Federal Labor Laws

Paul K. Rainsberger, Director
University of Missouri – Labor Education Program
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XVII. The Duty to Furnish Information

A. Legal Background

1. From the earliest days of the National Labor Relations Act, the Board has taken the position that the duty to bargain carried with it the duty to provide access to information, when requested, which is relevant to a bargaining issue in dispute. Without such access, meaningful negotiations are hindered by the inability of the parties to discuss the issues intelligently.[1]

2. The duty to provide access to information applies both to the negotiation of a contract and to the administration of that contract. Moreover, in contract administration, it is not necessary that a grievance actually be filed. The union has a right to information which is necessary for the union to determine whether a contract violation has occurred.[2]

3. The Board distinguishes between information which is classified as "wage data" and that which is "financial" data. A union is presumably entitled to wage data as long as it is relevant to an issue in dispute. However, access to financial data is required only if the employer has claimed an inability to pay the demands of the union.[3] Whether the employer has made a claim of an inability to pay or is merely summarizing its financial position must be interpreted in the context of all of the circumstances.[4]

4. The duty to furnish relevant information also applies to employer requests for access to information from the union.[5]

5. The right to information from the employer is distinct from rights to information which may exist under other federal law. For example, standards promulgated under the Occupational Safety and Health

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[1] *See, e.g., S.L. Allen & Co.,* 1 NLRB 714 (1936), and *Pioneer Pearl Button Co.,* 1 NLRB 837 (1936).

[2] *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967).

[3] *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149 (1956).

[4] *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955 (D.C. Cir. 2003).

[5] *Printing & Graphic Communications Union Local 13 (Oakland Press, Inc.),* 233 NLRB 994 (1977).

Act provide separate rights to information concerning health and safety issues.

B. Relevance of Information Requested

1. The union is presumably entitled to information that is relevant to an issue in dispute. The right extends to any non-financial information related directly to a mandatory subject of bargaining. Examples of information to which the union would be entitled with a showing of relevance are:

    a. Job rates and classifications,[6]

    b. Workload information and time study results,[7]

    c. Seniority lists,[8]

    d. Profit sharing plan information,[9]

    e. Names and addresses of employees.[10]

2. The union must request the information and make some showing that the information is relevant, although the Board and courts will tend to regard relevancy broadly.[11]

    a. Certain information is presumed to be relevant. Presumptively relevant information generally includes information pertaining to bargaining unit employees. If information is presumptively relevant, the employer must establish the lack of relevance in order to deny a request.[12] Examples of information that have been considered presumptively relevant include unit payroll records, the name, address and telephone numbers of unit employees, dates of hire, shift schedules, hours of work, existing work rules, pension and insurance plan provisions and costs,

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[6] *Millard Processing Services*, 308 NLRB 38 (1992).

[7] *E.g., Beverly Health and Rehabilitation Services*, 328 NLRB 959 (1999)(workload); *H.J. Scheirich Co.*, 300 NLRB 687 (1990)(time study results).

[8] *E.g., NLRB v. Gulf Atlantic Warehouse Co*., 291 F.2d 475 (5th Cir. 1961).

[9] *E.g., NLRB v. Toffentti Restaurant Co*., 311 F.2d 219 (2nd Cir. 1962)

[10] *E.g., Comcraft, Inc.,* 317 NLRB 550 (1995)

[11] *NLRB v. Item Co*., 220 F.2d 956 (5th Cir. 1955).

[12] *Coca-Cola Bottling Co*., 311 NLRB 424 (1993).

other benefit information, and existing work rules, regulations and policies.[13]

b. For other requests for information, the burden is on the union to establish the relevancy of the information requested.[14] Examples of common requests in which the union must establish the relevance of the information are matters concerning subcontracting,[15] information about employees of the employer at different work locations,[16] information that the union seeks for purposes other than collective bargaining,[17] information about temporary agencies and the employees provided by such agencies,[18] and information to determine whether the employer has established an alter ego.[19]

3. The request for information must be reasonably precise. The right to information does not give to the union the right to engage in "fishing expeditions."[20] However, if a request is vague, the employer may have an obligation to work with the union in seeking clarification of a vague request.

4. There are additional affirmative defenses that an employer may raise to justify a refusal to provide requested information. For example, an employer may be justified in denying union access to proprietary information if it can establish that the union will misuse that information.[21]

C. Access to Financial Information

1. The duty to disclose financial information is less comprehensive. Financial data includes information concerning the financial health

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[13] *Metta Electric*, 349 NLRB 1059 (2003); *MEMC Electronic Materials, Inc.,* 338 NLRB No. 142 (2003)

[14] *Shoppers Food Warehouse Corp.*, 315 NLRB 258 (1994).

[15] *Compare, Disneyland Park*, 350 NLRB No. 88 (2007)(no showing of relevance) *with, Clear Channel*, 347 NLRB No. 47 (2006)(relevance shown).

[16] *Frito-Lay, Inc*., 333 NLRB 1298 (2001)(relevance established).

[17] *Southern California Gas Co.*, 342 NLRB 613 (2004(not relevant).

[18] *St. George Warehouse, Inc.*, 341 NLRB 904 (2004).

[19] *Pulaski Construction Co*., 345 NLRB 931 (2005); *Contract Flooring Systems,* 344 NLRB 925 (2005)

[20] If a request is vague or speculative, the employer may not be obligated to furnish the information. *Rice Growers Assoc. of California*, 312 NLRB 837 (1993).

[21] *Allen Storage & Moving Co*., 342 NLRB 501 (2004); *Page Litho, Inc.*, 311 NLRB 881 (1993).

of the company, including financial statements, sales records, and production data.

2. The company is required to provide access to financial data only if it pleads poverty, claiming an inability to pay for the demands of the union.[22]

   a. If the company pleads poverty, it is under an obligation to provide financial information to support that claim. It is not a requirement that the books be opened completely to the union.

   b. The "plea of poverty" must be based on a clear indication that the economic demands of the union will create a financial hardship on the employ. There is no legal obligation to provide access to financial information if the employer simply claims a desire not to meet the economic demands of the union.[23]

   c. If the employer claims that it is operating at a competitive disadvantage, a claim of inability to pay is not found and the employer is under no obligation to provide financial information to substantiate such a claim.[24]

   d. However, if an employer is seeking economic concessions from the union, it may be required to provide at least limited access to financial information necessary to support the employer's demands.[25]

   e. Reasonable restrictions can be imposed on the union's access to the financial records of the company. For example, the company may insist that the records be reviewed on company property or by a licensed accountant.

D. Claims of Confidentiality

1. The Supreme Court has ruled that the union's right to information about specific individual employees may be limited by the employer's claim of confidentiality of the records.[26] Additional questions concerning the confidentiality of records arise in cases involving trade secrets and classified information in the possession of government contractors.

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[22] *NLRB v. Truitt Manufacturing Co.,* note 3, *supra*.

[23] *See, North Star Steel Co*., 347 NLRB No. 119 (2006); *ConAgra, Inc*., 321 NRLB 944 (1996).

[24] *Nielson Lithographing Co*., 305 NLRB 697 (1991).

[25] *Caldwell Manufacturing Co.*, 346 NLRB 1159 (2006).

[26] *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

2. In determining whether and how a union should be given access to confidential information, a balancing test is used. The reasons underlying the union's request for the information are weighed against the employer's legitimate need to keep the information confidential.

    a. If the employer's need to keep the information confidential is substantial and if the employer offers a reasonable alternative to disclosure of the data, the claim of confidentiality will probably be upheld. However, there is an obligation to work with the union in developing an accommodation of the union's need for the information and the confidential nature of the information requested.[27]

    b. If the union requests information that meets the standards of confidentiality, the union and employer must negotiate over a reasonable accommodation that provides the union access to the information that it needs while assuring the confidentiality of the employer's records.[28]

    c. If the union has limited its request in a manner that safeguards any potential confidentiality claim, the employer will be required to provide access to the information. For example, a union request for doctor's slips submitted in support of absenteeism in a manner that removes all indication of the underlying medical condition has been regarded as a reasonable method for assuring non-disclosure of confidential information.[29]

    d. Authorizations signed by an individual giving the union access to the information may be required in some cases.

3. Similar rules have been used in cases involving trade secrets and classified information in the possession of the employer. The union may be required to give assurances that the information will not be disclosed or to provide other safeguards against improper disclosure of the information. A government contractor is probably permitted to require that the union have someone with appropriate security clearance review the records.

4. Certain information is confidential because it falls within the attorney-client privilege and related work-product claims of confidentiality, including witness statements obtained in the course of an investigation.[30]

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[27] *International Protective Services*, 339 NLRB 701 (2003)/

[28] *GTE Southwest Inc.,* 329 NLRB 563 (1999).

[29] *Norris Sucker Rods*, 340 NLRB 195 (2003).

[30] *Ralph Grocery Co.,* 352 NLRB No. 18 (2008); *Northern Indiana Public Service Co.*, 347 NLRB No. 17 (2006); *Fleming Companies, Inc*., 332 NLRB 1086 (2000).

E. Form of Disclosure

1. The employer does not have to provide the information requested in a specified form, as long as the manner in which it is provided is not unduly burdensome.[31] Similarly, the union's request must not be unduly burdensome on the company.

2. A union may be provided access to the plant to conduct an independent time study, if such a study is the only reasonable means through which the union may obtain information concerning work load issues.[32]

3. Information must be provided in a reasonable amount of time. What constitute an unreasonable delay will depend on the complexity of the request, the reasons for delay and impact of the delay on the union.[33]

4. The employer is under no obligation to collect information in response to a union request. If the information requested does not exist, there is no requirement that it be disclosed.[34]

4. The employer may require that the union pay reasonable costs for the duplication of any records provided to the union.[35]

5. The employer does not have a duty to interpret the information.[36]

F. Implications of Non-Disclosure

1. If an employer has not complied with a legitimate request for information and the issue about which the request has been made remains an open issue in bargaining, the bargaining will not be considered as having reached impasse.[37] Therefore, an employer would be prevented from unilaterally changing conditions of employment because of the failure to provide information and the lack of a bargaining impasse.

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[31] *Grinnell Fire Protection Systems, Co*., 332 NLRB 1257 (2000); *Cincinnati Steel Castings Co*., 86 NLRB 592 (1949).

[32] *Nestle-Purina Petcare Co*., 347 NLRB No. 91 (2006); *Holyhoke Water Power Co.*, 273 NLRB 1369 (1985).

[33] *Anheuser-Busch, Inc.*, 342 NLRB 560 (2004); *Valley Inventory Service*, 295 NLRB 1163 (1989).

[34] *Harmon Auto Glass,* 352 NLRB No. 24 (2008).

[35] *Martin Marietta Energy Systems*, 316 NLRB 868 (1995); *Food Employers Council*, 197 NLRB 651 (1972).

[36] *Albany Garage, Inc*., 126 NLRB 417 (1960)

[37] *Decker Coal*, 301 NLRB 729 (1991).

2. Charges based on requests for information will not be deferred to the existence of a negotiated grievance procedure.[38]

G. Health and Safety Data

1. The duty to disclose information extends to health and safety information.[39] However, a union may have broader rights to information under OSHA. The rights to information under Taft-Hartley and OSHA are separate and distinguishable.

2. The criteria for disclosure of health and safety information under Taft-Hartley are comparable to those for any other type of wage data.

3. Under OSHA there are a number of standards which require disclosure of specific types of information both to individual workers and to their bargaining agents. Among the broadest of the OSHA standards requiring disclosure are:

   a. The Hazard Communications Standard[40], which requires that an employer inform workers of the hazards of substances used in their work location,

   b. The Employee Access to Medical and Exposure Records Standard[41], which requires that workers be given access to certain medical records and monitoring data concerning their exposure to toxic substances.

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[38] *Medco Health Solutions of Spokane, Inc.,* 352 NLRB No. 78 (2008); *General Dynamics Corp*., 270 NLRB 829 (1984).

[39] *Oil, Chemical, and Atomic Workers v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983), *enforcing*, *Minnesota Mining and Manufacturing and OCAW*, 261 NLRB 27 (1982), *Borden Chemical and International Chemical Workers*, 261 NLRB 64 (1982), *and Colgate Palmolive and OCAW*, 261 NLRB 90 (1982).

[40] 29 CFR § 1910.1200.

[41] 29 CFR § 1910.20.