

E. The Duty to Provide Information for Bargaining

1. The Right to Relevant Information

Unions have a broad right to information relevant to the negotiation and administration of the collective bargaining agreement. This obligation is based on the principle that the employer's duty to bargain includes the duty to provide the union with the information it needs to engage in informed bargaining. There cannot be a good-faith bargaining impasse on a subject if the employer has refused to provide the union with relevant information it has requested in order to bargain over the issue.

An employer has no duty to provide information voluntarily, only to provide what is requested. The information requested must be relevant to formulating the union's bargaining proposals, contract negotiations, or contract administration, including information needed to evaluate and process a grievance through the grievance procedure to arbitration. A union needing information must request it from the employer and explain the reasons for needing it. The Board has frequently stated that it uses a broad, "discovery-type" standard to determine the relevance of an information request. The employer (or the union on an employer's request) must provide requested information if it is probably or potentially relevant. Thus, under this broad approach, the union's right to information pertaining to a grievance does not depend on the grievance's merits, only on the relevance of the information to the grievance as alleged.

Basically, a union is entitled to any information it needs on any matter relevant to the bargaining process, contract administration, or the evaluation and processing of grievances. Thus, for example, if a union is considering a contract proposal to limit subcontracting, it can request data on past com-

pany subcontracts. If the union believes contractual overtime provisions have been violated, it can request data on the number and distribution of overtime hours. If there is a grievance as to production line speed, the union is entitled on request to the company's time study data if any, and may even make its own time study. However, the Board applies a somewhat restrictive rule governing a union's right to do its own on-site testing, balancing the need for the test or study against the employer's private property right. This means that an employer can lawfully deny access if the union could obtain the same information without going on premises. In most cases, however, a union is able to justify the need for an on-site test, at least to verify data provided by the company. A newly certified union is usually entitled to visit the employer's facility to observe its operations. The Board has stated that direct observation is necessary for the union to develop an informed and reasonable negotiating strategy so that the employees receive the representation for which they voted. The *Lechmere* decision limiting the right of an outside union to enter private employer property (see chapter 3) does not apply. *Lechmere* governs the right of "stranger unions," and the duly certified or recognized union requesting access to carry out its collective bargaining functions is not a "stranger."

If an employee is disciplined, the union can request information about the reasons for the discipline and the evidence supporting it. However, an employer does not have to give the union copies of witness statements before the hearing because of the possibility that the witnesses may be subject to harassment. Similarly, an employer does not have to give a union the names of informants who reported misconduct, such as drug use or a theft ring, to the employer. However, on the union's request, the employer must give the union a summary of

the evidence supplied by the informant, without identifying the source, that is sufficient for the union to prepare its defense. Similarly, under the broad, discovery-type approach the Board applies, an employer must furnish a union, on request, with copies of reports prepared by the employer's security investigators summarizing customer complaints against an employee. The reports are not protected unless the customer requested and received assurances of confidentiality before providing the information.

A union is entitled to the names and addresses of all employees, in the bargaining unit, their job classifications, wage rates, and seniority dates. These basic data are necessary to begin bargaining. If a contract includes a union security clause (see chapter 10), the union can also request the name of each employee, as hired, in order to enforce the clause. However, the Board has held that employee Social Security numbers are not presumptively relevant, and a union is not entitled to this information from the employer unless the union can establish a reason for needing it. On request, a union is entitled to relevant information about the application of an employer's personnel practices to minority group bargaining unit employees to ensure fair, lawful, and nondiscriminatory treatment. Questions sometimes arise as to a union's right to information about an employer's hiring practices. Applicants for employment are not yet employees. Therefore, the Board has held that a union is entitled to information about hiring practices only if the union has an objective basis for believing that the employer may discriminate in hiring against members of a protected group (see chapter 13). The union can then request the information needed to verify its beliefs. A union usually is not entitled to a copy of an employer's affirmative action program, if any, as the plan itself does not directly affect the terms and conditions of employment of bargaining unit employees.

Technically, a union represents strike replacements; thus, a striking union can request a list of replacements' names and addresses. Employers frequently protest that unions will use this list to harass the replacements. The Board has held that the union is entitled to the list unless there is a "clear and present danger" that the list would be used to intimidate or harass replacements. However, some courts of appeals reviewing Board decisions on this issue have held that an employer may withhold the names if the employer has a reasonable basis for believing that the list will be used improperly.

The Board presumes that requested information directly related to the bargaining unit is necessary and that the union is entitled to it. However, an employer is not required to produce information that is not directly related to the unit, such as information about the wages and fringe benefits it provides to employees at another facility outside the unit, unless the union establishes the probability that the information is relevant for a specific reason. Thus, for example, if the union has reason to believe that employees outside the bargaining unit are performing bargaining unit work, it can request information about the work the suspect employees are doing. If a contract limits subcontracts to employers who pay their employees no less than an amount equivalent to the wages and fringe benefits received by the bargaining unit employees, the union may request information from the employer to verify the compensation received by the subcontractor's employees even though the employer, in turn, must obtain this information from the subcontractor. If a union suspects that an employer has improperly established an alter-ego or double-breasted operation to evade the collective bargaining agreement (see discussion later in this chapter), the union may request detailed personnel and financial information to uncover the relationship between the companies.

This list of possible information is far from exhaustive. Basically, the scope of the union's right to information is as broad as the union's need for information on any matter relevant to the bargaining process, contract administration, and the evaluation and processing of grievances.

Although it does not occur often, employers are also entitled to relevant data from the union. If a contract requires that an employer obtain his employees from a union hiring hall, the employer can request data as to the union's ability to refer enough qualified employees to meet the employer's needs, such as the list of names and addresses of employees who apply for referral. Some contracts include a "most favored nation" clause requiring that the union offer a contracting employer any more favorable conditions of employment that the union agrees to with another employer. In such a case, the contracting employer may request a list of all the employers with whom the union has a contractual relationship, as well as a copy of their contracts, to determine whether those agreements contain better terms to which the employer would be entitled.

2. Limits on the Employer's Duty

There are some limits on the employer's (or union's) obligation to provide information. Thus, a request cannot unduly burden the other party. A union may have to pay for the employer's administrative expenses (such as clerical and copying costs) when gathering large amounts of information. If substantial costs are involved in gathering the requested information, the parties may bargain over the amount the employer may charge the union. If no agreement is reached, the employer may simply permit the union to have access to the records from which the union can reasonably compile the needed information on its own.

Employers sometime argue that a union's request for information that appears relevant on the surface may actually have

some other purpose for which the employer may properly reject the request. For example, a union may request a list of subcontractors to check on compliance with a contractual restriction on subcontracting but may actually intend to use the list to identify nonunion employers as an organizing tool. However, the Board's position is that the union is entitled to information if it has a legitimate collective bargaining purpose (as discussed previously) even though there may also be other reasons for the request or the information may be put to other uses, such as organizing. However, information may not be requested in bad faith. Thus, in one case, an appellate court, reversing a Board decision, held that a union was not entitled to the names of subcontractors because (according to the court) the union intended to use the information to drive the nonunion subcontractors out of business, rather than to ensure compliance with the subcontracting clause. In a few cases, the Board has held that an employer need not provide certain information if the request did not pertain to an alleged contract violation and the contract did not expire for a substantial time period, so that the information was not relevant at the time to formulating a new contract proposal. The Board ruled in one case that a union's request for information about the cost of providing certain additional medical benefits as it proposed in bargaining was not relevant because the employer had firmly rejected the union's proposal and the information requested was also readily available directly to the union. However, in most cases, an employer cannot reject a union's request for relevant information just because it is available from another source. The union is entitled to the information from the employer to verify the information it already has. Also, a union is not obligated to use a burdensome procedure to obtain desired information from another source if the employer has the information readily available in a more convenient form.

Usually the employer does not have to interpret the data provided to the union or put them in the precise form the union requests. However, if the information requested is computerized or needs explanation to be understood, the employer must put the data in a usable form and give the necessary explanation. In most cases, a union is entitled to a copy of relevant company records. However, if the records are simple and uncomplicated, the employer may only have to allow the union to inspect the records and make notes as to their contents.

a. Right to Profit Information The union is entitled to financial information about company profits only if the employer asserts it is financially unable to pay a requested increase. This is called “pleading poverty.” The union is not entitled to financial data just because it would assist it in preparing wage demands for bargaining. The Board is very strict in applying this doctrine. Thus, if an employer indicates that it could afford a certain increase with difficulty, but prefers to use its available funds for other purposes, the union would not be entitled to financial information because the employer did not specifically state that it could not afford the increase. A union is not entitled to review company financial records just because the employer asserts that a wage increase would place it at a competitive disadvantage. However, if the employer goes further and claims it will not be able to survive or stay in business for the term of the agreement under the union’s proposal, the union is entitled to review relevant financial information to verify this claim.

b. Confidential Data The Supreme Court has indicated that an employer’s legitimate interest in the confidentiality of certain information may prevail over the union’s need. In *Detroit Edison* (1979),¹⁷ the union requested that the company provide it with

a copy of an aptitude test used to determine eligibility for promotions and copies of the test results for those taking the test. The data were needed to arbitrate a grievance over the denial of promotions to certain senior employees. The company denied the union’s request for the test on the grounds that the test had to be kept secret. The company did offer to allow a psychologist, selected by the union, to evaluate the test in confidence, but the union rejected this proposal. The employer also denied the union’s request for the test results of individual employees because the company had promised employees that it would keep the results confidential. The company did offer to release the test results of any employee who signed a waiver permitting the release. The Supreme Court, reversing the Board, held that the employer did not have to turn over the test directly to the union and that the employer’s requirement that the individual employees agree to the release of their scores was reasonable. The Court stated that the burden on the union in getting the releases was minimal.

Since the *Detroit Edison* decision, the Board has proceeded carefully on a case-by-case basis in balancing an employer’s claim of confidentiality against the union’s need for relevant information. Thus, the burden is on the party claiming confidentiality to establish this claim. In general, for information to be confidential, it must: reveal highly personal information, such as individual medical records or psychological test results, contrary to promises or reasonable expectations of privacy; reveal substantial employer proprietary information, such as trade secrets; be reasonably expected to lead to harassment or retaliation, such as the identification of witnesses; or be information that is traditionally privileged in lawsuits, such as material falling within the attorney-client privilege or a document prepared for pending or anticipated litigation. Even if an employer (or a union in response

¹⁷ See legal principle 16.A.

to an employer's request) properly regards certain information as confidential, it must raise the issue promptly. It must bargain with the union as to a means to provide as much of the information requested as possible while meeting its legitimate confidentiality claims (such as removing names or other identifying comments from individual employee records, limiting the union officials to whom the information is released, or submitting the complete information to a third person mutually selected by the parties to analyze the information for the union without jeopardizing employee privacy). The Board has emphasized that the right to privacy in an employee's record belongs to the employee, not the employer. Thus, an employer may not raise a privacy claim unless it has promised the employee that the records will be confidential or, as in the case of medical records, the employee has a legitimate expectation of privacy. If the union's need for personally identifiable records in a particular situation is relatively high, and the employee's privacy concerns are relatively light, the employer may be required to provide personally identifiable records to the union without individual employee releases. For example, co-employees usually know when another employee is disciplined or is absent. Thus, individual employees have only a very slight privacy interest at stake if the union is provided information without the employee's consent about the number of times the employee has been absent or disciplined. However, the reasons for an employee's absence may be personal, so that, depending on the union's need for the information, the employer might reasonably require that the employee sign a release before that information is provided to the union.

c. Occupational Safety and Health Information The Board has held that a union is entitled to a broad range of data from the employer pertaining to occupational safety

and health, including such items as morbidity and mortality statistics on past and present employees; the generic names of all substances used in the plant and a statement of their known effects; results of clinical and laboratory studies of individual employees taken by the employer; and company statistics on occupational illnesses and accidents related to workers' compensation claims. Usually, however, an employer may remove the name of the individual employee and any references that would identify the individual from any medical information provided. Supplying the union with statistical or aggregate medical data may result in the unavoidable identification of some individual employees' medical information, but the Board has reasoned the union's need for the data, potentially revealing the past effects of the workplace environment on the employees, outweighs any minimal intrusion into the employee's privacy.

The Board requires that the parties bargain in good faith regarding the conditions under which needed generic chemical information should be furnished to the union with appropriate safeguards to protect the company's legitimate rights to maintain trade secrets. The Board will impose specific remedies as to the records to be provided and the union's use or distribution of the information only if the parties are unable to agree.

A union has the right to select an outside specialist to enter the employer's facility and make necessary on-site inspections and tests relevant to the administration of a contractual safety clause, a pending grievance, or upcoming negotiations. The union does not have to rely on the employer's safety data which, intentionally or not, may be biased. As discussed above, the Board applies a balancing test to determine a union's right to on-site testing, balancing the need for such tests against the employer's private property rights. However, in most cases, the union should still be able

to justify its need for access to the company's property to inspect and test for safety hazards or to verify data provided by the company. The employer may limit union testing to reasonable times and periods and require the union to sign an agreement protecting any company trade secrets (e.g., confidential industrial processes) to which it may have access during the inspection.

F. The Bargaining Duty of Successor Employers

Generally, an employer is a successor employer if it takes over the business of another employer, the predecessor's employees are retained as a majority of the new employer's workforce, and the new employer continues operations in the same industry. The takeover may be through a merger or consolidation of two companies, a stock transfer, transfer of assets or a lease, or any other business combination. In *Burns International Security Services, Inc.* (1972),¹⁸ the Supreme Court held that a successor employer is not bound by the predecessor's collective bargaining agreement and is free to bargain for its own contract. The Court said that ordering a successor employer to adopt the predecessor's contract is contrary to the principle of Section 8(d), which states an employer cannot be compelled to agree to specific contract terms. The successor may, however, be required to recognize and bargain with the incumbent union under the conditions discussed below. A successor employer may also be liable for the unfair labor practices committed by the predecessor provided the successor was aware of the violations at the time it assumed control.

1. Retaining the Prior Workforce

Under *Burns*, a new employer has no obligation to hire the prior employees; it can hire or bring in all new employees if it wishes. However, the employer would vio-

late Section 8(a)(3) of the Act (see chapter 4) if it discriminatorily refused to retain the prior employees because they were union members or to avoid having to recognize the union. If the Board finds that the new employer discriminatorily refused to hire the prior employees, it will presume that the prior employees would have been a majority of the new workforce but for the discrimination and that the successor was therefore obligated to bargain to impasse with the incumbent union before changing existing terms of employment, such as reducing the employees' pay or benefits. This can result in a substantial back pay award to the employees who were not hired or whose compensation was reduced.

Under *Burns*, the new employer is obligated to bargain with the prior incumbent union when the employees represented by it comprise a majority of the new workforce. If the employer hires all the predecessor's employees, it becomes a successor employer obligated to bargain with the incumbent union from the date of hiring. If the employer hires 6 of 10 prior employees and 5 new employees, the Board presumes that the union continues to represent the 6 employees. The successor will be required to bargain with the union from the time it is clear that the six employees are a majority of the new workforce. If the new employer retains all 10 of the prior employees and brings in 12 new employees as well, the employer is not legally a successor. It has no obligation to bargain with the prior union even though all the old employees are retained because the prior employees are not a majority of the new workforce. If the employer does not retain any of the prior employees, it has no bargaining obligation with the incumbent union, provided the decision to hire all new employees is not discriminatorily motivated.

In *Fall River Dyeing and Finishing Corp.* (1987),¹⁹ the Supreme Court upheld

¹⁸ See legal principle 17.A.

¹⁹ See legal principle 17.B.

Fourth
Edition

LABOR GUIDE TO LABOR LAW

Bruce S. Feldacker
Attorney-at-Law, J.D., LL.M.



PRENTICE HALL, Upper Saddle River, New Jersey, 07458

VP/Editorial Director: Jim Boyd
Editor-in-Chief: Natalie Anderson
Senior Acquisitions Editor: David Shafer
Managing Editor (Editorial): Jennifer Glennon
Assistant Editor: Michele Foresta
Editorial Assistant: Kimberly Marsden
Executive Marketing Manager: Michael Campbell
Director of Production: Michael Weinstein
Production Manager: Gail Steier de Acevedo
Production Coordinator: Kelly Warsak
Manufacturing Buyer: Natacha St. Hill Moore
Senior Manufacturing and Prepress Manager: Vincent Scelta
Cover Design: Bruce Kenselaar
Full Service Composition: Impressions Book and Journal Services, Inc.

*In appreciation to my wife Barbara,
my children Robert, Deborah, and Caryl Beth,
my son-in-law Rob, and my grandchild Jack Granick*

Copyright © 2000 by Prentice-Hall, Inc.
Upper Saddle River, New Jersey 07458

All rights reserved. No part of this book may be reproduced, in any form or by any means, without written permission from the Publisher.

Library of Congress Cataloging-in-Publication Data

Feldacker, Bruce S.
Labor guide to labor law/Bruce S. Feldacker.—4th ed.
p. cm.
Includes index.
ISBN 0-13-016523-9
1. Labor laws and legislation—United States. 2. Labor unions—
Law and legislation—United States. I. Title.
KF3369.F44 1999
344.7301—dc21 99-26652
CIP

Prentice-Hall International (UK) Limited, London
Prentice-Hall of Australia Pty. Limited, Sydney
Prentice-Hall Canada, Inc., Toronto
Prentice-Hall Hispanoamericana, S.A., Mexico
Prentice-Hall of India Private Limited, New Delhi
Prentice-Hall of Japan, Inc., Tokyo
Editora Prentice-Hall do Brasil, Ltda., Rio de Janeiro

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1