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Employer's Duty to Supply Information to the Union a Study of the Interplay of Administrative and Judicial Rationalization

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THE EMPLOYER'S DUTY TO SUPPLY INFORMATION TO THE UNION—A STUDY OF THE INTERPLAY OF ADMINISTRATIVE AND JUDICIAL RATIONALIZATION

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The imposition of an affirmative obligation on an employer to provide his employees' exclusive bargaining representative with various kinds of information has been one of the most significant developments in the evolution of the concept of good faith bargaining under section 8(a)(5) of the Labor Management Relations Act.[1] This development has been in part a response to the realization that certain information acts as the lubricant needed to keep the collective bargaining machinery running smoothly. It recognizes that the parties can negotiate and administer a collective bargaining agreement only when they have available the information necessary to make informed, intelligent decisions.

The employer's obligation to provide information to the employees' bargaining representative has evolved from contributions by both the National Labor Relations Board and the judiciary. In the early stages of this evolution, attempts were made to classify types of requests for information. A dichotomy arose between requests for employee wage data, which were presumptively relevant to the bargaining process, and requests for other types of information. As the law in this area developed, the Board demonstrated a growing propensity to accord the presumption of relevance to data other than employee wages. More recently, a "substantiation doctrine" has been utilized to require the employer to furnish data, and the type of data requested has become

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1 29 U.S.C. §§ 141-87 (1970) [hereinafter referred to as "the Act"].

Section 8(a)(5) of the Act provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5) (1970).

Section 8(d) of the Act provides in part:

> For the purposes of this section, 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 . . . .

29 U.S.C. § 158(d) (1970).

less significant. This article will examine this evolutionary progression and will discuss whether the Board and the courts in the "substantiation" cases have adopted a rationale which is significantly different from that of the traditional "information" cases, and whether the Board and the courts have been consistent in their application of the substantiation doctrine vis-à-vis various types of information in diverse factual contexts.

I

PROVING THE "NECESSITY" OF REQUESTED INFORMATION

From the beginning, the Board and the courts have held that an employer has a general obligation to provide information needed by his employees' bargaining representative for the proper performance of its duties.[2] Such a rule, of course, entailed an explication of the burden the union had to meet to establish that it needed information to perform properly its duties as bargaining representative.

A. *Development of the Presumptive Relevance Rule*

In *Aluminum Ore Co.*,[3] the Board stated the classic test of relevance: the union must demonstrate that the requested information is necessary for it to bargain intelligently over specific issues raised during the course of negotiations. From this somewhat restrictive criterion the Board and the courts together developed modifications that broadened the union's right to information. The most important of these have formed the basis for the presumptive relevance test for in-unit wage data.

In *Yawman & Erbe Manufacturing Co.*,[4] the Board ordered the employer to furnish the union with certain wage data concerning merit increases for unit employees, on the theory that the union *might* find it necessary *or desirable* to make demands for changes in existing merit systems should evidence of inequities emerge upon review of the data. Although the Board, consistent with the premise of *Aluminum Ore*, continued to formulate the rule in terms of the union's need for the

2 *See, e.g.*, Aluminum Ore Co., 39 N.L.R.B. 1286, *enforced*, 131 F.2d 48 (7th Cir. 1942) (job classification list, names of employees, nature of jobs, wage rate, and payroll information); Sherwin-Williams Co., 34 N.L.R.B. 651 (1941), *enforced*, 130 F.2d 255 (3d Cir. 1942) (job rates for other paint manufacturers in vicinity); Pioneer Pearl Button Co., 1 N.L.R.B. 837 (1936) (proof of contention that employer's poor financial condition prevented wage increase or hour decrease).

3 39 N.L.R.B. 1286, *enforced*, 131 F.2d 485 (7th Cir. 1942).

4 89 N.L.R.B. 881 (1950), *enforced*, 187 F.2d 947 (2d Cir. 1951).

requested information with respect to specific bargaining issues, it indicated its willingness to allow the union to base its demand upon the potential usefulness such information might have in framing bargaining demands.[5]

The Court of Appeals for the Second Circuit enforced the Board's *Yawman & Erbe* order in a per curiam decision[6] which served as a springboard for the Board's subsequent adoption of a presumptive relevance test for in-unit wage information. In its opinion the Second Circuit held that the requested information was relevant and went on to observe:

> Indeed, we find it difficult to conceive a case in which current or immediately past wage rates would not be relevant during negotiations for a minimum wage scale or for increased wages.
>
> Since the employer has an affirmative statutory duty to supply relevant wage data, his refusal to do so is not justified by the Union's failure initially to show the relevance of the requested information. The rule governing the disclosure of data of this kind is not unlike that prevailing in discovery procedures under modern codes. There the information must be disclosed unless it plainly appears irrelevant. Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issue.[7]

In 1954, the Board formally departed from the *Aluminum Ore* standard which required a showing of actual or at least prospective need for wage information in relation to a specific subject of bargaining. *Whitin Machine Works*[8] presented the Board with a situation in which the charging union requested a list of employee names together with each employee's wage rate. The request was based upon the need to compare unit employee wages to area standards, but the information was useful for collective bargaining purposes generally. Rejecting the employer's argument that the union did not need the

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5 Without such information, there is no basis for determining to what extent, if any, the minimum wage would affect any employees in the unit. Further, the information requested for 1948 would enable the Union to ascertain if any wage inequities existed among employees in the unit and to frame its contract demands so as to eliminate any possible discrepancies. In sum, the Respondent's refusal to divulge information as to the current salaries of the employees in the unit placed the Union in the position of dealing *in vacuo* on subjects relating to wages, as there existed no area known to the Union in which it could vary its wage position. 89 N.L.R.B. at 882 (footnote omitted).

6 NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947 (2d Cir. 1951).

7 *Id.* at 949 (footnotes omitted).

8 108 N.L.R.B. 1537, *enforced*, 217 F.2d 593 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955).

wage rates collated as to individual employees to compare the wage rates to area standards, the Board adopted the presumptive relevance rule suggested by the Second Circuit in *Yawman & Erbe* without specifically mentioning that opinion.[9] Two days later, however, the Board issued a "short form" decision in *Item Co.*,[10] adopting the trial examiner's report which had applied the presumptive relevance test for in-unit wage information in reliance upon the *Yawman & Erbe* reasoning that this type of information must be supplied unless plainly irrelevant.[11]

Finally, citing the court's opinion in *Yawman & Erbe* and its own *Whitin Machine Works* decision along with Chairman Farmer's concurrence in that case,[12] the Board unequivocally adopted the presumptive relevance test in *Boston Herald-Traveler Corp.*[13] The presumption was to attach even in circumstances where the employer could show that the subject to which the information pertained had not actually been discussed during negotiations.[14]

Although the presumptive relevance test was developed in in-unit wage information cases arising during contract negotiations, it has been applied to a wide variety of wage information requests designed to enable the union to administer the collective bargaining agreement.

In *Acme Industrial Co.*,[15] the employer refused to supply the union with requested information pertaining to pending grievances involving a subcontracting clause, asserting that because the contract had not been violated it was under no duty to supply the information. The Board found that the information was necessary to enable the union to evaluate intelligently the grievance filed, and accordingly ordered that

9 In ordering the employer to make the wage information available, the Board concluded: "[I]t is sufficient that the information sought by the Union is related to the issues involved in collective bargaining, and . . . no specific need as to a particular issue must be shown." 108 N.L.R.B. at 1539. Chairman Farmer, concurring, would have gone further than the other Board members:

> I would not require that the union show the precise relevancy of the requested information to particular current bargaining issues. It is enough for me that the information relate to the wages or fringe benefits of the employees. Such information is obviously related to the bargaining process, and the union is therefore entitled to ask and receive it.

Id. at 1541 (concurring opinion).

10 108 N.L.R.B. 1634 (1954), *enforced*, 220 F.2d 956 (5th Cir. 1955).

11 89 N.L.R.B. at 882.

12 *See* note 9 *supra*.

13 110 N.L.R.B. 2097 (1954), *enforced*, 223 F.2d 58 (1st Cir. 1955).

14 110 N.L.R.B. at 2099. As succinctly stated by the Board in Pine Indus. Relations Comm., Inc., 118 N.L.R.B. 1055, 1060 (1957): "[I]n 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."

15 150 N.L.R.B. 1463, *enforcement denied*, 351 F.2d 258 (7th Cir. 1965), *rev'd*, 385 U.S. 432 (1967).

the information be supplied.[16] The Seventh Circuit declined to enforce the Board's order,[17] holding that the provision for binding arbitration of contract disputes foreclosed the Board from exercising its statutory power to order the company to supply the requested information.[18] Reversing the court of appeals, the Supreme Court concluded that the Board may determine the need for requested information without awaiting the arbitrator's decision.[19] The Court reasoned that the Board's action would strengthen, rather than jeopardize, the arbitral process by affording the union the opportunity to evaluate the merits of the grievance, and thus make an informed decision on whether to proceed to arbitration.[20] Of particular importance is the fact that the Supreme

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16 150 N.L.R.B. at 1466-67.

17 Acme Indus. Co. v. NLRB, 351 F.2d 258 (7th Cir. 1965).

18 The court reasoned:

> The latter [the application of contract provisions] is a matter exclusively reserved for the arbitrator. Under the circumstances here presented Board intervention to make the determination of relevancy in the light of its independent interpretation of the meaning and application of the contract provisions contravenes the policy expressed in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 [1960], . . . concerning the priority which should be accorded the grievance and arbitration procedures and machinery provided for in the contract.

Id. at 260-61.

19 NLRB v. Acme Indus. Co., 385 U.S. 432, 438-39 (1967).

20 *Id.* at 438. In Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (Aug. 20, 1971), the Board, in a three-to-two decision, held that a dispute over allegedly unlawful unilateral changes made by the company should be resolved through the arbitration procedures provided for in the contract rather than through the processes of the Board since the matter was "essentially a dispute over the terms and meaning of the contract between the Union and the Respondent." 77 L.R.R.M. at 1932. In an address entitled "First Questions from Collyer," NLRB General Counsel Peter G. Nash commented:

> [I]s a dispute over a union request for information relevant to the evaluation and processing of grievances deferrable under Collyer? A refusal to furnish such information may itself be an arbitrable matter under the terms of a particular coutract. But the Supreme Court's decision in the Acme Industrial case casts doubt on the suitability of deferral in such a case. The Court characterized the Board's assertion of jurisdiction there as "not intruding upon the province of the arbitrator" but rather "in aid of the arbitral process." An employer's refusal of grievance information might also be considered evidence of a general unwillingness to settle disputes by arbitration. Collyer deferral may not, therefore, be appropriate in disputes over grievance information requests except, perhaps, where the grievance about which the information was requested is already before an arbitrator. The union there might reasonably be required to direct its request to the arbitrator.

Nash, *First Questions from Collyer*, 1971 LABOR RELATIONS YEARBOOK 151, 156 (footnote omitted). Subsequently, the General Counsel issued the following instructions to all NLRB Regional Directors, Officers-in-Charge, and Resident Officers:

> Disputes over a union's request for information relevant and necessary to its evaluation and processing of grievances, even though arbitrable under the particular bargaining agreement, should not be deferred for arbitration. However, in instances in which the underlying grievance is already before an arbitrator, the question of deferral of the dispute over the request for information should be submitted to Washington for advice.

Memorandum, Arbitration Deferral Policy Under Collyer, Feb. 28, 1972, at 8 (footnote

Court established that there is no question that the general obligation of the employer to provide the bargaining representative with all relevant information needed for the proper performance of its duties extends beyond contract negotiations into the life of the contract.

Since *Acme* was not a wage data case, the Supreme Court's holding can only be said to approve the general rule that an employer has an obligation to provide necessary information in contract administration cases when necessity is specifically established. The Board, however, has adopted the presumptive relevance test regarding requests for in-unit wage data in contract administration situations.[21] The Board has cited many instances of wage information requests which have a "direct bearing" on the bargaining representative's ability to administer the contract and are thus considered presumptively relevant. Among the types of wage information having such a "direct bearing" on bargaining are (*1*) individual earnings,[22] (*2*) job rates and classifications,[23] (*3*) merit increases,[24] (*4*) pension data,[25] (*5*) incentive earnings,[26] (*6*) piece rates,[27] and (*7*) the operation of an incentive system.[28]

Thus the Board and the courts have fashioned from the broad language of section 8(a)(5) of the Act a rule that establishes an affirmative obligation on the employer to provide necessary and relevant information to the union both during the negotiation of the contract and

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omitted) (on file at the *Cornell Law Review*). The footnote to the first quoted sentence reads:

> The Court's decision in *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432 [1967], . . . was believed to weigh against deferral for arbitration in disputes over a union's request for grievance information.
>
> An employer's denial to a union of information relevant to grievance processing might also be viewed as precluding the "quick and fair means" the Board referred to [in *Collyer*, 77 L.R.R.M. at 1934] for resolving disputes and as evidencing a purpose on the part of an employer to obstruct the efficient working of the arbitral process.

Id. n.15.

21 In 1967, the year of the Supreme Court's *Acme* decision, the Board observed:

> Both the Board and the courts have found violations of Section 8(a)(5) in unsatisfied requests for information which has a direct bearing on the negotiation of wages and fringe benefits *or the bargaining representative's ability to administer the agreement.* Such information is "presumptively relevant" to the performance of the Union's functions.

Standard Oil Co., 166 N.L.R.B. 343, 345 (1967) (footnotes omitted) (emphasis added).

22 *See* Timken Roller Bearing Co., 138 N.L.R.B. 15 (1962), *enforced*, 325 F.2d 746 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964).

23 *See* Taylor Forge & Pipe Works v. NLRB, 234 F.2d 227 (7th Cir. 1956).

24 *See* NLRB v. J.H. Allison & Co., 165 F.2d 766 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948).

25 *See* Phelps Dodge Copper Prods. Corp., 101 N.L.R.B. 360 (1952).

26 *See* Dixie Mfg. Co., 79 N.L.R.B. 645 (1948), *enforced*, 180 F.2d 173 (6th Cir. 1950).

27 *See* Vanette Hosiery Mills, 80 N.L.R.B. 1116 (1948), *enforced sub nom.* NLRB v. Itasca Cotton Mfg. Co., 179 F.2d 504 (5th Cir. 1950).

28 *See* Dixie Mfg. Co., 79 N.L.R.B. 645 (1948), *enforced*, 180 F.2d 173 (6th Cir. 1950).

during its administration.[29] Regarding in-unit employee wage data, a presumption of relevance has been established; the union is not required to establish a specific need for the requested wage data. With respect to information other than employee wage data, the union must demonstrate that the information is necessary to enable it to bargain intelligently concerning a particular bargaining issue.[30]

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[29] Several defenses to union demands for information have been successfully maintained. The first was established in Cincinnati Steel Castings Co., 86 N.L.R.B. 592, 593 (1949); an employer need not supply information in the exact form requested if he supplies it in a manner "not so burdensome or time-consuming as to impede the process of bargaining." *See, e.g.*, Tex-Tan, Inc., 134 N.L.R.B. 253 (1961), *enforcement denied in part*, 318 F.2d 472 (5th Cir. 1963) (refusal to furnish complex and voluminous time study record in organized fashion held acceptable); J.I. Case Co., 118 N.L.R.B. 520 (1957), *enforced*, 263 F.2d 149 (7th Cir. 1958) (oral presentation of complicated time study information held unacceptable); Old Line Life Ins. Co. of America, 96 N.L.R.B. 499 (1951), *enforced sub nom.* Insurance Employees Local 65 v. NLRB, 200 F.2d 52 (7th Cir. 1952) (offer to supply union with verification of old list of unit employees' names and wage rates instead of current list held acceptable). As a developing corollary, when the employer raises bona fide objections to the form in which the data are requested, the union must state its specific needs to enable the employer to supply the information in a mutually satisfactory form, if possible. *See* American Cyanamid Co. (Marietta Plant), 129 N.L.R.B. 683 (1960) (employer desired to keep unique manufacturing techniques confidential). *See also* Emeryville Research Center, Shell Dev. Co. v. NLRB, 441 F.2d 880 (9th Cir. 1971). But the union has a right to information in the form it requests if that form is necessary, *i.e.*, "a necessarily reliable and reasonably expeditious" device for making intelligent bargaining or grievance processing possible. General Elec. Co., 186 N.L.R.B. No. 1, 75 L.R.R.M. 1265, 1266 (Oct. 16, 1970) (videotape of operations insufficient).

Another defense—one which has not been notably successful—is that the union's request for information imposes an "unreasonable burden" on the employer. Application of this defense requires a balancing of the interests of both parties. *See* General Elec. Co. v. NLRB, 414 F.2d 918 (4th Cir. 1969); Fafnir Bearing Co., 146 N.L.R.B. 1582 (1964), *enforced*, 362 F.2d 716 (2d Cir. 1966) (defense rejected in both cases). *But see* Food Employer Council, Inc., 197 N.L.R.B. No. 98, 80 L.R.R.M. 1440, 1441 (June 16, 1972) (no obligation to supply information already furnished to union "in clear and understandable form on a reasonably current periodic basis"). Confidentiality of the requested information is no defense, whether the information is confidential to employees (*see* NLRB v. Item Co., 220 F.2d 956 (5th Cir. 1955); Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942); Electrical Mfg. Co., 173 N.L.R.B. 878 (1968); Boston Herald-Traveler Corp., 110 N.L.R.B. 2097 (1954)), whether it is confidential to the employer for competitive reasons (*see* Frontier Homes Corp., 153 N.L.R.B. 1070 (1965), *enforced in relevant part*, 371 F.2d 974 (8th Cir. 1967); Boston Herald-Traveler Corp., *supra*), or even if the confidentiality of a nonunit third party is at stake (*see* General Elec. Co., 184 N.L.R.B. No. 45, 74 L.R.R.M. 1444 (June 30, 1970), *enforced*, 81 L.R.R.M. 2303 (6th Cir. Sept. 15, 1972) (employer required to identify companies which had supplied information for area wage survey)). *But see* Shell Oil Co. v. NLRB, 457 F.2d 615 (9th Cir. 1972) (refusal to disclose employee names and addresses held privileged because of company's bona fide concern over possible harassment of nonunion employees); United Aircraft Corp., 192 N.L.R.B. No. 62, 77 L.R.R.M. 1785 (July 30, 1971) (refusal to disclose employee medical information until relevant to specific contract dispute held privileged because of "generally recognized" confidential nature of physician's report).

[30] One presently unresolved issue is the matter of the allocation of financial liability for producing information. In his concurring opinion in Whitin Machine Works, 108 N.L.R.B. 1537, 1540 (1954), Chairman Farmer stated that the employer could require the

B. *Expansion of the Traditional Limits of Presumptive Relevance*

Although the presumption of relevance was originally associated with requests for in-unit wage data, the Board and the courts have expanded the concept in two ways: (*1*) by broadening the definition of "wage data," and (*2*) by developing a rule of presumptive relevance in the area of employee addresses. These developments suggest the need for an analysis of the rationale supporting the presumptive relevance doctrine in order to predict what its scope will be.

1. *Expanding the Definition of "Wage Data"*

In *Sylvania Electric Products, Inc.*,[31] the union sought information concerning a noncontributory group insurance program maintained by the company for its employees. The union asked for information as to levels of benefits, the scope of coverage, cost, and the amount of claims paid. The company generally acceded to the union's request for information, but it refused to provide information regarding current pre-

union "to enter into reasonable arrangements for the compilation of the requested data including provisions for bearing the additional cost to the employer of furnishing the requested information." *Id.* at 1541. As bargaining units become larger, as collective bargaining concerns itself with more sophisticated issues, as the information itself becomes more complex, and as the right to information is extended, the cost of supplying requested data will substantially increase. The task of dividing costs between union and employer will vary in difficulty with the circumstances of each case. Recently the Board wrestled with the problem of reimbursement to the employer of the expense of duplicating employment records ($50,000). The Board held: "'Good-faith bargaining requires only that such information be made available at a reasonable time and in a reasonable place and with an opportunity for the Union to make a copy of such information if it so desires.'" United Aircraft Corp., 192 N.L.R.B. No. 62, 77 L.R.R.M. 1785, 1796 (July 30, 1971), *quoting* Lasko Metal Prods., Inc., 148 N.L.R.B. 976, 979 (1964). Thus the employer was not required to pay the duplicating costs once the records were made available. In Food Employer Council, Inc., 197 N.L.R.B. No. 98, 80 L.R.R.M. 1440 (June 16, 1972), the Board stated:

> If there are substantial costs involved in compiling the information in the precise form and at the intervals requested by the Union, the parties must bargain in good faith as to who shall bear such costs, and, if no agreement can be reached, the Union is entitled in any event to access to records from which it can reasonably compile the information. If any dispute arises in applying these guidelines, it will be treated in the compliance stage of the proceeding.

Id. at 1441 (footnote omitted).

Whether, when a compilation of data "in clear and understandable form" (*id.*) is necessary, the employer is required to "make available" the compilation for duplication by the union or is only required to produce "raw data" to be compiled and duplicated by the union at its expense remains an unsettled question. Perhaps the question will be answered by reading United Aircraft Corp., *supra*, together with the rule in Cincinnati Steel Castings Co., 86 N.L.R.B. 592 (1949), that information must be "made available in a manner not so burdensome or time-consuming as to impede the process of bargaining." *Id.* at 593. The rule would then be that the employer's duty ceases when, but only when, data are made available in a nonburdensome form. Thus, the employer would pay (or at least share) the cost of the compilation and the union would pay the cost of duplication.

31 127 N.L.R.B. 924 (1960), *rev'd*, 291 F.2d 128 (1st Cir.), *cert. denied*, 368 U.S. 926 (1961).

mium rates and the amount of premiums paid during the preceding two years. The Board, reversing the trial examiner, held that the premiums paid by the company, as well as the benefits granted, constituted wages, that the requested premium cost data were directly related to the matter of wages, that such data were presumptively relevant to the bargaining representative's obligations, and therefore that the employer's refusal to furnish the requested data violated the Act.[32] The Board's holding that premium costs were wages falling within the in-unit wage information rule was a significant extension of the presumptive relevance test.

However, the Court of Appeals for the First Circuit rejected the Board's theory and adopted instead the trial examiner's distinction between the benefits of group employee insurance—admittedly "wages" within the meaning of the Act[33]—and the cost of obtaining such benefits, which was held not to be directly related to wages or conditions of employment within any ordinarily accepted meaning of the words.[34] It is clear from the court's reasoning that it was limiting the scope of presumptively relevant information to demands for wage data or conditions of employment as ordinarily defined, and was unwilling to expand the concept to cover matters *directly related* to wages or conditions of employment. But the court did point out that there might be circumstances under which a union would be entitled to know the cost of a noncontributory welfare program, for example, if the employer had refused to accede to the union's demand for increased or broader insurance coverage for employees.[35]

Despite the First Circuit's refusal to enforce its order in *Sylvania,* the Board continued its attempt to expand the scope of the presumptive relevance concept. Presented with a similar issue in *General Electric Co.,*[36] the Board adopted the trial examiner's report, which stated:

> First, [General Electric] contends that cost information as to its pension and insurance proposals could not be legally required because employees were not being asked to bear any part of the cost of the new increments. That contention is rejected on the authority [*inter alia*] of the Board's decision in *Sylvania* . . . .[37]

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32 127 N.L.R.B. at 925-26.

33 Sylvania Elec. Prods., Inc. v. NLRB, 291 F.2d 128, 131 (1st Cir. 1961); *see* W.W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949) (group health and accident insurance held "wages").

34 291 F.2d at 131.

35 *Id.* at 132.

36 150 N.L.R.B. 192 (1964), *enforced,* 418 F.2d 736 (2d Cir. 1969), *cert. denied,* 397 U.S. 965 (1970).

37 150 N.L.R.B. at 261. Even prior to *General Electric,* the Board had asserted its adherence to its rulings in *Sylvania:* "[W]e respectfully disagree with the distinction

The Board has since tempered its opposition to the First Circuit's *Sylvania* holding by recourse to that court's dictum that there may be circumstances under which premium cost information would be relevant.[38] It assumed this compromise position in a case involving the same company.[39] *Sylvania II* arose in circumstances similar to *Sylvania I*. In the course of negotiations for a new contract, the employer offered the union a "package" that included improvements in existing welfare programs. Upon request, the employer furnished the union with information relating to the cost of its current program, but refused to provide a breakdown of the cost of its proposed package, including the welfare improvements. The union desired the requested information to enable it to decide whether to bargain for retention of the existing welfare plan, and on that basis to seek a higher wage rate rather than increased benefits. The company countered that only benefit levels were of legitimate concern to the union, not cost to the employer. The Board argued to the First Circuit that meaningful bargaining as to wages, hours, and other terms and conditions of employment may require a party to disclose information on matters that do not themselves fall within that phrase. Therefore, when the union makes a demand for cost information to enable it better to balance the desirability of an increase in welfare benefits against the desirability of an equivalent increase in take home pay, the requested cost information is so necessary to effective negotiation that withholding it should be deemed inconsistent with good faith bargaining. The First Circuit enforced the Board's order in *Sylvania II* based on this reasoning.[40]

In *Sylvania I*, the Board had relied upon presumptive relevance by arguing that both benefit levels and premium costs are wages, hence

drawn by the court of appeals between costs and benefits of a noncontributory insurance plan . . . ." Electric Furnace Co., 137 N.L.R.B. 1077, 1080 (1962).

38 *See* note 33 and accompanying text *supra*.

39 Sylvania Elec. Prods., Inc., 154 N.L.R.B. 1756 (1965), *enforced*, 358 F.2d 591 (1st Cir. 1966).

40 Sylvania Elec. Prods., Inc. v. NLRB, 358 F.2d 591, 593 (1st Cir. 1966). In NLRB v. General Elec. Co., 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970), in discussing *Sylvania I* and *II*, the Second Circuit commented:

> GE argues that a prior decision of the First Circuit, Sylvania Electric Products, Inc. v. NLRB, 291 F.2d 128 (1st Cir.), *cert. denied*, 368 U.S. 926, 82 S. Ct. 360, 7 L. Ed. 2d 190 (1961), denied discovery of such information for a noncontributory plan and thus demonstrated that the state of the law was, at the very least, highly unsettled. In the first *Sylvania* case, however, the court was careful to indicate that if the Company interposed a cost objection to a Union proposal—as here—the Union might be entitled to the cost figures, citing *Truitt*. In any event the second *Sylvania* case expressly distinguished the first almost to the point of extinction by permitting the Union to demand cost information wherever the Union sought to weigh the value of different posssible wage-benefit packages.

418 F.2d at 750 n.6.

that data concerning premium costs are relevant without establishing relevance vis-à-vis any specific bargaining issue. Notwithstanding the Board's adherence to that position in *General Electric*, the Board made no mention of the presumptive relevance doctrine in *Sylvania II*, but established the necessity for the requested information by tying it to a specific union decision to be made at the bargaining table. The rationale of the *Sylvania II* position accords with that underlying the presumptive relevance doctrine without requiring the literal expansion of the definition of wages attempted in *Sylvania I*.

A recent decision involving the question of supplying data relevant to the cost of welfare benefits is *Cone Mills Corp.*[41] During negotions the union requested data on the cost of the employer's proposed noncontributory pension plan and on the actuarial assumptions upon which it was based. In ordering the employer to make this information available to the union, the Board, citing *Sylvania II*, concluded that the data were "necessary and important for any further bargaining or trading on the subject,"[42] even though the union had never suggested that it might wish to make a *"Sylvania II* decision" affecting its bargaining position on improved insurance benefits as opposed to wage increases. The Court of Appeals for the Fourth Circuit ordered enforcement of the Board's order,[43] citing the classic presumptive relevance case for in-unit wage data, *NLRB v. Whitin Machine Works.*[44]

The Fourth Circuit's decision in *Cone Mills*, although not equating cost information with "wage" data, nevertheless lays down a broad rule of presumptive relevance based on the reasoning that such information is relevant to the union's "duty to intelligently evaluate all employee benefits for which it is negotiating."[45] Moreover, the Board's reasoning in *Cone Mills*, fairly interpreted, indicates a presumption of relevance for premium cost information because the union *may* want to make a *Sylvania II* tradeoff of benefits for increased wages. Under either analysis, one is hard pressed to hypothesize a situation in which cost information would not be relevant; therefore, it would seem that

41 169 N.L.R.B. 449 (1968), *enforced in relevant part*, 413 F.2d 445 (4th Cir. 1969).

42 169 N.L.R.B. at 456.

43 Cone Mills Corp. v. NLRB, 413 F.2d 445 (4th Cir. 1969).

44 217 F.2d 593 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955). The *Cone Mills* court reasoned:

> The Union, in its representative capacity, has an affirmative duty to intelligently evaluate all employee benefits for which it is negotiating. Consequently, it is an unfair labor practice within the meaning of the Act for an employer to refuse to furnish such information as is necessary to the proper discharge of this duty.

413 F.2d at 449.

45 413 F.2d at 449.

data as to premium costs should and will be viewed as presumptively revelant, although such data are not considered "wage" information.[46]

Attempts to apply the presumption of revelance to data as being directly related to wages (the thrust of the Board's position in *Sylvania I*) might be called a derivative presumptive relevance rule. Although the Board retreated from this approach in the premium cost cases, this derivative approach has been given vitality in at least one subsequent case. In *International Telephone & Telegraph Corp.*,[47] the union alleged that the company had bargained in bad faith by refusing to supply, among other things, the factors used in recommending merit increases for unit employees. The collective bargaining agreement provided that the sum of such increases was divided into two parts. One part, representing two-thirds of the total, was computed upon the basis of company recommendations as to recipients and the amount each was to receive. Discussions relating to these recommendations between the company and the union were mandatory, and if the parties could not agree, the company had the right to put its proposals into effect unilaterally. Concerning the remaining one-third, a board composed of both union and company representatives was to review recommendations made by the union. Unresolved disputes centering on computation of this portion were to be submitted to arbitration. The Board ordered the company to provide data showing the factors used by the employer in recommending merit increases. The Board did not suggest that the requested data were presumptively relevant; rather it found that since the union had a responsibility to recommend recipients, to review employer recommendations, and possibly to arbitrate disputes arising out of the merit increase provisions of the contract, the union needed the requested data to fulfill specific contractual administrative responsibilities.[48]

The Court of Appeals for the Third Circuit enforced the merit increase data portion of the Board's decision,[49] but grounded its decision on a presumptive relevance analysis:

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46 The history of the development of the law regarding premium cost data illustrates the important contribution a circuit court decision can make in the decisional process of the Board. Had the First Circuit in *Sylvania I* enforced the Board order, the presumptive relevance rules would have been extended through the traditional rhetoric of in-unit *wage* data invoked in *Whitin* and its progeny. But faced with the rejection of this expanded definition of wage data by the First Circuit in *Sylvania I*, the Board was forced to re-evaluate the presumptive relevance concepts outside wage data situations and develop another rationale for finding that premium cost data is necessary and relevant.

47 159 N.L.R.B. 1757 (1966), *enforced in relevant part*, 382 F.2d 366 (3d Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968).

48 159 N.L.R.B. at 1765.

49 International Tel. & Tel. Corp. v. NLRB, 382 F.2d 366, 372-73 (3d Cir. 1967).

> Since merit payments are in fact "wages," information relating to such payments is "presumptively relevant."... The union, under the terms of the collective bargaining agreement, had the right to discuss the recommendations of the petitioner in an effort to influence the petitioner's judgment. We do not see how this prerogative could be exercised effectively without knowing the basis of the petitioner's suggestions.[50]

The court's reasoning in *International Telephone* that both merit payments, which are concededly wages, and matters "relating to such payments" are presumptively relevant is substantially the same as that of the Board in *Sylvania I*. In both cases the presumptive right to information is keyed to the direct relationship of the data to in-unit wages.[51]

2. *Developments in the Area of Employee Address Information*

Whether a union has a presumptive right to the addresses of unit members, or whether the union must establish that this information is specifically necessary to its administration of the contract, is an unsettled issue. However, there are indications that a rule of presumptive relevance is emerging.

One of the first decisions by the Board indicating that employee address information should be so viewed was *Standard Oil Co. of California, Western Operations, Inc.*[52] There, although the Board found specific necessity for the requested information based on the inadequacy of other means of communicating with unit employees, the Board's rationale may lead one to conclude that employee address information is so inherently related to the efficacy of the bargaining process that it should be treated as presumptively relevant. The Board in *Standard Oil* noted that information is presumptively relevant when it has a "direct bearing on the negotiation of wages and fringe benefits or the bargaining representative's ability to administer the agreement."[53] Al-

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50 *Id.* at 372 (citation omitted).

51 The language quoted following the court's discussion of presumptive relevance is somewhat troublesome. If the court intended that the right to the requested data should be evaluated as in-unit wage data, then even if the union had *no* right to participate in the selection of merit increase recipients, the union would have a *presumptive right* to the requested data since it has a presumptive right to any "wage" data. Whether the court misunderstood the legal significance of "presumptive relevance" as developed by the Board or whether it was attempting to buttress its holding by finding that the information was not only presumptively relevant but also specifically necessary is unclear. In either event, it appears that by finding presumptive relevance based on the close relation of the requested data to wages, the court extended the presumptive relevance principles beyond the traditional limitation of "wage" data.

52 166 N.L.R.B. 343 (1967), *enforced*, 399 F.2d 639 (9th Cir. 1968).

53 166 N.L.R.B. at 345 (footnote omitted).

though not specifically treating the requested employee address information as presumptively relevant, the Board ordered the employer to provide the information to the union because the information "would enable" the union to function more efficiently by enabling it to poll (*1*) employee preferences and priorities in contract negotiations, (*2*) employee experiences and recommendations with respect to the grievance-arbitration machinery, and (*3*) employee decisions on the prudence of striking over a particular issue.[54] Since these are benefits that always will result from access to employee addresses and since the ability to poll unit members on these matters always will enable the union to represent more effectively the unit members, employee addresses always will have the "direct bearing" that gives rise to a presumption of relevance.

The implications of *nonaccess* to employee address information also suggest that address information be viewed as presumptively relevant. Without such information, the bargaining representative is unable adequately to poll the unit employees, solicit their opinions, or ascertain their desires. Although handbills and bulletin boards arguable adequately to poll the unit employees, solicit their opinions, or termine employee sentiment. Similarly, union meetings may be adequate vehicles to solicit the views of the union members in the unit, but meetings are frequently not well attended, and the union owes a duty of fair representation to all unit employees, not just to those who are union members.[55] Further, during the processing of grievances and preparations for arbitration the union will often find it necessary to interview thoroughly both members and nonmembers. Such interviews can be time consuming, particularly since one who has chosen not to join the union may be unwilling to communicate freely with union representatives on company premises in an unhurried manner. Hence, the union cannot efficiently and effectively negotiate or administer the contract without employee addresses, and nonaccess thereto certainly has a "direct [adverse] bearing on the negotiation of wages and fringe benefits or the bargaining representative's ability to administer the agreement."[56]

Accordingly, it may be concluded that the rationale underlying the Board's decision in *Standard Oil*, though admittedly not its holding, suggests that the presumption of relevance should be accorded to requests for employee address information and that the union should be entitled to this information without regard to the degree of difficulty which it experiences in its efforts to communicate with employees.

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54 *Id.*

55 *Id.*; *see* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

56 166 N.L.R.B. at 345 (footnote omitted).

Additional support for the proposition that such information is inherently related to the bargaining process can be derived from the opinion of the Court of Appeals for the Second Circuit in *Prudential Insurance Co. of America v. NLRB*.[57] Finding inadequate the alternative channels of communication, as the Board had in *Standard Oil*, the court held that the requested address information was necessary to enable the union adequately to represent unit employees. The court commented that certain information is "so central to the 'core of the employer-employee relationship' that it has been held to be presumptively relevant"[58] and added that employee address information is to be considered even more fundamental than other types of information traditionally falling within the doctrine.[59] The soundness of the Second Circuit's conclusion might well be tested by re-examining the basis for according presumptive relevance to certain categories of requested information. Urging the adoption of a presumptive relevance rule for in-unit wage data, Chairman Farmer in his concurring opinion in *Whitin Machine Works*[60] concluded:

> I am convinced, after careful consideration of the import of the problem on the collective-bargaining process, that this broad rule is necessary to avoid the disruptive effect of the endless bickering and jockeying which has theretofore been characteristic of union demands and employer reaction to requests by unions for wage and related information. The unusually large number of cases coming before the Board involving this issue demonstrates the disturbing effect upon collective bargaining of the disagreements which arise as to whether particular wage information sought by the bargaining agent is sufficiently relevant to particular bargaining issues.[61]

To require a demonstration that the alternative channels of communication are inadequate to enable the union to communicate with unit employees in every case involving address information is to invite

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57 412 F.2d 77 (2d Cir. 1969).

58 *Id.* at 84, *quoting* Curtiss-Wright Corp., Wright Aeronautical Div. v. NLRB, 347 F.2d 61, 69 (3d Cir. 1965).

59 The kind of information requested by the Union in this case has an even more fundamental relevance than that considered presumptively relevant. The latter is needed by the union in order to bargain intelligently on specific issues of concern to the employees. But data without which a union cannot even communicate with employees whom it represents is, by its very nature, fundamental to the entire expanse of a union's relationship with the employees. In this instance it is urgent so that the exclusive bargaining representative of the employees may perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests. Because this information is therefore so basically related to the proper performance of the union's statutory duties, we believe any special showing of specific relevance would be superfluous.

412 F.2d at 84.

60 108 N.L.R.B. 1537 (1954).

61 *Id.* at 1541 (concurring opinion).

to the bargaining table "endless bickering and jockeying." The Board in *Standard Oil* reasoned that "[t]he Union's effectiveness as an employee representative [is] necessarily dependent on its bargaining strength, and this in turn [is] dependent on continued employee adherence and support."[62] A rule that promotes "endless bickering and jockeying" and delays access to employee addresses weakens the union's bargaining strength, erodes the union's effectiveness as a full participant in the bargaining process, and creates the type of "disturbing effect upon collective bargaining" that the presumptive relevance rules have sought to avoid.

The rationale of the Board in *Standard Oil*, read together with the opinion of the Second Circuit in *Prudential Insurance*, establishes a foundation for the proposition that requests for employee addresses should be treated as presumptively relevant. Furthermore, extension of coverage to employee addresses would be consistent with the underlying rationale of the presumptive relevance concept. It was the Second Circuit's dictum in *Yawman & Erbe* upon which the Board subsequently relied in the initial development of the presumptive relevance rule.[63] Perhaps the Board will again look to Second Circuit dictum, this time in *Prudental Insurance*, to expand the application of presumptive relevance to employee address information.[64]

C. *Critique of the Presumptive Relevance Concept*

Precisely what is meant by the legal conclusion that requested data is "presumptively relevant"? The answer to this question requires an understanding of why information in the possession of the employer must be made available to the union and not treated merely as a mandatory bargaining subject that must be negotiated to good faith impasse.[65]

In *Whitin Machine Works*,[66] the Board stated:

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62 166 N.L.R.B. at 346.

63 *See* notes 6 & 7 and accompanying text *supra*.

64 *But see* Shell Oil Co. v. NLRB, 457 F.2d 615 (9th Cir. 1972), where the Ninth Circuit held that there is not a per se duty to supply requested information once it has been shown to be relevant. Although the union's need for the names and addresses was not seriously disputed, the court concluded that the company's refusal to provide the information did not violate the Act under the special facts of the case. The company had established a bona fide concern that disclosure of the information would result in union harassment of nonunion employees and the company had offered a reasonable counterproposal—furnishing the information to an independent mailing service. *See also* Sign & Pictorial Local 1175 v. NLRB, 419 F.2d 726 (D.C. Cir. 1969).

65 *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

66 108 N.L.R.B. 1537 (1954).

> [T]he authority conferred by Section 9(a) of the Act upon a union representing a majority of the employees in an appropriate unit entitles the union to all [essential] wage information . . . and . . . it is the employer's duty, on request, to accommodate the union. . . .
>
> Refusal by an employer to supply necessary information makes impossible the full development of the collective-bargaining negotiations which the Act is intended to achieve. It therefore constitutes a violation of Section 8(a)(5) of the Act. . . . [I]n these [wage data] cases it is sufficient that the information sought by the Union is related to the issues involved in collective bargaining, and . . . no specific need as to a particular issue must be shown.[67]

Subsequently, in *F.W. Woolworth Co.*,[68] which involved the right to wage data in connection with the administration of the contract rather than during its negotiation, the Board concluded: "The employer's duty, in either instance, is predicated upon the *need* of the union for such information in order to provide intelligent representation of the employees."[69]

The limits on the right to information and the correlative duty to supply it have not been fully delineated but, as was explained by the trial examiner in *American Oil Co.*,[70] entitlement to information must be based on more than mere "relevance" in the abstract.[71] Indeed, the Supreme Court in *NLRB v. Acme Industrial Co.*[72] ordered the employer to supply the union with requested data on the basis that the data were *necessary* to enable the union to sift out unmeritorious grievances and to determine which should be processed to arbitration.[73]

In *Curtiss-Wright Corp., Wright Aeronautical Division v. NLRB*[74] the Court of Appeals for the Third Circuit wrestled with the dichotomy between the "necessity" rationale underlying the information cases and the "relevance" rhetoric invoked. In that case, the union, which represented only some of the employees (the remainder being nonunion confidential and administrative employees), sought wage and related

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67 *Id.* at 1538-39 (footnote omitted).

68 109 N.L.R.B. 196 (1954), *enforcement denied*, 235 F.2d 319 (9th Cir.), *rev'd per curiam*, 352 U.S. 938 (1956).

69 109 N.L.R.B. at 197 (emphasis added).

70 164 N.L.R.B. 29 (1967).

71 [A]ll of the cases considering this issue, either in their facts or their rationale, indicate, as the Board stated in *Woolworth*, that the right to the information arises out of a "need" for it shown by the circumstances of the particular situation. While it is often stated that the information sought must be "relevant," more than abstract relevance is required. The fact that the information will be merely "helpful" is not enough.

Id. at 33.

72 385 U.S. 432 (1967).

73 *See* notes 15-20 and accompanying text *supra*.

74 347 F.2d 61 (3d Cir. 1965), *enforcing* 145 N.L.R.B. 152 (1963).

data concerning the nonunit employees. The Board, finding that some of the requested information would assist the union in fulfilling its statutory obligations as bargaining representative, ordered that it be made available.[75] The court, enforcing the Board's decision, attempted to unravel the confusion by suggesting that reasonable necessity should be presumed once it is determined that information is relevant to the union's statutory obligation. The court agreed with the Board's view of the general rule regarding employer disclosure of wage and related information and summarized that rule as follows:

> [I]f the requested data [are] relevant and, therefore reasonably necessary, to a union's role as bargaining agent in the administration of a collective bargaining agreement, it is an unfair labor practice within the meaning of Section 8(a)(5) of the Act for an employer to refuse the requested data.[76]

The court reasoned that if the information sought covers wage and related information pertaining to employees in the bargaining unit, the data should be treated as presumptively relevant and the union should not be required to show its precise relevance unless the presumption is rebutted. But the court continued:

> [A]s to other requested data, however, such as employer profits and production figures, a union must, by reference to the circumstances of the case, as an initial matter, demonstrate more precisely the relevance of the data it desires. Thus, the standard, relevancy of the data, is the same for all cases, but the manner in which a union can demonstrate that its requests conform to the standard shift [*sic*] with the type of information desired.
>
> Once relevance is determined, an employer's refusal to honor a request is a per se violation of the Act. *Reasonable necessity for a union to have relevant data is apparent; necessity is not a separate and unique guideline, but is directly related to the relevance of the requested data.*[77]

It thus appears that the reason for the development of the rule that an employer has an affirmative obligation to provide certain information to a union is that the efficiency and effectiveness of collective bargaining depends upon disclosure by the employer. Need being the linchpin of the rule, all information demands must be evaluated by the test of whether the requested information is necessary for the union to fulfill its statutory obligation as bargaining representative. Certain types of information will always be needed by any collective bargaining representative to enable it to perform its functions. Therefore, to pro-

[75] 145 N.L.R.B. at 152.

[76] 347 F.2d at 68 (footnote omitted).

[77] *Id.* at 69 (emphasis added).

mote the peaceful negotiation and administration of contracts and to avoid interruptions and other deleterious effects that could result from contests over the reasons the union alleges that the information is necessary, the Board and the courts have raised a rebuttable presumption that a need exists for certain information. The legal label for the type of data a union will be found to have a presumptive right to receive is information that is "presumptively relevant." But this label is semantically misleading. To be precise, it should be termed information that is "presumptively necessary." Only when "relevant" is read to mean "necessary" does the case rhetoric comport with the underlying rationale.

It is submitted that some information other than in-unit wage data —for example, pension cost data and employee address information[78] —should be treated as presumptively relevant, or as we suggest, presumptively necessary. One should ask not whether information will be "relevant," but rather, whether the data will be "necessary" to enable the union to fulfill its statutory obligations. For instance, are not data to evaluate the fairness of the application of a plant rule or other employer action necessary to enable the union to decide whether a grievance should be filed, at least where the matter in issue arguably is subject to the grievance machinery? Even as to "out-of-unit" information, should not the union have the right to copies of all subcontracts involving, or possibly involving, unit work—regardless of the circumstances involved or the union's need for such documents with respect to a particular dispute? Why is such information not presumptively necessary to enable a union to evaluate whether the integrity of the bargaining unit is being eroded by employer action?[79] Guarding against such erosion is surely a statutory obligation of the bargaining agent.

Collective bargaining has been and will continue to be interrupted during both negotiations and the administration of the contract by disputes as to whether requested information is necessary. A broadening of the presumptive need rules would greatly facilitate collective bargaining. An understanding of the reason for the rule will enable a

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78 *See* notes 52-64 and accompanying text *supra.*

79 Under current Board and court decisions, information concerning out-of-unit matters is not presumptively relevant. The union must therefore demonstrate in each case the need for the requested data with respect to a particular dispute. *See, e.g.,* American Oil Co., 164 N.L.R.B. 29, 34 (1967); International Tel. & Tel. Corp., 159 N.L.R.B. 1757, 1759 (1966), *enforcement denied in part,* 382 F.2d 366 (3d Cir. 1967), *cert. denied,* 389 U.S. 1039 (1968); Curtiss-Wright Corp., Wright Aeronautical Div., 145 N.L.R.B. 152 (1963), *enforced,* 347 F.2d 61 (3d Cir. 1965).

liberalization without burdening the employer by requiring him to supply all information which might be merely "relevant" or "helpful."[80]

II

SUBSTANTIATION AS A BASIS FOR ORDERING THE PRODUCTION OF INFORMATION

A. *Fundamental Principles*

In *NLRB v. Truitt Manufacturing Co.*,[81] the Supreme Court ordered the defendant company to allow the union's certified public accountant to examine the company's books and other financial data,

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[80] For an indication of at least one court's concern over this possibility, see Curtiss-Wright Corp., Wright Aeronautical Div. v. NLRB, 347 F.2d 61, 69 (3d Cir. 1965). *See also* Fafnir Bearing Co., 146 N.L.R.B. 1582, 1586 (1964) (footnote and citations omitted):

> As in other cases where the statutory rights of employees conflict with the property rights of employers, the doors are not "always open or always closed." Rather a balance must be struck between these competing considerations, based on the "actualities of industrial relations" . . . which will accommodate the rights of both parties "with as little destruction of one as is consistent with the maintenance of the other" . . . .

The Board's recent decision in General Elec. Co., 192 N.L.R.B. No. 9, 77 L.R.R.M. 1561 (July 14, 1971), *enforced*, 81 L.R.R.M. 2303 (6th Cir. Sept. 15, 1972), is a good example of the Board's ability to differentiate between what is necessary and what is merely helpful. The Board ordered the employer to provide the union with an area wage survey over the company's protest that it had no such duty since it had not relied on the survey in denying recent wage rate grievances. The Board held that even if respondent "did not specifically rely on the wage surveys in regard to individual grievances, its reliance was inherent in setting the wage rates and in considering the grievances as a group with respect to their overall wage structure" (77 L.R.R.M. at 1562)—a reasonable inference from the company spokesman's testimony that, during the grievance meeting, "we looked at the grievances, *we considered them as a group and our rate structure was proper.*'" *Id.* (emphasis in original). The Board reasoned that by stating that the wage rates were "proper" the company could only mean "proper" in relation to the wage structure in the company's geographic area. Thus the company must have taken into consideration the area wage survey. *Id.* Chairman Miller, dissenting, contended that the majority erred either as to the facts in finding that the company relied on the area wage survey or as to the law in misapplying presumptive relevance concepts to out-of-unit information. In either event, Miller concluded, the majority opinion "appears to hold that *any* such information which *could* have relevance to shaping either party's decision with respect to any matter at issue or to be negotiated must be revealed to the other party upon request." *Id.* at 1566 (emphasis in original). Contrary to the chairman's assertion, the majority emphasized that it was not holding that any information which might have relevance must be disclosed, but rather that its decision rested on its conclusion "that there was inherent reliance by the Company upon the wage surveys in its possession as evidenced by the Company's testimony that wage surveys are used . . . to determine if [the Company's] wage structure is proper and effective for the purpose of attracting and retaining employees." *Id.* at 1562.

[81] 351 U.S. 149 (1956).

over the objection of the company that the requested information was irrelevant to bargaining. The Court noted that the company had claimed throughout negotiations concerning a wage increase for unit employees that it was undercapitalized, that it had never paid dividends, and that a wage increase would put it out of business. Accordingly, the Supreme Court held that the company's refusal to substantiate its claim of inability to pay constituted, under the circumstances, bad faith bargaining violative of section 8(a)(5) of the Act.[82] The holding of the Court was premised upon section 204(a)(1) of the Act,[83] which requires employers, employees, and unions to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions."[84] The Court reasoned:

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. *If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.* And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.[85]

Truitt is generally regarded as the landmark information decision even though it does not strictly fall within the "information" line of cases. The classic information cases are based on the reasoning that certain information is deemed necessary to enable the union to fulfill its section 9(a) bargaining obligations; hence, the employer has an affirmative obligation to supply the requested information.[86] However, in *Truitt*, the Supreme Court neither referred to section 9(a) nor relied on any of the "necessary and relevant" information cases. Thus *Truitt* might be better viewed as establishing an entirely separate basis for finding an obligation to supply requested information—the good faith duty to substantiate bargaining claims. Good faith, the Supreme Court reasoned, may require the employer to substantiate a position taken during bargaining. Since the duty to substantiate is not dependent upon a prior showing of necessity, the obligation to produce sufficient economic data to support a bargaining position arises notwithstanding

82 *Id.* at 153.

83 29 U.S.C. § 174(a)(1) (1970).

84 *Id.*

85 351 U.S. at 152-53 (emphasis added).

86 *See* cases cited in note 2 *supra.*

that collective bargaining may be able to continue without this information, that is, even though the requested substantiating information may not be "necessary" under the traditional analysis.[87]

B. *Application of Substantiation Principles During the Administration of a Contract*

The duty to supply information during the administration stage of bargaining could be greatly affected by the *Truitt* substantiation rule. The Supreme Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*[88] observed that "[t]he grievance procedure is . . . a part of the continuous collective bargaining process."[89] This clearly suggests that a position taken during the processing of a grievance is a bargaining position, and in at least one case, *Puerto Rico Telephone Co.*,[90] the Board applied the *Truitt* rationale to bargaining positions taken during the administration of the contract. There, the company in 1958 began a large scale modernization program so extensive that it unquestionably would entail the subcontracting of considerable bargaining unit work. After the program had been substantially completed, the company began to lay off employees, and by 1963, 227 had been let go. The union considered the company's continued subcontracting of unit work as the reason for the layoffs. The company disputed this claim, but agreed to submit the dispute to the grievance committee. The union members of the grievance committee requested the following data:

(*1*) volume of business during January, February, and March 1963 compared to that during November 1962 when the contract was signed;
(*2*) earnings derived by the company from this volume of business;
(*3*) amounts saved by the company due to wages not paid to those laid off;

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87 Although the Board's decision in Truitt Mfg. Co., 110 N.L.R.B. 856 (1954), may be read as presenting a traditional information case of the *Whitin* variety, the Supreme Court was careful to limit its holding to a substantiation analysis. The dissenters argued that the case should be returned to the Board because the Board had applied a per se test in determining that the employer had violated § 8(a)(5), *i.e.*, that the employer's failure to supply information constituted a per se refusal to bargain in good faith. 351 U.S. at 157 (Frankfurter, J., concurring in part and dissenting in part). The majority, however, chose to uphold the Board's finding of a violation after an analysis of the particular facts, but explained that in substantiation cases not every refusal to substantiate would be a violation of § 8(a)(5). *Id.* at 153-54.

88 363 U.S. 574 (1960).

89 *Id.* at 581.

90 149 N.L.R.B. 950 (1964), *enforced in relevant part*, 359 F.2d 983 (1st Cir. 1966).

(4) whether others were performing the work previously done by laid-off personnel; and
(5) the overall savings that would accrue to the company.[91]

The union stated that it desired the requested information to determine whether the layoffs were due to "economic reorganization," as claimed by the employer, and to evaluate the employer's allegations of savings allegedly resulting therefrom. The union made no claim of "necessity," and the company rejected the union's request.

The Board held that on the issue "whether Respondent (employer) was duty bound to support its claim that the layoffs were effected for economy reasons,"[92] the employer had violated section 8(a)(5) by its refusal to comply with the union's request. The Board based its conclusion on two grounds. Initially, the Board noted that the requested information was "relevant in order to enable the Union to perform its statutory obligation in administering the bargaining contract" and "to enable the Union to evaluate intelligently the pending grievance it was then attempting to process."[93] But the Board reasoned further: "Respondent's claimed economy having been advanced as an 'argument . . . important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.' "[94]

The Court of Appeals for the First Circuit, enforcing the union's right to the requested information, decided that the information was relevant to the union's fulfillment of its statutory obligations under the Act. But the court also held, as had the Board, that the union had a right to the information because the union "wanted the company to prove that . . . economic reasons existed."[95]

Puerto Rico Telephone is significant for two reasons. First, the Board, with court approval, applied the *Truitt* substantiation rule to a case of bargaining during the administration stage. Second, although

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91 149 N.L.R.B. at 958.

92 *Id.* at 965.

93 *Id.* at 966. The requested information was found to be "relevant" not only with respect to the specific grievance the union was attempting to process but also with respect to the union's statutory obligation to administer the contract, since with the information the

> [u]nion could in future layoffs, as well as in the pending layoff, be "in a better position to advise an employee about his rights, to reject those employee claims which are not supported by the facts, and to protect the rights of employees generally in properly administering the contract."

Id. at 966, *quoting* Timken Roller Bearing Co. v. NLRB, 325 F.2d 746, 753 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964).

94 149 N.L.R.B. at 966, *quoting* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956).

95 Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983, 986-87 (1st Cir. 1966).

most substantiation cases arise in the context of an employer's claimed "inability to pay"[96] or "inability to remain competitive,"[97] the Board in *Puerto Rico Telephone* relied on a substantiation analysis where the employer merely claimed its action would be more economical. The significance of these two aspects of the decision to the development of the law on demands for information during contract administration is clear. If the Board will apply *Truitt* principles to contract administration cases and not limit substantiation to claims of inability to pay, then the union will have an entirely separate basis for claiming the right to information which will substantiate an employer's grievance position without demonstrating a specific necessity for the requested data.

An excellent illustration of the potential application of substantiation as a basis for requiring production of information may be found in the 1967 Board decision in *American Oil Co.*[98] In that case, the bargaining agreement provided that the company would make "every reasonable effort to use its available working force and equipment in order to avoid having its normal work performed outside."[99] Apprehensive that the company was subcontracting unit work in violation of the contract, the union requested that the company provide it with copies of all future subcontracts involving unit work. The Board dismissed a section 8(a)(5) complaint which was based on the employer's refusal to supply the requested information. Relying upon the general principles of out-of-unit information cases such as *Curtiss-Wright Corp., Wright Aeronautical Division v. NLRB*,[100] the Board concluded that since the request for this out-of-unit information was not shown to be relevant to the circumstances of any particular grievance, specific necessity had not been established.

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96 *See, e.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. Southland Cork Co., 342 F.2d 702 (4th Cir. 1965); NLRB v. Taylor Foundry Co., 338 F.2d 1003 (5th Cir. 1964). In Palomar Corp., 192 N.L.R.B. No. 98, 78 L.R.R.M. 1030 (Aug. 11, 1971), *enforced*, 80 L.R.R.M. 3217 (5th Cir. July 25, 1972), the *Truitt* principle was applied where an employer claimed financial inability to *continue* paying the wage rates provided in the previous collective bargaining contract.

97 In Cinciunati Cordage & Paper Co., 141 N.L.R.B. 72 (1963), the Board noted that an employer's contention that a wage increase would not permit him to "stay competitive" was tantamount to a claim that the wage increase would lead to the employer's impoverishment. *Id.* at 77. No matter how the employer phrased his claim of penury—whether present or future—the Board held the principles of *Truitt* to apply. *Id.* In Western Wirebound Box Co., 145 N.L.R.B. 1539 (1964), *enforced*, 356 F.2d 88 (9th Cir. 1966), the *Truitt* principle was extended to encompass the claim of "competitive disadvantage."

98 164 N.L.R.B. 29 (1967).

99 *Quoted id.* at 30.

100 347 F.2d 61 (3d Cir. 1965).

In the *American Oil Co.* case, the company throughout the controversy had taken the position concerning the alleged subcontracting of unit work that it was not violating the contract, but the General Counsel did not raise a "substantiation" argument. Had this argument been presented, the Board might well have applied the *Truitt-Puerto Rico Telephone* rule. The General Counsel could have contended that the company's claim that it was not subcontracting unit work was an assertion of a present and continuing bargaining position, since it would be unreasonable to require shop stewards to begin each working day by asking management if it intended to subcontract unit work during that particular day. Management's assertion, viewed in this light, was a statement that it was not subcontracting and did not intend to subcontract unit work in violation of the contract. If the case had been thus analyzed, it is arguable that the substantiation doctrine would have required the company to substantiate its position by producing the subcontracts requested.

III

Merging Concepts or Confused Analysis?

A serious question exists whether the *Truitt* decision will ultimately be construed as establishing substantiation as a separate basis for ordering employers to make information available to unions. Many Board and court cases, several citing *Truitt*, consider the union's request for substantiating evidence as a demand for "necessary" information.

In *Fafnir Bearing Co.*,[101] the Board was faced with a significant issue in the area of demands for information made during the administration stage of a collective bargaining agreement. The company had furnished the union with all time study data which it had utilized in setting piece rates[102] but had denied the union's request to conduct its own independent time studies at the company's plant. In ordering the company to comply with the union's request, the Board reasoned that the employer's time study data were insufficient to enable the union to judge the accuracy of the piece rate determination. Although on its facts *Fafnir* might have been considered a substantiation case (substantiation of the company's position that its time study had been

101 146 N.L.R.B. 1582 (1964), *enforced*, 362 F.2d 716 (2d Cir. 1966).

102 It is, of course, settled that time study information used to determine rates of compensation constitutes wage data. *See, e.g.*, Otis Elevator Co., 102 N.L.R.B. 770, *enforced as modified*, 208 F.2d 176 (2d Cir. 1953).

properly conducted and the proposed rates accurately computed), the Board opted for an analysis based upon "necessity" principles. Thus, the Board reached the conclusion that the independent time study was "necessary to enable the Union to make an intelligent decision whether to proceed to arbitration."[103]

The Court of Appeals for the Second Circuit, enforcing the Board's decision, recognized that the case turned on a question of substantiation: "The issue confronting us, however, is whether in the circumstances presented here, the Company in fact was required to . . . grant permission to the Union to make a live study so that it could reliably evaluate the company's data."[104] Notwithstanding this characterization of the question presented, the court enforced the Board's decision because it believed the union *needed* the substantiating information to evaluate the pending grievances. The court cited *Truitt* for the general proposition that an employer is obligated to supply relevant information,[105] but it did not rely on *Truitt* for the proposition that apart from the need of the time study in relation to a specific grievance, the company had a duty to substantiate its position that the proposed piece rates were fair and that its own time study accurately reflected the job.

Other time study cases have involved the issue of substantiation of an employer's piece-rate determination, but the rationale of these cases does not focus upon the substantiation issue as separate and distinct from that of necessity. Rather, the Board and the courts tend to merge or confuse the two. For example, in *General Electric Co.*[106] the collective bargaining contract provided that the setting of production standards was subject to the grievance-arbitration machinery. The union requested the right to conduct a separate time study,

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103 146 N.L.R.B. at 1584.

104 Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 721 (2d Cir. 1966). It should be noted that the Second Circuit in NLRB v. Otis Elevator Co., 208 F.2d 176 (2d Cir. 1953), had refused to require the company to allow the union to conduct independent time studies. In *Fafnir* the court distinguished *Otis Elevator* on the ground that in the earlier case the union had not alleged that the employer's data were insufficient to enable the union to bargain intelligently. In Wilson Athletic Goods Mfg. Co., 169 N.L.R.B. 621 (1968), the employer was found to have unlawfully refused to permit a union time study even though the union had neither requested nor received the employer's time study data. Since the employer's study would not have been "intelligible" to the union unless it had further knowledge of the variables involved, it would have been "unreasonable" to have required the union to have first requested to review the employer's study before being permitted to conduct its own study. *Id.* at 621-22.

105 362 F.2d at 721.

106 173 N.L.R.B. 164 (1968), *enforced*, 414 F.2d 918 (4th Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970).

claiming it lacked sufficient data to present grievances involving production standards effectively. In enforcing the Board's order that the employer permit the union to make its requested independent time study, the Court of Appeals for the Fourth Circuit cited *Fafnir* in support of the relevance-necessity test underlying its own opinion:

> "An employer's duty to provide *relevant* information to union representatives so that they can effectively bargain on behalf of their members has been established beyond question. . . . Consequently . . . we believe the Board, exercising its expertise and special competence, could properly determine that the Union's *need* to conduct these tests outweighed the Company's interest in closing its doors to outsiders."[107]

However, in its conclusion, the Fourth Circuit brought in the substantiation theme:

> The data collected by General Electric was that [*sic*] which it relied on, in part, to set hourly rates. General Electric claimed that based upon this data the employees involved in wage grievances were not underpaid. Under such circumstances, *it was incumbent on General Electric under § 8(a)(5) of the Act to disclose proof of the accuracy of its position.*[108]

CONCLUSION

The state of the law regarding the substantiation of bargaining positions is unclear. *Truitt* is not based on a section 9(a) obligation, and *Puerto Rico Telephone* supports the proposition that the substantiation requirement is a separate basis for ordering that information be made available. Nevertheless, cases such as *Fafnir* seem to

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107 414 F.2d at 922-23, *quoting* Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 721 (2d Cir. 1966) (emphasis added).

108 414 F.2d at 925 (emphasis added). Similarly, in Waycross Sportswear, Inc. v. NLRB, 403 F.2d 832 (5th Cir. 1968), the Fifth Circuit, relying in part on *Truitt* to sustain a Board finding that the company had unlawfully refused to permit the union to study a plant's piece-rate operations in connection with wage negotiations, reasoned:

> We agree with the Second Circuit's recent decision holding that the refusal of an employer to allow the Union to make a piece-rate study in connection with evaluating the merits of a grievance constitute independently a violation of § 8(a)(5) . . . [citing *Fafnir*]. If needed during the performance under an existing contract, such information may be of even more significance in negotiations looking toward the making of an agreement. The demand here was reasonable and well supported in need. The refusal by Waycross violated "the duty of the employer to furnish to the union relevant data to enable the representative effectually to bargain for the workers."

Id. at 836 (footnote omitted), *quoting* Sinclair Ref. Co. v. NLRB, 306 F.2d 569, 571 (5th Cir. 1962). *See also* NLRB v. General Elec. Co., 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

indicate that substantiation will be viewed from the perspective of what a union *needs* to administer the contract effectively rather than what the employer must do to fulfill the statutory duty to bargain in good faith. The difference is critical. The former analysis requires that the union establish the necessity for the requested information to enable it to bargain intelligently. Under the latter position, the union need only establish that the employer introduced an argument in the give and take of bargaining; the employer must then provide "some sort of proof of its accuracy."[109] Perhaps the principles of substantiation have been merged into the "necessary and relevant" rationale intentionally, or perhaps the Board and the courts have failed to understand that *Truitt* is not a "necessary and relevant" case at all.

In any event, it is submitted that the national labor policy of encouraging collective bargaining will be enhanced by recognizing substantiation as a separate basis for requiring the production of information. *Truitt* teaches that good faith bargaining requires each party to rely upon only honest claims. Thus, when a party presents a claim, the requirement of good faith bargaining should be held to entail that the claim be substantiated, even in the absence of the showing of a specific need for the information.

[109] NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956).