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Labor Law-Duty to Bargain-Disclosure to Union of Costs of Noncontributory Group Insurance

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LABOR LAW—DUTY TO BARGAIN—DISCLOSURE TO UNION OF COSTS OF NONCONTRIBUTORY GROUP INSURANCE—In the course of bargaining for a new contract with an employer, the union requested information regarding the costs and benefits of a noncontributory group health insurance program[1] which the employer provided for its employees. Petitioner provided a breakdown of the plan's benefits but refused to disclose its cost. Charging that this refusal amounted to a violation of the employer's statutory duty to bargain in good faith about "wages,"[2] the union procured the issuance of a complaint by the National Labor Relations Board. The trial examiner concluded that such costs were costs of production rather than wages and consequently did not have to be disclosed.[3] The Board disagreed and entered a cease-and-desist order. On petition to set aside the order, and cross-petition for enforcement, *held*, order set aside. Only the benefits of a health insurance program are emoluments of value includible under the term "wages," and an employer is under no duty to disclose the

1 In a noncontributory health insurance plan the total premium is paid by the employer, whereas in a contributory plan a part of the premium is deducted from the employees' pay checks and the remainder of the cost is defrayed by the employer.

2 NLRA § 8(a)(5), amended by 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1958).

3 Sylvania Elec. Prods., Inc., 127 N.L.R.B. 924, 937 (1960).

cost of an insurance plan unless the employees contribute to the financing of the plan or the employer interposes cost as a ground for refusing a demand for increased coverage. *Sylvania Elec. Prods., Inc. v. NLRB*, 291 F.2d 128 (1st Cir.), *cert. denied*, 368 U.S. 926 (1961).

The National Labor Relations Act provides that employers must bargain in good faith with respect to "wages, hours, and other terms and conditions of employment."[4] The act leaves the parties free to decide whether to bargain about aspects of the employment relationship which fall outside the scope of the mandatory bargaining provision even though they may affect the well-being of the employees.[5] The difficulties encountered in distinguishing between voluntary and mandatory subjects of bargaining have in turn given rise to conflicts over what types of information management must disclose to labor unions. Requests for information fall into two general categories analogous to the two categories of bargaining. The first involves information directly related to the "mandatory" sphere of bargaining: *e.g.*, "wage" data. Here the unions typically request such information as individual wage rates, job classifications and rates, incentive earnings, and the bases for merit increases. The courts have required employers to disclose such information,[6] agreeing with the unions that such data is essential if unions are to formulate and discuss demands intelligently and police existing contracts.[7] But, in addition, unions frequently ask for such non-wage data as costs of production, sales, return on capital, profits, and cost-price schedules.[8] In this area the courts are

4 § 8(d), added by 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

5 NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

6 See, *e.g.*, J. I. Case & Co. v. NLRB, 253 F.2d 149 (7th Cir. 1958); Boston Herald-Traveler Corp. v. NLRB, 223 F.2d 58 (1st Cir. 1955); NLRB v. Item Co., 220 F.2d 956 (5th Cir. 1955); NLRB v. Whitin Mach. Works, 217 F.2d 593 (4th Cir. 1954); NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947 (2d Cir. 1951). At first the courts were not ready to say that an employer who did not disclose such information to the unions should be found to be bargaining in bad faith as a matter of law, but only that this would raise a prima facie presumption of bad faith. The presumption was rebuttable by the employer's showing that the information requested was not pertinent to the negotiations. See Pool Mfg. Co., 70 N.L.R.B. 540, 550 n.11 (1946). But with the decision in NLRB v. Yawman & Erbe Mfg. Co., *supra*, the stage was set for the change from a presumption into a legal conclusion, the court stating that it was "difficult to conceive a case in which current or immediately past wage rates would not be relevant during negotiations for a minimum wage scale or for increased wages." *Id.* at 949. The rule was confirmed in NLRB v. Whitin Mach. Works, *supra*, where the court said: "Refusal by an employer to supply such necessary information makes impossible the full development of collective bargaining negotiations which the statute intended to achieve." *Id.* at 594.

7 See, *e.g.*, J. I. Case & Co. v. NLRB, *supra* note 6, at 153. See generally Di Fede, *Employer Duty To Disclose Information in Collective Bargaining*, 6 N.Y.L.F. 400 (1960); Sherman, *Employer's Obligation To Produce Data for Collective Bargaining*, 35 MINN. L. REV. 24 (1950).

8 See, *e.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); International Woodworkers of America v. NLRB, 263 F.2d 483 (D.C. Cir. 1959). See generally Symposium,

confronted with conflicting policy considerations. On the one hand, management fears that by disclosing such data it will be forced to justify its basic policy decisions to the unions.[9] On the other, the unions argue that any distinction is purely arbitrary, for once apprised of this information they will be capable of determining whether a company is able to pay a higher wage by cutting production costs, absorbing the increased wage cost, raising prices without losing its competitive position, or increasing productivity.[10] In light of these opposing contentions a compromise seems to have been reached whereby disclosure will be required only when "necessity" as well as relevancy is shown. Thus, the Supreme Court has required a company to make known sufficient financial data to prove its repeated contentions that it would be unable to meet the costs of the wage increase requested by the union.[11] But where inability to pay was not an issue, such disclosure has not been required.[12]

Group insurance is now generally considered to be a subject of mandatory collective bargaining, for the financial cushion provided in the event of illness is regarded as an emolument of value arising from the employment relationship and therefore is a wage.[13] Unions claim that employer costs of such programs are "wage data" which must be disclosed upon request. In cases involving a contributory insurance plan it has been held that the union is entitled to such information.[14] The court in the principal case felt that without the presence of a deduction from take-home pay there was no direct connection between insurance costs and employee wages, construing the term "wage" to include only the value of the benefits derived from the plan.[15] However, the Seventh Circuit has apparently ignored any such distinction and, without indicating whether the employees

What Kind of Information Do Labor Unions Want in Financial Statements?, 87 J. Accountancy 368 (1949).

9 See Sherman, *supra* note 7, at 34. See also NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

10 See International Woodworkers of America v. NLRB, 263 F.2d 483, 485 (D.C. Cir. 1959); Symposium, *supra* note 8, at 368.

11 NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

12 International Woodworkers of America v. NLRB, 263 F.2d 483, 485 (D.C. Cir. 1959). "[W]ages and hours are the heart and core of the employer-employee relationship, and information concerning existing and past wage rates and patterns is essential to the union to enable it to bargain intelligently. This is not necessarily so with respect to what the employer's records show about how much or at what cost or in what time he produces his goods, and how or at what cost or in what volume he sells those products."

13 NLRB v. John S. Swift Co., 277 F.2d 641 (7th Cir. 1960); NLRB v. General Motors Corp., 179 F.2d 221 (2d Cir. 1950); W. W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948); Potlatch Forests, Inc. v. International Woodworkers of America, 108 F. Supp. 906 (D. Idaho 1951), *aff'd*, 200 F.2d 700 (9th Cir. 1953); Phelps Dodge Copper Prods. Corp., 101 N.L.R.B. 360 (1952).

14 Stowe-Woodward, Inc., 123 N.L.R.B. 287 (1959); Skyland Hosiery Mills, Inc., 108 N.L.R.B. 1600 (1954); Phelps Dodge Copper Prods. Corp., *supra* note 13.

15 Principal case at 131.

contributed to the financing of the plan, has required disclosure of cost information solely on the belief that it was relevant wage data.[16] This seems the better view since the employer's costs are a labor cost to him regardless of whether there is an additional contribution from the employee, and it would seem that in either case the employer's contribution directly affects the employee's total wage to the same extent and in much the same manner. Thus, if disclosure is to be mandatory under a contributory plan, as the court in the principal case admits,[17] it should be mandatory under a noncontributory plan as well.

Rather than concentrating on an illusory distinction, the court should have focused its attention on the relevance of the information requested by the union to its legitimate bargaining position. The Board's opinion indicates that the union's request for information was based upon a desire to substitute one type of benefit for another.[18] The union felt that since the bargaining unit was composed of relatively young employees it might be preferable to replace some or all of the retirement insurance included in the plan with immediate cash payments in the form of higher wages. Discussion of such changes in employee benefits is certainly within the area of mandatory bargaining, and intelligent bargaining on this matter by the union would seem dependent upon the information requested. The court's finding of a lack of a significant relationship failed to respond to the specific problem confronting the union.

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16 NLRB v. John S. Swift Co., 277 F.2d 641 (7th Cir. 1960).
17 Principal case at 131.
18 Sylvania Elec. Prods., Inc., 127 N.L.R.B. 924, 925 (1960).