 (1949).

text. Nothing is more dangerous. Qualifications and the *ratio decidendi* are equally as significant as the holdings involved.

If the information demanded by the union is pertinent and is essential for bargaining purposes—either for negotiating a new contract or for the proper administration of the existing agreement, the NLRB will require the company to furnish it. A refusal by management results in a finding of an unfair labor practice, *i.e.*, a refusal to bargain collectively with the statutory representative of the employees. The data sought by the union may range from the description of the job content of a position in a particular department to a breakdown of the corporation's financial statement. In all instances the Board will have to determine the relevancy of the information in the light of the pending negotiations and the reasonableness of the request. Where the union overreaches in its demands for unnecessary details⁷⁹ or where it pettily insists that the material be submitted in the exact form requested,⁸⁰ the Board will not come to its aid. Application of all these principles, however, will not be easy and many more decisions by the appellate courts will be necessary before the complete picture is delineated.

At least the parties can take cognizance of the defenses that have been rejected by the authorities so that futile positions will not be adopted. And the direction in which we are headed may be noted. An employer's most effective defense to an unfair labor practice charge would seem to be a showing that all data necessary for collective bargaining had already been proffered to the union in a form that would not "impede the process of bargaining."

Generally it may be stated that the company's obligation in this respect extends to the furnishing of information to the union which will enable it to bargain intelligently concerning any issue which is an appropriate subject for collective bargaining. Especially is this so when a material matter has been placed in issue by the employer. The trend of the decisions is in the direction of requiring management to produce data demanded by the union in order to encourage more rational bargaining. In the very few cases involving this broad question that have come to the attention of the courts, the holdings of the NLRB have been upheld for the most part. At the present writing there is no reason to expect that the climate of judicial opinion will be any different in the future.

79. *E.g.*, *Yawman & Erbe Mfg. Co.*, 89 N.L.R.B. No. 108, 26 L.R.R.M. 1052 (1950).

80. *E.g.*, *Cincinnati Steel Castings Co.*, 86 N.L.R.B. 592, 24 L.R.R.M. 1657 (1949).