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Labor Law: A Union's Duty to Furnish Information to an Employer for Purposes of Collective Bargaining

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LABOR LAW: A UNION'S DUTY TO FURNISH INFORMATION TO AN EMPLOYER FOR PURPOSES OF COLLECTIVE BARGAINING—*Oakland Press Co.*, 233 N.L.R.B. No. 144 (1977).

INTRODUCTION

Recently, in *Oakland Press Co.*,[1] the National Labor Relations Board held that a union has an affirmative duty to furnish information to an employer which is "relevant and necessary" to the bargaining process. Oakland Press claimed that the failure of the Printing and Graphic Communications Union to provide certain requested information was an unfair labor practice in violation of section 158(b)(3) of the National Labor Relations Act.[2] Oakland asserted that a union's duty to furnish information under section 158(b)(3) was parallel to an employer's duty to furnish information under section 158(a)(5).[3] An employer has had a general duty to furnish information necessary for a union's intelligent bargaining and presentation of issues since the passage of the original Act.[4] It was not until the *Oakland Press* decision that this duty was extended to a union. This note examines the duty of a labor organization to furnish requested information to an employer in light of the *Oakland Press* decision.

STATEMENT OF THE FACTS

Oakland Press had a collective bargaining agreement with Local 13 of the Printing and Graphic Communications Union.[5] The agreement specified that additional employees were to be hired on a daily basis when certain machinery or operations were being utilized. Under the agreement, the union was to provide the employees for additional work at straight time rates. Regular employees were not entitled to the work at overtime rates if competent substitutes were available. In practice, the union consistently allowed regular employees the option of working the extra hours at overtime rates before it referred substitute straight time personnel.

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1. 233 N.L.R.B. No. 144 (1977).

2. 29 U.S.C. § 158(b)(3) (1976): "It shall be an unfair labor practice for a labor organization or its agents—to refuse to bargain collectively with an employer; provided it is the representative of his employees subject to the provisions of section 159(a) of this title."

3. 29 U.S.C. § 158(a)(5) (1976): "It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

4. Aluminum Ore Co., 39 N.L.R.B. 1286, *enforced*, 131 F.2d 485 (7th Cir. 1942). *See generally* Annot., 2 A.L.R.3d 880 (1965) (Duty of furnishing information to employee representatives, under National Labor Relations Act).

5. 233 N.L.R.B. No. 144 at 2 (1977).

In February 1976, the union and Oakland Press began negotiations for a new contract. During negotiations, Oakland requested that new sections be inserted into the contract requiring the union to make a "bona fide effort to provide competent substitutes" at straight time rates. This change was requested because Oakland believed they were paying too much in overtime costs to regular employees when qualified substitutes were available at straight time rates.

On September 13th and 14th, Oakland requested two men more than the scheduled number of workers. Two regular employees on their days off were assigned to work overtime. Consequently, Oakland requested the union's hiring lists for those days to ascertain the availability of straight time substitutes. In subsequent bargaining sessions on October 14th and 19th, information concerning the availability of straight time help over a period of time was sought. On October 20th, Oakland made a formal demand for bargaining information concerning the union's practices on straight time referrals. At no time during the contract negotiations or afterward did the union comply with the request.

The issue considered by the administrative law judge was whether the union had rejected the proposed contract modifications in good faith. The judge concluded that the union had the privilege to refuse to accede to Oakland Press' bargaining demands,[6] since the rejection was made in good faith, and therefore, the union had not violated section 158(b)(3).[7]

DECISION OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, in reversing the decision, broadened the issue. It considered whether the information requested by Oakland was relevant and necessary to the bargaining process. The Board dismissed the good faith argument and analyzed the union's refusal to furnish information in terms of a refusal to bargain under section 158(b)(3). The Board found that without the requested information the employer could not effectively evaluate referral practices under the existing agreement, test the validity of proposals, or formulate contract proposals on referrals of employees. The Board analogized the requested information to information requested by unions concerning wage rates and job classifications. The information was further seen as having an economic impact on the negotiated wage package and as permitting Oakland to better predict its overtime costs over the length of the new contract. The Board cited the 1976 *Square*

6. *Id.*
7. *Id.*

D Co.[8] decision where the NLRB assumed, without deciding, that a union's duty to provide relevant information is parallel to that of an employer.

ANALYSIS

The original National Labor Relations Act had no provision making a union's refusal to bargain collectively an unfair labor practice. The intent of section 158(b)(3) was to apply bargaining standards to unions similar to those then being applied to employers in collective bargaining situations. The similarity in standards was intended to reduce the disparity which then existed between the parties. "[U]nder [section 158(b)(3)], not only must employers bargain collectively, but employees must bargain collectively, as well. If either of them fails to do so, they are guilty of engaging in unfair practices."[9] The amendments were thus designed to bring the National Labor Relations Act in line with the ideal that both parties to labor negotiations have the same obligation to furnish information necessary to intelligent discussions so that the ultimate decision may turn upon fair consideration of the facts and arguments.[10]

Only the *Square D* and *Oakland Press* decisions have specifically considered the issue of whether a union has a duty to provide information to an employer. They based the union's duty on a parallel duty of the employer to furnish wage data and other pertinent information related to bargaining which is exclusively within the control of the employer.[11] The *Square D* dispute occurred during the third step of a grievance proceeding. A union representative informed the company personnel manager that, if the grievance went to arbitration, he possessed a typewritten document which would win the case for him. The representative refused to show the document to the manager. In *Square D*, the Board assumed that unions have the same duty to furnish information as an employer.[12] Nevertheless, the Board refused to order the union to release the requested document because it was unwilling to order divesture based merely on the proclamation of the party

8. 224 N.L.R.B. 111 (1976).

9. 93 CONG. REC. 5005 (1947) (remarks of Sen. Hatch). *See also* NLRB v. Insurance Agents, 361 U.S. 477 (1960) (examines the congressional intent behind section 158(b)(3)).

10. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1434 (1958).

11. Acme Indus. Co., 150 N.L.R.B. 1463 (1965), *enforcement denied*, 351 F.2d 258 (7th Cir. 1965), *rev'd*, 385 U.S. 432 (1967). *Accord*, Timken Roller Bearing Co., 138 N.L.R.B. 15 (1962), *enforced*, 325 F.2d 746 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964); San Diego Newspaper Guild v. NLRB, 548 F.2d 863 (9th Cir. 1977).

12. 224 N.L.R.B. at 111.

holding the information that it was relevant.[13] A proper analysis of the extent of a union's duty to furnish information must therefore come from an examination of the parallel employer's duty and an understanding of what type of information has been held relevant.

A. The Nature of the Employer's Duty to Supply Information

The first consideration by the Supreme Court of the duty of an employer to supply information occurred in *NLRB v. Truitt Manufacturing Co.*[14] The issue was whether an employer should be permitted to argue that he could not afford to pay higher wages and at the same time refuse requests by the union for information to substantiate the claims.[15] The union requested any information which related to Truitt's position that the higher wages were not economical. Truitt contended that the information requested was irrelevant to the bargaining process and related to matters exclusively within the province of management.[16]

The Court upheld the NLRB decision that the refusal to supply the wage information violated section 158(a)(5) and was an unfair labor practice for failing to bargain in good faith. However, the Court refrained from making every refusal of an employer to furnish information a per se violation of the Act. Each case must turn on its particular facts.[17] Truitt had a statutory duty to bargain in good faith.[18] Because of this duty, the Court decided that Truitt could not claim that information relating to its ability to pay increased wages was irrelevant. *Truitt* is significant for the holding that an employer must furnish information only when it is relevant to assist the union in its statutory duty to bargain in good faith.[19]

Ten years later, the Court again considered the duty of an em-

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13. *Id.*
14. 110 N.L.R.B. 856 (1954), *enforced*, 351 U.S. 149 (1956).
15. *Id.* at 150.
16. *Id.* at 151.
17. *Id.* at 153. *See* Note, *Union Refusal to Bargain: Section 8(b)(3) of the National Labor Relations Act*, 71 HARV. L. REV. 502, 504 nn.13-17 (1958).
18. 29 U.S.C. § 158(a)(d) (1970):

> 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.

19. 351 U.S. at 154-155.

ployer to supply information. In *Acme Industrial Co.*,[20] grievances were filed with the union alleging that the company was removing machinery from its plant in violation of the labor agreement. In order for the union to properly process the grievances, information about the removal was requested. The Court went one step further than the *Truitt* court and impliedly equated information relevant to the union's statutory duties with information necessary for the union to perform those duties.[21] The Court found that the requested information was necessary for the union to intelligently evaluate the grievances and ordered Acme to supply the requested information.[22]

The *Acme* decision did not strictly adhere to the general standard of relevancy articulated in *Truitt*. *Truitt* held that specific information related to wage increases or refusals to increase based on the financial condition of the employer was relevant. *Acme* is more consistent with modern notions of discovery. There was a probability that the desired information was relevant, and that it would be necessary to the union in carrying out its statutory duties and responsibilities. Thus, a showing that requested information is probably relevant and necessary was sufficient for the union to garner requested information.

Based on *Truitt* and *Acme*, courts will assume that certain kinds of information are relevant, unless clearly shown to be irrelevant.[23] *Truitt* judicially adopted an existing Board rule[24] that information which relates to wages is presumed to be relevant to the bargaining process, and must therefore be furnished to the union if requested. *Acme* extended the presumption to include information relevant to the union's statutory obligation to bargain in good faith.

This standard of presumptive relevance offered little help in recent cases which have considered whether information is relevant to the bargaining process.[25] Most of the recent disputes have concerned information which is beyond the parameters of the presumptive relevance standard. The question in the most recent decisions has turned upon

20. Acme Industrial Co., 150 N.L.R.B. 1463 (1965), *enforced*, 385 U.S. 432 (1967).

21. *Id.* at 437.

22. *Id.* at 435.

23. Bartosic & Hartley, *The Employer's Duty to Supply Information to the Union*, 58 CORNELL L. REV. 23 (1972). *See* Southwestern Bell Telephone Co., 173 N.L.R.B. 172 (1968); Connecticut Light & Power Co., 229 N.L.R.B. No. 152 (1977).

24. *See generally* Yawman & Erbe Mfg. Co., 89 N.L.R.B. 881 (1950), *enforced*, 187 F.2d 947 (2d Cir. 1951); Whitin Mach. Works, 108 N.L.R.B. 1537, *enforced*, 217 F.2d 593 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955); Boston Herald-Traveler Corp., 110 N.L.R.B. 2097 (1954), *enforced*, 233 F.2d 58 (1st Cir. 1955).

25. *See* Trustees of Boston University, 210 N.L.R.B. 330 (1974); Northwest Publications Inc., 211 N.L.R.B. 464 (1974).

how far the boundaries of relevant information are to be extended beyond information necessary to intelligently bargain for wages and dispatch the statutory duties of the union. Statutory duties encompass more than bargaining in good faith. They also include the general administration of the bargaining agreement.[26]

As might be anticipated, arguments have been made that all information available to an employer is presumptively relevant to the bargaining process.[27] These contentions have been readily dismissed:

> It has long been established by court and Board decisions that certain information is presumptively relevant because it bears directly on the negotiations or general administration of the collective bargaining agreement. Other information, not so obviously related to the Union's bargaining or contract administration or grievance responsibilities may or may not be relevant, depending on the circumstances.[28]

For example, *Southwestern Bell Telephone Co.*[29] and *Ohio Power Co.*[30] both dealt with information concerning work which had been contracted away from union members. The union desired information to determine if it was less costly for the work to be done by outside contractors than for the union to perform the work itself. In both cases, the NLRB refrained from extending the relevance standard. The Board found that the cost information had no relevance to negotiations between the parties and that it was not necessary for the union to police the agreement.[31]

The *Globe Stores, Inc.*[32] decision provides an example of information the employer was required to furnish despite its being beyond the scope of the presumption of relevance. The Retail Clerks Union asked for information from Globe concerning the number of group managers within each Globe store. The union felt that some of the "group managers" were performing the same functions as "supervisors," who were members of the union, and that this performance might undercut the authority of the union. The requested information was not concerned with wages, and there was no statutory obligation related to a union's loss of authority. Nevertheless, the Board held that the information should be furnished based on the probable or potential relevance and the necessity of the information to the union's mission of

26. *See* text accompanying note 28, *infra.*
27. Connecticut Light & Power, 229 N.L.R.B. No. 152 (1977).
28. *Id.*
29. Southwestern Bell Tel. Co., 173 N.L.R.B. 172 (1968).
30. Ohio Power Co., 216 N.L.R.B. 987 (1975).
31. Southwestern Bell, 173 N.L.R.B. at 173. Ohio Power, 216 N.L.R.B. at 987.

employee representation.[33] The Board conceded that the union could gather the information elsewhere, but held that this did not relieve the duty of the employer to provide it.[34]

The *Globe* decision is consistent with the approach taken in *Acme*. Both deal with information in terms of the "probable or potential" relevance.[35] The decisions were made to facilitate the bargaining process. In *Acme*, the information was relevant and necessary to accelerate the grievance process and to avoid postponement of negotiation until the completion of arbitration on the issue.[36] In *Globe*, the court held that the information was probably relevant and clearly necessary to protect the union's right to represent employees and enforce the labor agreement.[37]

B. The Tests of Relevance and Necessity

The current standard utilized by the NLRB involves two tests. The first is a threshold determination of whether the information is presumptively relevant. This was the approach taken by the Supreme Court in *Truitt* and *Acme*. If the desired information relates to wages or a statutory obligation, disclosure will be ordered. Some information may, however, be relevant and yet not be included in a presumptive category. In that situation the court will determine whether the information is necessary. This latter determination goes beyond the presumption and turns on the particular facts of each case. This is what the NLRB did in *Globe*. In the second situation, the burden is on the requesting party to prove the necessity of the information.

The *Oakland Press* decision fits within the guidelines of the current standard. Oakland requested information concerning the union's policy in referring extra men to work. The NLRB determined that this information may have an impact on the wage package because it affected overtime costs. The information is not presumptively relevant, however, because the information primarily concerned the indirect wage impact of the union's policy in referring straight time personnel. This kind of information was beyond Oakland's statutory obligation to honor the bargaining agreement.

In order to secure the information, Oakland had to make a clear showing that the information was necessary for collective bargaining. The facts of the *Oakland Press* decision support this claim. The com-

32. 227 N.L.R.B. 1251 (1977).
33. *Id.* at 1254.
34. *Id.*
35. Acme, 385 U.S. at 437. Globe, 227 N.L.R.B. at 1254.
36. Acme, 385 U.S. at 436.
37. Globe, 227 N.L.R.B. at 1254.

pany showed that straight time referrals had been a subject of negotiation for nine months. Oakland had tried to insert language into the contract which would clarify the role of each party and had expressed concern about overtime costs because they could have an indirect impact on the wage package. The lack of information affected the bargaining positions of the two parties. Without the information, Oakland could not construct future employee referral proposals, evaluate the effectiveness of the current employee referral policy or project its overtime costs over the length of the new agreement. Oakland was therefore able to successfully show that the information in the possession of the union was necessary to the company's performance of its duty to engage in informed collective bargaining.

The amorphousness of the current standard may be its greatest strength. Due to the nature of labor relations it is best to have a flexible rule which can adapt to the merits of each fact situation. Each party during collective bargaining seeks a superior negotiating position. This often leads to such tactical maneuvers as bluffing or cajoling the opponent.[38]

The standard should promote a fair agreement by minimizing obfuscation and ensuring that relevant information is furnished. This requires a standard which is broad enough to include information necessary to provide parity between the parties. At the same time, it is requisite that the standard exclude information which is not essential to that parity. Only through a flexible standard may the decision making body vary its approach to accommodate the factual differences in each dispute.

CONCLUSION

The *Oakland Press* decision holds that a union's duty to supply information under 29 U.S.C. section 158(b)(3) is the same as an employer's duty under section 158(a)(5). The decision logically incorporates the body of case law interpreting the employer's parallel duty. There is a presumption that certain kinds of information will be relevant. Nevertheless, not all information which is relevant can be obtained through the operation of this presumption. In some situations the party seeking information must additionally show that it is necessary for collective bargaining. The parameters of presumption are well established. The scope of necessity has not been thoroughly examined.

Only by requiring both the union and the employer to furnish information that is presumptively relevant and information that is necessary to the issues in bargaining will informed bargaining parity be

38. *See* Square D, 224 N.L.R.B. at 111.

achieved between the parties. In the future, an employer desirous of information which he feels is relevant to labor negotiations will be able to challenge its denial as refusal by the union to bargain in violation of section 158(b)(3).

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