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Labor Law - Collective Bargaining - Duty of Employer to Furnish Information Relating to Ability to Pay

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LABOR LAW—COLLECTIVE BARGAINING—DUTY OF EMPLOYER TO FURNISH INFORMATION RELATING TO ABILITY TO PAY—A regional negotiating committee of the International Woodworkers of America, AFL-CIO, sent

questionnaires to some six hundred employers with whom it had bargaining relations.¹ The committee desired information to assist in measuring wage demands for bargaining with employers in the Pacific northwest lumber and plywood industries. The information requested related to each employee, his job classification, hourly rates, seniority rights, paid holidays, vacations, and annual hours. The employers were also requested to furnish figures showing the annual board-foot production of their respective operations and related sales totals expressed in dollars. The employers declined to provide the data despite repeated requests from the union. After negotiations had commenced and the employers still refused, the union filed charges before the NLRB of an unfair labor practice under section 8(a)(5) of the NLRA.² The Trial Examiner found that the refusal to supply the requested information was a refusal to bargain collectively. *Held*, the employers violated section 8(a)(5) by refusing to furnish the individual wage and employment information. Although this information was requested by the international union, it was intended to be used by the locals. There was no violation, however, in refusing to provide the production and sales totals since the employers at no time claimed inability to pay the wage demands. *Pine Industrial Relations Committee, Inc.*, 118 N.L.R.B. No. 142, 40 L.R.R.M. 1315 (1957).³

The principal decision is the first to hold expressly that an employer need not produce financial data⁴ unless he has claimed inability to pay as a defense to the union's wage demands. This rule is to be contrasted with the development in the wage data area.⁵ Initially a refusal by an employer to furnish wage data was regarded only as evidence of bad faith.⁶ Subsequently, emphasis was put on the duty to provide wage information upon request when the union could show it to be relevant to the bargaining issues.⁷ Finally, wage data was recognized as the crux of collective bargaining and no showing of specific relevance to particular bargaining issues was

¹ Various local unions had delegated certain bargaining functions to the regional committee.

² It is an unfair labor practice for the employer "... to refuse to bargain collectively. . . ." Labor-Management Relations Act, 1947, 61 Stat. 141, 29 U.S.C. (1952) §158(a)(5). The duty to bargain is to "... confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." Labor-Management Relations Act, 1947, 61 Stat. 142, 29 U.S.C. (1952) §158(d).

³ Chairman Leedom, Members Rodgers and Bean made up the majority. Member Murdock dissented.

⁴ Financial data generally includes balance sheets, profit and loss statements, declarations of dividends, production costs and other data normally regarded as solely within the realm of management.

⁵ For an indication of information comprising wage data, see 57 Col. L. Rev. 112 at 120 (1957).

⁶ *Crompton-Highland Mills, Inc.*, 70 N.L.R.B. 206 (1946), enforcement den. (5th Cir. 1948) 167 F. (2d) 662, revd. 337 U.S. 217 (1949).

⁷ *Yawman & Erbe Mfg. Co.*, 39 N.L.R.B. 881 (1950), enforced (2d Cir. 1951) 187 F. (2d) 947.

required.⁸ The different approach used in the present decision on requests for financial data reflects several considerations. Financial data may be helpful to bargaining, but it is not as relevant to the general bargaining process as are wage and employment data.⁹ Management may feel that the company's financial status is solely its concern.¹⁰ Even where unfair labor practices on the part of employers have been found, the NLRB orders have not required them to open their books for inspection.¹¹ In all cases that had previously reached the NLRB the defense of inability to pay had already been asserted;¹² thus the rule has been that the employer must furnish financial information to substantiate his claim of inability to pay the wages demanded.¹³ The present decision implements what was implicit in prior decisions by establishing that general relevance of the financial data to bargaining is not a sufficient basis for compelling such data to be furnished, but that ability to pay must be in issue.¹⁴ The rule seems to strike a desirable balance between the conflicting interests of the employer and the union. The NLRB appreciates that financial data may be helpful to realistic and successful bargaining,¹⁵ but considers that the employer may nevertheless be in good faith in refusing to supply it. Management has urged that disclosure of financial data can cause injuries competitively, provide the union with information useful for purposes other than bargaining, and lead to putting management policies on the bargaining table.¹⁶ Of significance also in the principal decision is the holding that regardless of the union's purpose, the production and sales information necessarily went to the issue of ability to pay. Member Murdock's dissent, based on the grounds that the informa-

⁸ *Whitin Machine Works*, 108 N.L.R.B. 1537 (1954), enforced (4th Cir. 1954) 217 F. (2d) 593, cert. den. 349 U.S. 905 (1955). As a union request prior to negotiations cannot be said without difficulty to be irrelevant, the view was taken that wage data is relevant to collective bargaining generally. Thus the employer has a duty to furnish such information unless it can be shown to be clearly outside the orbit of bargaining or that the request was made for purposes of harassment.

⁹ Cf. *Douglas Silk Products Co.*, 107 N.L.R.B. 450 (1953).

¹⁰ See generally Barkin, "Financial Statements in Collective Bargaining," 4 *LAB. L. J.* 753 (1953); Sherman, "Employer's Obligation To Produce Data for Collective Bargaining," 35 *MINN. L. REV.* 24 (1950).

¹¹ Although in wage data cases specific information has had to be supplied, the NLRB has required only that the employer substantiate his position of inability to pay so that the union is intelligently informed. See Miller, "Employer's Duty To Give Economic Data to Union," 101 *J. ACCOUNTANCY* 40 (1956); Shair, "A Look at the Books," 6 *LAB. L. J.* 53 (1955).

¹² E.g., *Southern Saddlery Co.*, 90 N.L.R.B. 1205 (1950); *I.B.S. Mfg. Co.*, 96 N.L.R.B. 1263 (1951); *Camp & McInnes, Inc.*, 100 N.L.R.B. 524 (1952); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

¹³ *Ibid.* Cf. General Counsel Ad. Rul., Case No. K-467, 38 *L.R.R.M.* 1076 (1956).

¹⁴ Principal case at 1317.

¹⁵ *Ibid.*

¹⁶ See 105 *UNIV. PA. L. REV.* 90 at 99 (1956); Leonard, "NLRB Policy on the Employer's Duty To Supply Economic Data for Bargaining," 6 *LAB. L. J.* 376 (1955).

tion was for purposes of determining employee productivity,¹⁷ suggests some difficulties. One problem is the continuing need for closer definition of financial data and wage and employment data. Another is the necessity for determining when an employer is or is not claiming inability to pay,¹⁸ for increased avoidance of this claim is to be anticipated. However, as the parties put more faith in collective bargaining, it may be hoped that fewer disputes over requested information will arise.

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¹⁷ This is a recognized bargaining factor. *Hughes Tool Co.*, 100 N.L.R.B. 208 (1952).

¹⁸ Compare the basis for refusal in the *Truitt* case, note 12 *supra*, with that of the principal case. In the former, the company insisted it was not basing refusal on inability to pay but on inability to compete if it granted the increase. In the latter, the employers claimed that business conditions did not warrant and could not support the increase in costs. See also General Counsel Rul., Case No. 951, 34 L.R.R.M. 1208 (1954).