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GOOD FAITH IN COLLECTIVE BARGAINING *

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THE CONCEPT OF GOOD FAITH

Is the duty to bargain in good faith definable? The National Labor Relations Board of the United States (hereinafter referred to as the Board) and the courts have attempted to define the meaning of the duty to bargain in good faith. Within a given factual collective bargaining situation, these interpretations have met with success, but as a body of norms to be applicable to the

*First of two parts. This paper was prepared with a total reliance on American authorities. It focuses primarily on the definition of collective bargaining as provided by section 8(d) of the Labor Management Relations Act of the United States. A comparison however of the definition of collective bargaining provided in section 13 of the Industrial Peace Act of the Philippines and the definition provided in the American statute discloses a very close similarity between them regarding the duty to bargain in good faith. Perhaps, with the benefit of hindsight provided by American labor-management jurisprudence on collective bargaining, we may be able to avoid the pitfalls of their experiences.

Sec. 8(d) of the LABOR MANAGEMENT RELATIONS ACT. 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.

Sec. 13 of the INDUSTRIAL PEACE ACT . . . Such duty to bargain collectively means performance of the mutual obligation to meet and confer promptly and expeditiously and in good faith for the purpose of negotiating an agreement with respect to wages, hours, and/or other terms and conditions of employment, and of executing a written contract incorporatng such agreement if requested by either party, or for the purpose of adjusting any grievances or question arising under such agreement, but such duty does not compel any party to agree to a proposal or to make concession.

** LL.B. ATENEO DE MANILA (1961); M.C.L., U. OF PENNSYLVANIA (1963).

total bargaining situation arising in the field of labor relations its success has been more limited.

This is not a scrutiny of their understanding of good faith, but rather to emphasize the point that the term good faith is by necessity a flexible concept of law. Human activity being so myriad and complex, necessity demands a criterion which would be applicable to all existing bargaining situations and to those which would later arise. A precise and well-defined rule of conduct aside from its rigidity would have found itself restricted to certain specific situations and would not be applicable to other bargaining conduct which were not defined or foreseen but which nevertheless required a rational relationship if industrial peace was to be achieved and the mutual welfare of both labor and management protected.

The Requirements of Good Faith in General

In spite of what the United States Congress and the United States Supreme Court[1] have said on the duty to bargain that neither side has to concede to a proposal, both the employer and the union realize that their relationship cannot remain in a state of flux. Economic necessity dictates a contract as a substitute for chaos.

The Board, in one of its earlier and leading cases,[2] remarked:

> Collective bargaining, as contemplated by the Act, is a procedure looking toward the making of a collective agreement by the employer with the accredited representatives of its employees concerning wages, hours, and other conditions of employment. The duty to bargain collectively which the Act imposes upon employers has as its objective the establishment of such a contractual relationship . . .

The whole purpose of the duty to bargain in good faith is to regulate bargaining between the parties not by compelling them to enter into a contract, but by helping them enter into a contract. In order to help the parties, good faith requires that the parties adopt a bargaining approach which will aid them in coming to an agreement. This approach has been enunciated by the Board and the courts during the formative years of bargaining in different shades, and has definitely withstood the test of time.

[1] NLRB v. Jones & Laughlin Corp., 301 U.S. 1, 44 (1937).
[2] Singer Mfg. Co., 24 NLRB 444, 464 (1940).

The principle enunciated by the Board in the *Singer Mfg. Co.* case[3] very clearly brings out this bargaining approach:

> The duty to bargain collectively is not limited to the recognition of the employee's representative qua representative, or to a meeting and discussion of terms with them. The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issue presented . . .

The bargaining approach required by the Board is twofold. First, it says what the parties should not limit themselves to doing and secondly, it states what the parties should do.

The first portion of the Board's criteria, recognition, then meeting and discussion with the union, are now provisions of the Labor Management Relations Act. An employer must fulfill these obligations, for non-recognition of a certified union is an outright unfair labor practice and a refusal to meet and discuss with the union is a clear violation of the statutory mandate of good faith under section 8(d) of said Act.

The second portion of the Board's principle may be subdivided as follows: the duty to bargain is an obligation (1) which requires negotiation and discussion (2) with an open and fair mind (3) with a sincere purpose to reach a basis of agreement on the issues presented; the duty to bargain is an obligation because specific sections of the law require both the employer in 8(a)(5) and the union in 8(b)(3) to bargain.

The requirement for "negotiation and discussion" states the mechanical process of bargaining. No matter how much an employer or union may want to come to an agreement, if they do not meet and discuss, no agreement will materialize. In the early but leading case of *P. Lorillard & Co.*,[4] the Board found a lack of good faith when the employer refused to meet and negotiate with the union at its plant in Ohio where the normal employer-union relationship usually took place and instead required the union to come to the company's main office in New York if it wanted to negotiate a contract. The Board said:

> Interchange of ideas, communication of facts peculiarly within the knowledge of the other party, personal persuasion and the opportunity to modify demands in accordance with the total situation as revealed at the conference

[3] *Supra.*
[4] 16 NLRB 684 (1939).

is of the essence of the bargaining process. Bargaining in the field of labor relations is customarily carried on over the conference table at which the representatives of both parties confront each other and exercise that personal and oral persuasion of which they are capable.

The requirement that bargaining be carried on with "an open and fair mind" is one of the most important but difficult requirment of good faith. The most obvious and perplexing question which is inevitably raised is: "How can you read a person's mind?" The only answer, aside from the person's outright disclosure of his thoughts is through an interpretation of his acts.

This criterion of an "open and fair mind" is of itself quite meaningless. However, when applied to a bargaining situation more particularly the conduct of a party during negotiations, the criterion becomes very relevant in the interpretation of the person's conduct.

The third requirement brings out the point which the parties should always bear in mind while bargaining: the reaching of a mutually satisfactory agreement between them. The whole bargaining process is geared towards this end. The Board and the courts have consistently held that the bargaining parties should make a sincere effort or an honest desire to come to an agreement.

In a very recent case[5] on good faith in bargaining the U.S. Supreme Court said:

> It is apparent from the legislative history of the act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach an agreement, in the belief that such an approach from both sides of the table promotes the over-all design of achieving industrial peace.

Criteria of Good Faith in Collective Bargaining

The basic problem of good faith lies in the difficulty of determining whether the bargaining conduct of a party is a mere sham or an earnest effort to come to an agreement. Based on their experience, the Board and the courts have formulated certain criteria as their basis for determining whether a given bargaining situation lacks good faith. These criteria may be in the form of a test, or the approach to bargaining adopted by a party or his doing or not doing of a particular act.

[5] NLRB. v. Ins. Agents Int'l, 361 U.S. 477 (1960).

The Totality of the Bargaining Conduct Test

In the case of *NLRB v. Reed & Prince Mfg. Co.*,[6] the court divided the over-all bargaining conduct of the employer into: the non-disclosure by the company of relevant bargaining data, its procrastinating attitude regarding the days when negotiations would occur, and unilateral increase of wages during negotiations. In interpreting each act, the court said that standing alone each act may be deemed equivocal, but when appraised in the context of the respondent's whole course of conduct, a lack of good faith was apparent. The court succinctly said:

> In such a case (as this) the question is whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiations as an elaborate pretense with no sincere desire to reach an agreement if possible, or that he bargained in good faith but was unable to arrive at an acceptable agreement with the union.

This however is not an absolute rule, because the Board has found a lack of good faith from one act alone. However, this rule is a basic guide in determining whether good faith exists. For instance, one poor mark in an examination is no indication that a student is a poor student. However a succession of low marks is a strong indication that the student is a poor one academically. This observation of human experience the Board has applied to good faith bargaining.

Past Bargaining History Test

This test is a corollary to the totality of bargaining conduct test. Instead of appraising only the present conduct, the Board relies also on the past conduct as a criteria (because the Board at times simultaneously uses several good faith norms) in finding good faith or the lack of it.

The Board's decision in the same case of *NLRB v. Reed & Prince Mfg. Co., supra*, prior to its appeal to the appellate court took note of the previous bargaining history of the company which was an unsavory one. The company on appeal objected on the ground that its prior bargaining conduct had no bearing on the present case. The court rejected this argument, stating that since, in the last analysis, good faith involves a finding of motive or a state of mind, this can only be inferred from circumstancial

[6] 205 F2d 131 (1953).

evidence of which the prior bargaining history is one such evidence. It went on to say that the Board could take judicial notice of a party's bargaining history considering that this factor is also considered in another area of labor law: the discharge of an employee for union activity.

However, the court mindfully took note that this is just one factor to be weighed on the scales of good faith bargaining. In this case the bargaining history of the company was adverse to it. In many other cases the court has relied on favorable bargaining history as indication of good faith.[7]

In discussing the totality test, the court took note of whether it could be inferred from the employer's total conduct that "he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible." The norm exprssed in the court's statement focused on what can also be termed as camouflage bargaining. Cases are replete with instances where the employer sought to hide from the Board his true bargaining intent by merely going through the motions of bargaining. The employer in these cases knew that if a refusal to bargain was filed by the union, he had to be 'on the record' as one who was seeking to reach an agreement with the union. Since the Board could not read his mind, the employer could show his intention through his acts like meeting with the union, being prompt at meetings, conferring with the union whenever the union wanted to or even conferring with the union far into the night. The Board has become aware of this type of conduct and has relied less and less on acts which can be faked or shammed. The Board has said:

> In determining whether the employer bargained in good faith, the fact that the parties bargained extensively, continuously and over a long period of time is not the crucial test: there must be a sincere desire to reach an agreement.

Petty Bargaining

In the same case of *NLRB v. Reed & Prince Mfg. Co., supra.* the court also considered lesser acts of the company in arriving at its conclusion. At the first meeting the union asked the employer if it could use the company's bulletin boards. The company replied

[7] Union Carbide & Carbon Corp., 100 NLRB 689 (1952); Div. 1142 v. NLRB, 294 F2d 264 (1961).
[8] Atlanta Broadcasting Co., 90 NLRB 808 (1950).

that while it could not comply with this request, it might be able to arrange for the posting of the union's notices on the plant gates. In spite of further requests from the union, it never materialized.

Furthermore, at the end of the recognition clause proposed by the union, the company wanted to insert the first proviso of section 9(a) of the Labor Management Relations Act. The union agreed provided the second proviso of the same same be also included. The company rejected the union's position.

In considering these acts the court agreed with the Board's reasoning that they:

> Indicate the Respondent's basic unwillingness to accept the principle of collective bargaining and . . . we cannot conceive of a good faith basis for a refusal to incorporate a statutory obligation into a contract in the very words of the statute. This type of *quibbling* is consistent only with the conclusion that there was bad not good faith bargaining. (Emphasis supplied)

It may be granted for the sake of argument that the employer was under no statutory obligation to grant even the minor concession of bulletin board privileges. This however does not excuse its attitude during negotiations. The employer it seems led the union into believing that if the union did not press for bulletin board privileges he would allow the union to post notices on the plant gates. This however never materialized. No serious bargainer, intent on coming to an agreement, would ever engage in such 'petty' bargaining.

This attitude was compounded by the employer's conduct regarding the wording of the contract. The employer had nothing to lose by incorporating a statutory proviso favoring the union as part of the contract since, irrespective of its incorporation, the employer was still bound by the statute, unless the employer wanted to infer that the non-inclusion was a waiver of the union's right. In such an event the union had the right to insist that its statutory right be incorporated.

As the court said, the quibbling of the employer could not be indicative of good faith. Rather it could be inferred that the employer merely wanted to talk the union to death.

[8a] Cummer-Graham Co., 122 NLRB, No. 134 (1959).

Flexibility

The court considered the bargaining conduct of the union as praiseworthy in *NLRB v. Reed & Prince Mfg. Co., supra.* It noted that the union's bargaining efforts were marked by considerable flexibility of approach by agreeing to modify some of its demands provided an agreement could be reached on other items. The company (on the other hand) took a firm stand on its proposals and declared in advance its opposition to any union security clause and to any form of arbitration in the settlement of company-union problems. Without going into the merits of this conduct, the Board and the courts have continuously stressed in relation to the bargaining context that an 'adamant stand' or a 'pre-determined attitude' or 'a mind hermitically sealed' is incompatible with good bargaining.

Justification

This criterion is an important gauge of good faith in bargaining. It eliminates a lot of surface bargaining, for if a party cannot justify his exercise of a certain conduct (for no intelligent person acts without a motive or a reason), the necessary inference is his lack of sincerity in bargaining and of a desire not to reach an agreement. This norm is the *why* of collective bargaining. The Board could say to the employer "Why did you unilaterally increase wages during bargaining?" and it could say to the union: "Why did you delay in meeting with the employer or why did you exhort the union members to take innumerable 'breaks' which resulted in a slowing down of production during the period of bargaining?

This norm should, however, be distinguished from the circumstances where the union's act or acts conditioned the bargaining response of the employer. For instance, the union cannot accuse the employer of bad faith bargining because of delays during negotiations when it is itself engaged in this kind of conduct. Rather, the justification sought is the justification of an act not conditioned upon the union's conduct.

This bargaining norm has not been adopted by the Board as a sole criterion, possibly for the understandable reason that it

[9] NLRB v. Nettleton; NLRB v. Denton.

may be accused of further regulating the bargaining process. It has, however, relied upon this norm to arrive at other norms in determining the presence of good faith.

Bargaining Conduct Which Is Justified — Division 1142[10]

In this case the employer was charged with having refused to bargain in good faith by refusing to recede from an announced position regarding its inability to pay the union's request for a wage increase. The court found no bad faith because the employer *had proved*, by throwing open its books to the union, that it *really* could not increase the wages of the employees. This, the court however considered, together with other reasonable conduct of the employer.

Bargaining Conduct Which Is Not Justified — Pilling & Son Co.[11]

The employer during negotiations answered every proposed contract item suggested by the union with a simple and curt 'no' without offering a reason for his rejection or a counter-offer of his own terms in reply. The court remarked: "Bargaining presupposes (a) common willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed to justify them on reason . . ."

BARGAINING CONDUCT LACKING IN GOOD FAITH

In spite of the broad scope of bargaining activities which the negotiating parties may engage in, the Board has invariably found an absence of good faith when certain and well-defined bargaining conduct were found to be present. The Board has isolated these specific conduct from the total bargaining conduct of the parties and the existence of one such conduct has resulted in a ruling of failure to bargain in good faith. No reliance was placed on the total or over-all bargaining relationship. These three specific types of bargaining conduct are discussed below.

Refusal to Sign a Written Agreement

Illustrative of this is the bargaining of the *Highland Park*

[10] 294 F2d 264 (1961).
[11] 199 F2d 32 (1941).

Mfg. Co.[12] During conferences looking forward to a labor contract, the company president refused to put into writing the terms which management and the company had agreed upon during their meetings. At the end of their bargaining sessions the union asked the president if he was willing to enter into an oral contract on the matters agreed, which would then be embodied in a statement and announced as the policy of the company. The president refused. The appellate court sustained a finding of lack of good faith with this ruling:

> The purpose of the written trade agreement is not primarily to reduce to writing settlement of past differences, but to provide a statement of principles and rules for the orderly government of the employer-employee relationship in the future. The trade agreement thus becomes, as it were the industrial constitution of the enterprise, setting forth the broad general principle upon which the relationship of employer and employee is to be conducted. Wages may be fixed by such agreements and specific matters maybe provided for; but the thing of importance is that the agreement sets up a modus vivendi under which employer and employee are to carry on. It may be drawn so as to be binding only so long as both parties continue to give their assent to it; but the mere fact that it provides a framework within which the process of collective bargaining may be carried on is of incalculable value in removing industrial strife. If reason and not force is to have sway in industrial relationships, such agreement should be welcomed by capital as well as by labor.

The agreement forged by the parties are to be the cornerstones of their labor-management relationship. A party who is sincere and stands ready to abide by the terms forged during the bargaining sessions should only be too willing to reduce these agreements into writing. The written agreement constitutes the best evidence of the outcome of the bargaining talks, so that for the term agreed upon, each party will know what its rights are and what its obligations are. The possibility of industrial strife is minimized if not totally eliminated. Doubtful points can be easily clarified.

A businessman seeking a business transaction who refuses to incorporate the terms of the agreement into a written contract would be viewed by the other party as one who has no serious desire to consummate the contract, or who stands ready to renege on the agreement. A labor agreement is more important, because during the life of the labor contract, both the parties and the public can thereby be assured of industrial peace. If a party

[12] NLRB v. Highland Park Mfg. Co., 110 F2d 632, 638.

should refuse to write out the basis of the labor agreement, the inference that he really is not interested in labor contract, becomes apparent. As a result, it has been incorporated in section 8(d) of the Labor Management Relations Act, that to sign a written agreement is a requirement of good faith.[13]

Unilateral Action During the Process of Bargaining

The problem of unilateral action presents itself after the duty to bargain has arisen but before a collective bargaining agreement has been concluded. Usually, the employer, without consulting the union, and in spite of the pendency of talks looking forward to a labor contract gives some concessions or benefits to the employees, whether it be financial, or on hours of employment or regarding any other factor of employment.

For instance, suppose the union demanded a ten cents wage increase aside from other concessions from management during their initial bargaining sessions and management replied that it wanted time to think the request over. Prior to the next meeting, the company suddenly informed the employee that as part of its policy to look after the welfare of its personel, effective that day, a ten cents wage increase would go into effect. The immediate reaction could be a union victory, but the long-term effect is the undermining of the union as an effective bargaining agent for the employees. The company sought to suggest to the laborers that they did not need a union to be able to gain concessions from management.[14] The idea of collectivity of action between employer and union in forging the terms and conditions of employment is negated. Furthermore, the bargaining position of the union is undermined because the employees might be satisfied with the concession given and would no longer press for other benefits originally requested from management. Once management senses that the employee are satisfied, the threat of strike as a weapon of labor is removed. The bargaining position of management immediately improves. Also a loss of interest in union activity may result, bringing withdrawals of memberships or apathy in the support of the union. This type of conduct, the Board has held

[13] See section 8(d) of the Labor Management Relations Act; see also section 13 of the Industrial Peace Act.

[14] NLRB v. Nat'l Shoes, Inc., 208 F2d 698.

was indicative of a lack of good faith on the part of the employer. The U.S. Supreme Court has said:

> Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.

However, unilateral actions on the part of the employer is allowed when an honest impasse has been reached by the parties in their collective bargaining sessions. Thus, the time when the employer is free to act with respect to the terms and conditions of employment on which he and the union could not agree, is limited to those cases where there had been a bona fide but unsuccessful attempt to reach an agreement or where the union bears the guilt for breaking off the bargaining negotiations.[16] Also a bargaining impasse does not relieve an employer from continuing his duty to take no action which would disparage the collective bargaining process or which amounts in fact to a withdrawal of the union's representative status.[17] The principal difficulty is that an employer cannot tell with any degree of certainty when an impasse has occured. Impasse is variously defined as a "breakdown in collective bargaining negotiations when neither side will make concessions";[18] the point when a deadlock has been reached . . . with neither side willing to give up its position or willing to accede to the position of the other party.[19] In practice it seems impossible to find any workable criteria which will indicate to the employer how long negotiations must go on before the Board will find that an impasse has occured.[20] The following criteria have been suggested for determining whether a genuine impasse has been reached: *first*, have the parties explored all avenue of agreement?; second, has the employer made unreasonable demands?; *third*, has the union taken an unreasonable position?; and *fourth*, have new issues been introduced?[21]

The Duty To Disclose Information for Intelligent Bargaining

It was earlier evidenced that the end purpose of collective bargaining is the agreement on a contract mutually satisfactory

[15] May Dept. Stores Co. v. NLRB, 326 U.S. 376, 386 (1945).
[16] NLRB v. Andrew Jergens Co., 175 F2d 130 (1949).
[17] Central Metallic Casket, 91 NLRB 672 (1950).
[18] 2 CCH Lab. L. Rep. 3120, 7889 (1957).
[19] *Ibid.*
[20] 37 N.Y.U. L. Rev. 666 (1960).
[21] 2 CCH Lab. L. Rep. 22011 (1957).

to union and management. Knowledge of this end however has not insured its outcome. The big problem is *how* to arrive at this purpose of collective bargaining. The good faith rule seeks to tell the parties how to arrive at this agreement. In many instances, this agreement materializes when the parties understand each other's position and through a process of give and take, proposals and counterproposals, the parties iron out a contract between them.

The Board through its accumulated experience has come to realize that in order that the parties may bargain intelligently, they have to be informed of certain issues. This need for information during bargaining may be illustrated through a simple hypothesis. Suppose the parties are bargaining. The union informs the employer that the cost of living has gone up ten percent since the last contract and in formulating its current wage proposals it needs the wage rates of the employees based on the last contract so it could use it as a *basis* to formulate new wages to meet the current cost of living. Is the union entitled to the information? The union would definitely argue that without this information it would have no basis, no starting point, to submit any intelligent proposal regarding wages to the employer.

The employer gives the information pursuant to the request and the union presents a ten percent wage increase proposal. The employer pleads financial inability to meet the union's demands. The union counters that the Department of Commerce reports that it was the best year for that particular industry and yet the employer pleads financial inability. The union then asks the employer to substantiate its plea by allowing a government accountant to audit the company's books. The employer refuses on the ground that the information is confidential and furthermore, the LMRA does not oblige him to do so. The union counters: "But how am I to know that you are telling the truth? The veracity of your plea necessarily depends upon you." If the employer still refuses would his refusal be indicative of a lack of good faith?

The issue which stands out then, is: when can either party, pursuant to their obligation to bargain in good faith, be obliged to disclose information requested by the other, so as to enable the party requesting the information, to understand the position of the other as well as to enable it to make intelligent counterproposals, so as to develop a basis for understanding between them, in the hope that a contract will ultimately be consummated?

Most certainly the going rate is a factor to be considered by a union in determining whether or not to press or eliminate its demand for a general wage increase. Likewise, current wages are directly related to the demand for a minimum (hourly wage rate). Without such information, there is *no basis* for determining to what extent, if any, the minimum wage would affect any employee in the unit. Further, the information would enable the union to ascertain if any wage inequities existed among the employees in the unit and to frame its demands to eliminate any possible discrepancies. In sum, the Respondent's refusal to divulge information as to current salaries of the employees in the unit placed wages, as there existed no area known to the union in which it would the union in the position of dealing in vacou on subjects relating to vary its wage position. (Emphasis supplied)

The Board here excellently argues why the information would have helped the union bargain intelligently. The Board pointed out that the employer wanted to renew the 1948 contract but would not disclose this to the union. How then could the union know what the employer wanted it to agree to if the employer would not disclose the contract? It is like asking a man if he would like to buy a house and when the buyer asks the seller if he can see the house first, the seller refuses. How can two intelligent persons come to an agreement under such circumstances. It thus becomes necessary for a party engaging in bargaining to know certain information in order to *understand* the proposals made by the other.

Furthermore, the union cannot formulate proposals which it desires to be the subject of agreement unless it has information on the subject which only the employer can disclose. For instance in this case the union wanted to set a minimum hourly wage. Without the existing wage rates it had no basis on which to determine this rate. Let us say the union wanted a minimum hourly wage rate of one dollar. Factually, the actual minimum hourly wage rate is one dollar and five cents but because of the employer's secrecy only he knew about it. The union because of a lack of wage data finds itself in an absurd position. This is by no means intelligent bargaining. The Board formulated the rule requiring disclosure of wage data to correct this imbalance of bargaining information. It was not done to favor the union, but rather to help the parties through 'honest proposals' based on accurate information to come to an agreement.

Member Murdock-dissenting and concurring:

Murdock wanted the disclosure of all three contracts. He argued: ". . . this is one of those specific areas where specific need for the information may not be apparent until it is made available. I would not substitute my judgment for that of the union as to what information is necessary to enable it to bargain intelligently.

The rationale behind this argument was adopted by the Board and the courts in subsequent cases.

The Reason Why Financial Data Disclosure Produces Intelligent Bargaining — An Illustration

In the leading case of *Southern Saddlery Co.*,[29] the employer willingly met with the union at all times. Negotiations centered almost exclusively upon the union's request for a wage increase of thirty cents an hour. This was finally pared down by the union to a token five cents an hour wage increase.

At the very outset of the negotiations, the employer opposed the union's demands on the ground that it was financially unable to grant any wage increase. When the union asked it to justify its plea, it refused on the ground that it was contrary to its policy to do so.

The Board finding a violation of 8(a) (5) reasoned as follows:

We believe, however, that, if the Respondent was unwilling to modify its initial opposition to the union's demand for a wage increase, it should, at the very least, have made a genuine and sincere effort *to persuade the union to accept its position.* Here, the validity of the Respondent's plea depended upon the existence of facts, peculiarly within its knowledge. The Respondent, therefore, in our opinion, was obliged to furnish the union with sufficient information to enable the latter to *understand* and discuss the issues raised by the Respondent in opposition to the union's demands. (Emphasis supplied)

This case conveys quite well the reason *why* financial data is necessary to obtain intelligent bargaining. First, we have to consider the basic purpose of collective bargaining: the reaching of an agreement. This agreement will exist only if the parties appreciate the position of one another. Unfortunately, the attitude of management and labor regarding one another, if not one of suspicion, is one of outright hostility. This attitude precludes one party from accepting the word of the other as true (assuming that it is true). The party asserting its financial inability is required by the other to prove the veracity of this position, or as the Board said, "to persuade the union to accept its position." If he proves it satis-

[29] 90 NLRB 1205 (1950).

factorily, the party requiring the proof will understand the reason for the financial inability of the party from whom he asked the proof. This understanding will maximize the possibility of an agreement.

Another factor which the Board brought out regarding the disclosure of either financial data or wage data is that these data "are peculiarly within its [the employer's] knowledge." For instance how could the employer expect the union to know its balance sheet for any given fiscal year, or its sales and production records and so on. It is quite rare that the union would even have the opportunity to collect these data and if so, expenses and feasibility of accumulation weigh heavily against the union.

Perhaps the reasonableness of this rule can be shown by assuming that the employer is on the verge of bankruptcy and so it asks the employees for a wage cut to save the company. The employees tell the employer to prove its financial condition. The employer is only too willing to show its books and other financial data to the union. This very same data which the employer may have refused to disclose to prove its financial inability to grant a wage increase it now discloses to support its request for a wage decrease.[30] This analogy is not perfect but it serves to show the importance of *informed bargaining.*

Is the Refusal To Disclose Pertinent Bargaining Data a Per Se Refusal To Bargain?

In the *Southern Saddlery case, supra,* the only conduct determinative of the employer's bad faith was its refusal to substantiate with financial data its claim of poverty. Other issues like dilatory tactics, refusal to give counterproposals, undermining the union, which normally (statistically) exist in the bargaining context of an employer who is bargaining in bad faith, were absent. Hence, from a factual necessity, one act determined the Board s finding that the bargaining requirements of good faith were not satisfied.

The Board relied on the total bargaining conduct of a party

[30] Singer Mfg. Co., 24 NLRB 444 (1940).
The employer in this case wanted a reduction of wages. The union refused and during the course of negotiations asked the company if it would let a government accountant go over its books to substantiate its position. The employer rejected the union's request without suggesting an alternative remedy to satisfy the union. The Board considered this as an indicia of bad faith.

as a norm for judging a person's good faith or lack of it. Would it be a violation of this rule, or better still, would it be compatible with this rule, if one act would be sufficient to constitute a violation of good faith? If this one act constituted a refusal to disclose pertinent data would a refusal to bargain be found? Are the differences between wage data and financial data irrelevant, at least in this respect, such that a refusal to disclose either would, standing alone, be violative of section 8(a) (5)? We turn to the *Truitt* case for the answers.

The Truitt Case

This case focused squarely on one of the myriad aspects of good faith bargaining: refusal of an employer to supply financial data to substantiate a claim of inability to pay a wage increase when requested by the union.

The union here asked for a wage increase of ten cents an hour. The company answered that it could not afford to pay dividends, and that an increase of more than two and one half cents would put it out of business. The union asked the company to substantiate this plea, and requested that a public accountant examine the company's books, financial data, etc. This was denied.

When brought before the Board,[31] it found a violation of 8(a) (5) saying:

> . . . it is settled law that when an employer seeks to justify the refusal of a wage increase upon an economic basis, as did the Respondent herein, good faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by reasonable proof.

The court of Appeals[32] disagreed with the Board's conclusion of law. The court said?

> To bargain in good faith does not mean that the bargainer must substantiate by the proof statements made by him in the course of bargaining. It means merely that he bargain with a sincere to reach an agreement.

On certiorari to the United States Supreme Court,[33] the more

[31] 110 NLRB 856 (1954).
[32] 224 F2d 869 (1955).
[33] 351 U.S. 149 (1955)
When the Truitt case was argued before the Board, the employer based his inability to grant a wage increase on the basis that such an increase would have made it unable to compete with other firms and offered evidence that it was paying as much or more than its competitors.

employer's obligation to furnish a labor organization information for collective bargaining purposes. (That I interpret the Whitin) case to require that the information be necessary as well as relevant to collective bargaining.

Relying basically on the cases of Oregon Coast Operator's Association, he quoted as follows:

An employer is under a statutory duty to furnish data to the employer's bargaining representative upon request, provided that the data is *relevant* and *needed* by the representative for purposes of collective bargaining. [Rodgers' emphasis]

He then went on to say:

The majority seeks to distinguish the instant case from the Oregon case on the ground that here the information sought related to wages only, whereas, in the Oregon case the union sought wage data and other information. This suggests that the Board has a dual standard for information cases, where-under if the union seeks only wage data, the sole criterion is relevance, but if the union requests both wage data and other information the necessity as well as the relevance must be shown.

In the *Pine Industrial Relations Committee case*,[41] the Board adopted the distinction which Rodgers brought out. In that case the Board said: ". . . . in *wage data* cases it is sufficient that the information sought by the union is relevant and no specific need as to a particular issue must be shown. . . ." The "other information" Rodgers mentions, as *Pine Industrial* will bear out, is financial data, and for this data, both relevance and necessity must be shown. Rodgers joined the majority in that case for he felt that the dichotomy drawn by the Board in *Glenn Raven* is now settled law.

Financial Data—the Employer's Ability To Meet the Economic Demand Must First Be Raised

The rules regulating the disclosure of wage data have been discussed. It may be concluded that the Board has formulated rules with a certain degree of liberality regarding its disclosure. The rules regarding the disclosure of financial data, as the discussion will show, are quite different from wage data. This results from the different objectives each type of data seeks to fulfill.

[41] 118 NLRB 1055 (1957) [also known as the International Woodworkers of America].

The case of *Pine Industrial Relations* is the leading case regarding the disclosure of financial data.

In the *Pine Industrial Relations Committee* case, the union requested the employer to submit its production and sales data to determine the size of the wage increase it would ask and in the event the employer turned down the union's request on the plea of financial inability to pay, then it would use the information to refute the employer's defense. The employer did not disclose any information, although it never claimed it would not grant the wage increase because of financial inability.

The Board concluded:

In any event, apart from the union's purpose, the information sought related to the financial status of the Respondent and necessarily went to the question of their ability to pay, and so we find.

. . . we note that, while in wage data cases it is sufficient that the information sought by the union is relevant and no specific need as to a particular issue must be shown, the same is not true where, as here, the union is seeking information relating to the employer's ability to grant a wage increase. In the latter case . . . *the employer's ability to pay must be brought into issue* before a refusal to furnish information relating thereto can be found to be violative of the Act.[42] [emphasis supplied]

What is meant by 'ability to pay must be brought into issue?" This seems to be the crux of the Board's rationale.

Financial information, as earlier indicated, is concerned with management's ability to meet labor's economic demands. Management uses this information to substantiate, and to justify the bargaining posture of inability to pay. Unless management raises this issue, there is no need for this information because the function which this type of information satisfies does not exist. It is the employer who will determine this need because if he grants the wage increase sought, he has determined that there is no need for the information.

This analysis may be clarified by the facts of the case itself.

[42] The Board's own footnote: The requirement that ability to pay must first be in issue before an employer is obliged to furnish information relating thereto reflects the rule, recently affirmed in Glenn Raven Knitting, that as to information other than wage data the test is both relevance and necessity and a specific need as to a particular issue must be shown. For until ability to pay becomes an issue, "specific need" for information as to it cannot be shown, nor can such information be said to be necessary and relevant.

The Board pointed out that the union would use the information to determine the size of its wage increase and if the employer pleaded inability to pay then it would use this information to refute the plea. Thus, instead of the employer's using this data to substantiate his claim of inability to pay, the union intends to use it to refute this plea. There has been a substitution of roles regarding the use of the information. The employer however did not raise his inability to pay. The union was *anticipating* it. The employer may very well grant the union's wage increase request and if it does the information becomes totality irrelevant to the union.

The difficulty with this reasoning is its being premised on the knowledge of the union's purpose regarding the information's use. Suppose there is no knowledge of this purpose and the issue of inability to pay has not been raised, is the union entitled to this data? It seems not. Perhaps the Board anticipated this by saying: "In any event, *apart* from the union's purpose...."

The question to be asked then, when the union asks for a certain type of information is: "Does this type of information determine the employer's ability to pay?" If it does, then this information is financial data and until the employer raises an issue of inability to pay, the necessity for the information does not arise.

The Board could have clarified its rationale by showing *how* sales and production affected the employer's ability to pay. Sales and production records show how many products were produced and sold. Production represents cost and sales represent gross profits. After deducting production costs from sales profits the net profits are determined and net profits will ordinarily determine whether management can grant a wage increase or not. Therefore, this information goes to the question of the employer's ability to pay.

Recapitulating briefly, the Board has established the following rules:

a. If the information sought determines an employer's ability to pay, the information sought is financial;

b. Until the employer's ability to pay is raised, the need for this type of information does not arise.

The Sylvania Electric Products Case[43]

This case is an important sequel to the rule of law laid down in the *Pine Industrial Relations* case. The union requested from the employer several types of information regarding the employer's insurance plan. The employer disclosed data regarding the benefits received under the program, the scope of its coverage, the amount of claims paid under it, but not its cost.

The trial examiner drew a distinction in its report between costs of an insurance program where the employees paid premiums and one solely borne by the employer. The former, it said, fell within the scope of wages, but the latter "had no more direct relation to wages than do other operating costs to which employees contribute." The Board rejected this distinction and considered both plans as part of the scope of wages, and since, this information was relevant to the bargaining process, the union was entitled to this form of wage data.

On appeal, the court upheld the distinction of the trial examiner and came to the conclusion that costs of an insurance program wholly undertaken by the employer could not be considered as wages. Since the information sought was not wage data, then it must have been financial data and so the rule regarding its disclosure is different. The court made the following remarks on this point:

> Thus, if Sylvania had refused to accede to the union's demand for increased or broader insurance coverage for the employees in the unit it represented *on the ground cost*, the union might be entitled to cost information, provided, its demand information was not made to impede the bargaining process. . . .
>
> Here however, no issue of cost arose, for Sylvania at no point in its negotiations with the union interporsed cost as a factor bearing on its willingness to consider any proposal the union might make with respect to changes in its employee insurance program. Saying that it took the cost of insurance program into account in arriving at the "level of benefits to be offered to the employees" is not equivalent of saying that it would not consider changes in its insurance program on account of cost. Sylvania provided the union with all the information it required with respect to the scope and amount of the benefits of its insurance program and this is all the union needed to *formulate* demands for changes in the program. Demands for other or more extensive coverage could be *formulated without reference* to cost and so

[43] 127 NLRB 924, (1960); 291 F2d 128, (1961).

could demands for increase in cash wages. The *cost* of the insurance program would *become an issue* should Sylvania *interpose* that element *as a ground for resisting* a request for change in insurance coverage. When that occurs the time will come to decide whether Sylvania should provide cost data to support its position. [emphasis supplied]

The court pointed out quite accurately that Sylvania never indicated that it would not grant increased or broader insurance coverage on the ground of cost or put it in another way, its inability to pay. The union never asked for increased insurance coverage. If the union had done so and Sylvania had resisted on the ground of cost, then the union would have been entitled to the information requested since the issue of the employer's ability to pay (costs) has been raised. The employer must now substantiate his plea of financial inability.[44]

Unfortunately, the court did not even rely on *Pine Industrial* for its ruling nor did it consider the information requested as financial data and the issue of cost as equivalent to the issue of ability to pay. If the court had done so, it would have strengthened its own ruling plus the jurisprudence on the matter.

The difficulty with the court's rationale is that it is not being conducive to helping the parties arrive at a contract as soon as possible. Before the union can avail itself of financial data it must first challenge the employer's ability to pay. Could it not be argued that if the union *knew* the condition of the employer's ability to pay, it would not challenge it in the first place? Or better still, the union would submit economic demands proportional to the employer's ability to pay. Waste of time is thus eliminated and a meeting of the minds is encouraged.

The Board in the *Pine Industrial Relations Committee* case, *supra* answered this objection as follows:

> In deciding this case we have not been unaware of the consideration that possession at the outset of bargaining of the facts about the employer's economic position may be helpful to the union intailoring its wage demands to what the employer can reasonably pay and thereby make bargaining, more realistic and successful. But our duty under the Act is to determine whether

[44] Tennessee Coal, 122 NLRB No. 177, (1959): We expressly do not adopt any implications ... that an employer's mere assertion of an unwillingness to grant union's economic demands, if unrelated to a claim of inability to pay, imposes an obligation on the employer to furnish such information requested.

> the obligation of good faith has been met rather than to establish ideal bargaining conditions.

Confidential Information as a Defense

One of the early and rather important objections to the disclosure of bargaining information by the employer was his assertion that the information sought was confidential. The discussion of this point is divided into the two familiar types of datum. Fortunately, this point has been recently ruled on by the Board, for it helps to crystallize the "current rule" on this important issue.

Financial Data

The employer has rarely relied on the confidentiality of its financial data as an excuse for refusing to divulge it. In the rather early case of *Manville Jencks Corp.*,[45] however, the employer refused to grant a wage increase on the ground that the data was confidential. It did however, at a subsequent meeting submit a financial statement covering five years of its operations. The Board found the statement to be useless since it in no way justified the employer's plea. The Board did not require the employer to disclose the information and merely rejected the defense tacitly by ordering the employer to bargain collectively. This conclusion follows because the rule regarding the disclosure of information had not yet developed. With the benefit of hindsight, if this case were to arise today, the employer's defense would almost certainly be rejected.

Wage Data

The defense of confidentiality was probably first raised in the case of *Aluminum Ore Co.*[46] The union, in this case, requested a complete job classification of all the employees in the unit. The union asserted that this information was necessary for it to understand the respondent's division of its employees among 'related groups' and also for a comparison of wage rates in the light of such division.

The company refused on the ground that the wage data was confidential, that only the employees involved could authorize its release, and that the union, as representative of all the employees in the unit, might secure it directly from the employees.

[45] 30 NLRB 382 (1941).
[46] 39 NLRB 1286 (1942); 131 F2d 485 (1942)

The Board rejected the company's arguments stating that without this information the union could not understand the position of the employer. It also said that the employer was the natural source of this information and expressed doubt, aside from the practicability, of the union's securing the information directly from the employee. In any event, the Board held that the employer's defense was superseded by the "intelligent bargaining required by the Act." On appeal the appellate court remarked:

> We can conceive of no justification for a claim that such information is confidential. Rather it seems to go to the root of the facts upon which the merits were to be resolved. . . . And if there be any reasonable basis for the contention that this may have been confidential data of the employer before the passage of the Act, it seems to us it cannot be so held in the face of the expressed social and economic purposes of the statute.

The Board's rationale seems more realistic than the court's. It propounded rather practical arguments to meet the employer's defense. It seems axiomatic that before there can be agreement there must be understanding. In a sense the rule 'compels' understanding by requiring disclosure but this compulsion is really a reminder to a party to fulfill his bargaining duty. If a party is permitted to hide behind the defense of confidentiality of information, the whole purpose regarding disclosure of information is negated because the union will not know what it is bargaining about.

It may be argued that the employer should be allowed to prove the confidential nature of the information. This is a valid argument, *provided,* the union is still sufficiently informed to enable it to bargain intelligently. It cannot be used as a blanket to smother disclosure of any and all datum.

The employer here never really proved that the information was confidential. Information is labeled confidential because its disclosure will hurt the person who seeks to keep it confidential. Yet in this case the employer told the union to get the information from the employees. If a person seeks to keep information confidential he will not even disclose a way by which such information may be secured. Although the employer claimed the data confidential to the employees it never showed why it was confidential or that the employees told it not to disclose the information.

Aside from an outright claim that wage data sought is confidential, the employer has colored this defense in the following hues:

1) The non-disclosure of the information will not hinder the bargaining process;

2) that the employees are entitled to keep this data private and only they may disclose it;

3) the union could easily obtain the information from their own members;

4) it would be detrimental to the employer's business if this information was disclosed;

5) and the disclosure of the data would create jealousy among the employees, lessen their morale and a chaotic condition may occur.

These arguments were rejected by the Board in three decisions handed down on the same day. The basis of the Board's decision were the rationales formulated in the *Yawman and Erbe Mfg. Co.* case *supra,* and the *Aluminum Ore Co.* case *supra.* One of the cases, *Boston-Herald Traveller Corp.*[47] was appealed. The court accepted the Board's arguments saying:

> The Board rejected petitioner's justification of its refusal to disclose confidential information because the preference of individual employees for secrecy is speculative and, if existent, must yield to the majority of employees, and because the danger of pirating is *out-weighed* by the necessity for fully informed bargaining. [emphasis supplied]

It is interesting to note the last statement of the court. It seems to apply a 'balancing of interest' standard. The inference is that it recognizes that the defense of confidentiality is a legitimate defense. However, if a clash should occur between this interest and a superior interest, as had occured in this case, then the superior interest must prevail. This rationale has merit because it does not brand the defense of confidentiality as *incompatible* with intelligent bargaining. Rather it merely relegates the defense to a lower status. The court has fashioned a flexible rule, that if justified by the circumstances the defense of confidentiality may be relied on.

[47] *Supra,* note 39.

In the recent case of *McCulloch Corporation*,[48] the company's wage rate was determined by the wage of 29 other companies engaged in similar operations. The company submitted this data to the union in the same form submitted to it by the companies. The union demanded that the identities of the companies and their wage rates should be disclosed together. The company agreed but refused to specify the rates paid by each of the participating companies on the ground that the employer had promised that this information would be kept confidential.

The trial examiner found and was upheld by the Board, that since the information given by the company to the union was in the same form provided by other companies and a disclosure of the wage rates would have involved a breach of confidence, this *limited restraint* on the union did not prevent it from bargaining intelligently.

It seems the Board will accept 'confidence' as a defense, though not an absolute one. The inference that can be gathered from these cases is, if 'confidence' will be used as a defense to preclude disclosure of *any* data whatsoever, it will be rejected.

However, if the employer has submitted sufficient though incomplete data to the union and this amount of data will enable him to bargain intelligently, the defense that the rest of the information is confidential will be upheld.

[48] 132 NLRB 201, (1961).

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