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Labor Law - Collective Bargaining - Duty of Employer to Substantiate Claim of Inability to Pay

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LABOR LAW—COLLECTIVE BARGAINING—DUTY OF EMPLOYER TO SUBSTANTIATE CLAIM OF INABILITY TO PAY—A union had been recognized by an employer for three years. Pursuant to a reopening clause in the current contract the union asked for a 10-cent wage increase. The company maintained that it was paying above average wages and could not afford more than a 2½-cent hourly raise. When the union asked to be shown the company's books as proof of this claim of inability to pay, the company refused on the ground that the union had no legal right to such information. The National Labor Relations Board found that the company had failed to bargain in good faith with respect to wages[1] in violation of section 8 (a) (5) of the amended National Labor Relations Act.[2] On appeal to the Supreme Court from denial of enforcement by the court of appeals,[3] *held,* reversed, three justices dissenting in part. A refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of failure to bargain in good faith. *National Labor Relations Board v. Truitt Manufacturing Co.,* 351 U.S. 149 (1956).[4]

The Supreme Court stated that it was not holding that employees were entitled to substantiating data in every case where an employer pleads poverty in opposition to a wage increase,[5] and the facts of the case make it uncertain whether or not employers will always be required to produce such data. As the dissent pointed out, the majority in fact affirmed the Board's application of a per se rule, and on the record respondent's conduct showed little evidence of bad faith other than its refusal to open the books. Thus, it may follow from *Truitt* that, as a practical matter, an employer will be required, on request, to attempt to substantiate his claim of inability to increase wages in virtually every case.[6]

1 Truitt Mfg. Co., 110 N.L.R.B. 856 (1954).

2 61 Stat. 141 (1947), 29 U.S.C. (1952) §158 (a) (5).

3 NLRB v. Truitt Mfg. Co., (4th Cir. 1955) 224 F. (2d) 869.

4 Justices Frankfurter, Clark and Harlan dissented in part because they felt the Board had ruled that Truitt's failure to supply financial data constituted per se a refusal to bargain in good faith. They thought that the case should be remanded so that the Board could consider the issue of good faith from the totality of the evidence on the conduct of the negotiation.

5 Cf. the statement, "If such an argument [inability to pay increased wages] is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." Principal case at 152-153.

6 See B. L. Montague Co., 116 N.L.R.B. No. 77, 38 L.R.R.M. 1289 (1956); NLRB v. F. W. Woolworth Co., (9th Cir. 1956) 235 F. (2d) 319, revd. 352 U.S. 938 (1956).

The exact scope of the *Truitt* rule, however, is none too clear. The holding in the principal case was simply that an employer who makes a claim in bargaining must, on request, offer "reasonable proof" to show that his claim is honest.[7] Yet requests for information in collective bargaining often arise for other reasons, e.g., to enable the union to police the contract or to bargain intelligently.[8] It is apparently felt that the rule of the *Truitt* case requires disclosure in any of these situations.[9] Another problem is raised by the principal case because the Court dismissed a defense that the data involved matters exclusively within the province of management. There was no clear indication, though, whether this was because the requested data was not "management" data or because even management data is not protected.[10]

Several alternatives remain open to the employer who wants neither to increase wages nor to open his books to the union. The employer may still be able, theoretically at least, to show his good faith without in fact substantiating his claim. The employer may be able to avoid the problem by eschewing the defense of inability to pay and contending that ability to pay is irrelevant in the particular bargaining situation.[11] Also, the Court has not foreclosed the possibility that a refusal to reveal economic data might be justified by showing that disclosure would be unduly burdensome or injurious to the business.[12]

7 See also NLRB v. Jacobs Mfg. Co., (2d Cir. 1952) 196 F. (2d) 680.

8 See Southern Saddlery Co., 90 N.L.R.B. 1205 (1950) (financial condition); Hughes Tool Co., 100 N.L.R.B. 208 (1952) (wage rates and rate classifications); B. F. Goodrich Co., 89 N.L.R.B. 1151 (1950) (salaries and merit ratings), remanded (6th Cir. 1951) 29 L.R.R.M. 2052; Aluminum Ore. Co., 39 N.L.R.B. 1286 (1942), enforced as mod. (7th Cir. 1942) 131 F. (2d) 485 (wages and wage histories).

9 See note 6 supra.

10 The court of appeals had thought the test was whether the information related to matters with which bargaining was properly concerned. Thus, it felt there was no duty to supply financial data because it related to managerial policies and such policies were outside the scope of compulsory bargaining. NLRB v. Truitt Mfg. Co., note 3 supra. Management has insisted that such things as accounting policy, dividends, manufacturing costs and the business' general condition are not within the compulsory bargaining area defined by 61 Stat. 142 (1947), 29 U.S.C. (1952) §158 (d) ("wages, hours and other terms and conditions of employment"). See 3 PRESIDENT'S NATIONAL LABOR-MANAGEMENT CONFERENCE 47-52 (1945). Labor feels that such information is essential to bargain intelligently. See Barkin, "Financial Statements in Collective Bargaining," 4 LAB. L.J. 753 (1953). There is some belief, also, that labor should be a partner in determination of many so-called entrepreneurial policies. See symposium, "What Kind of Information Do Labor Unions Want in Financial Statements?" 87 J. ACCOUNT. 368 (1949). See generally Sherman, "Employer's Obligation To Produce Data for Collective Bargaining," 35 MINN. L. REV. 24 (1950). The Supreme Court in the principal case perhaps reversed the lower court because (1) the data involved was relevant to a subject of compulsory bargaining, (2) the duty to disclose is not limited by the subject of the bargaining, (3) there is a duty to bargain about some managerial policies, or (4) an employer will not be permitted to make an arbitrary claim in bargaining regardless of the data on which it is based.

11 Both parties in the principal case considered ability to pay as relevant to the bargaining. Compare BACKMAN, ECONOMIC DATA UTILIZED IN WAGE ARBITRATION 40, 42 (1952), with Barkin, "Financial Statements in Collective Bargaining," 4 LAB. L.J. 753 (1953).

12 Principal case at 151.

In the principal case there was no indication of what would happen once an employer supplies the union with the requested information. The NLRB customarily does not look at the reasonableness of bargaining positions in determining good faith. In extreme cases, however, it might conceivably find that on the basis of the information revealed the employer could not plead poverty in good faith.[13] Even where the data evidenced the employer's good faith, disclosure might have serious consequences. Whether given economic data indicates inability to increase wages is a matter of judgment and not simply a question of fact.[14] Thus, the employer's real motive in withholding the information might be that he does not wish to "bargain" about what the data shows and perhaps even about proper financial policies for his business.[15] Certainly an employer should not be able to plead poverty when his claim is not honest, but employers may have other reasons[16] for wanting to withhold economic data bearing on their financial conditions. The Court leaves to conjecture and to future delineation the full implications of its decision.

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[13] See generally Smith, "The Evolution of the 'Duty to Bargain' Concept in American Law," 39 MICH. L. REV. 1065 at 1094-1098, 1100, 1107 (1941).

[14] See Dunlop, "The Economics of Wage-Dispute Settlement," 12 LAW & CONTEM. PROB. 281 at 293 (1947).

[15] The practical effect of this might be to throw many so-called managerial policies into the bargaining arena. There is still doubt, however, as to whether these subjects are within the scope of compulsory bargaining. See note 10 supra. There is a distinction between bargaining as to (1) whether an employer who admittedly can afford a wage increase should grant one, and (2) whether an employer can afford a wage increase at all. It is the latter issue which management feels should be determined unilaterally.

[16] In addition to the reasons discussed in the text, disclosure is often resisted on the ground that it will mean a loss of confidential data to competitors. It is not made clear in the principal case whether this reason can ever be used as a defense.