Volume 69 | Issue 2 Article 13

February 1967

Labor Law--Bargaining in Good Faith--Union's Right to Conduct Time Studies on Company Property

Edward Perry Johnson
West Virginia University College of Law

50 per cent of the stock of the transferee is controlled by the transferor or its sharesholders; but, Congress rejected this proposal.[32] A few commentators feel that the adoption of such a proposal would solve many of the problems surrounding a liquidation-reincorporation.[33]

Thus it is imperative that the tax advisor be extremely cautious when confronted with a transaction in the area of reincorporation. Inconsiderate action could easily result in heavy economic loss for the taxpayer-client. A liquidation-reincorporation transaction that is bona fide in every respect and which involves either less than a transfer of "substantially all" the assets or more than 20 per cent change in stock ownership will result in capital gains treatment. But the taxpayer runs the risk of having a judicial tribunal determine the bona fides of his intent with respect to a liquidation-reincorporation. There is also a possibility that the court may attempt judicial legislation and relax standards so that it will be easier for the Commissioner to bring a liquidation-reincorporation within the reorganization provision of the Code. The present state of the law does not seem to be adequate from the standpoint of the Treasury in that it allows a corporation to bail out earnings at capital gains rates while the business is continued in essentially the same manner with a new corporate front. The result is a tax loophole which should be corrected. The possibility of specific legislation makes it presently desirable to carefully consider any attempted or potential liquidation-reincorporation. If a liquidation-reincorporation is treated as a reorganization, it could cost the taxpayer-client thousands of tax dollars.

Jacob Michael Robinson

Labor Law—Bargaining in Good Faith—Union's Right to Conduct Time Studies on Company Property

U, union, represents employees in the plant of *C*, company, where wages are based upon a "piece-rate system." To establish rates, *C* conducts time studies to determine normal work pace, then provides a bonus for higher levels of productivity. *U* filed griev-

[32] Proposed Section 357, liquidation followed by reincorporation, contained in H.R. 8300 as passed by the House, 83rd Cong., 2d Sess. (1954).
[33] See Schwartz, *supra* note 31, at 159.

ances on certain of these piece-rates and eventually requested all time study data which the company had used to determine these rates. The material was furnished, but *U's* representative was dissatisfied, because of unclear use of "adjustment factors" in the company's data. When *C* would not account for these figures to *U's* satisfaction, *U's* representative requested permission to conduct his own time studies so that he could intelligently advise *U* whether to accept the rates established by *C*, or invoke arbitration, the final step in the grievance procedure. *C* refused to grant the request and *U* filed a complaint with the National Labor Relations Board, charging failure to bargain in good faith. The Board held that Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act were violated by the refusal to permit access to the plant for the purpose of conducting independent time studies. *Held*, order enforced. A union-conducted time study would provide the only means for full assessment and verification of employer's proposed piece work rates. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716 (2d Cir. 1966).

This case represents yet another extension of the employer's duty to bargain, especially with respect to the obligation to provide information within the employer's possession.

Under the provisions of the National Labor Relations Act, a duty is imposed upon both employers and unions to bargain collectively with each other "in good faith."[1] The state of mind necessary to constitute "bargaining in good faith" on the part of the parties is often difficult to define. Hence, the required bargaining "in good faith" has taken many forms. One long established principle is that an employer has an affirmative duty to furnish economic information sufficient to enable the union to bargain intelligently and to discuss issues raised by the employer.[2] Economic information has been held to include such items as time-study information,[3] incentive rates,[4] and even individual employees' earning records.[5] An employer is relieved of his duty only when furnishing the in-

[1] National Labor Relations Act § 8a(5), 8b(3), 8d; 29 U.S.C. §158a(5), 158b(3), 158d (1958).

[2] Matter of Truitt Mfg. Co., 351 U.S. 149 (1956).

[3] J. I. Case Co. v. NLRB, 253 F.2d 485 (7th Cir. 1958).

[4] Dixie Mfg Co., 79 NLRB 645 (1948), *enforced* 180 F.2d 173 (6th Cir. 1950).

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

formation would cause him undue hardship or when the union can obtain the information as easily as the employer.[6]

The duty to provide information was applied originally to the period of contract negotiations between the union and the employer. However, in the last few years a new trend has been noted. In more recent cases, the right to relevant economic information has been held to include "the processing of a grievance under the bargaining agreement and the union's bona fide actions in administering the bargaining agreement during the period of its existance."[7]

The theory behind this concept appears to be that collective bargaining is a continuing process requiring many periodic adjustments in matters not covered or contemplated in existing agreements. The rights secured under a contract require constant policing and administration by a union if it is to fulfill its obligation to bargain intelligently on behalf of its members. Since matters of disagreement between union and management come within the scope of the contract by means of the grievance procedure mechanism, the grievance procedure is a part of this continuous collective bargaining process.[8]

In most instances, the information which the unions could request from employers has consisted of written records within the company's exclusive control. But, if we are to assume that the principal case is indicative of future holdings, it now appears that the mere furnishing of written records will not always terminate the employer's duty to provide information.

In the instant case, the NLRB found that the employer's records were inadequate for proper verification of the company's proposed piece-rates. Therefore, the Board traveled the "next step" and

---

[6] Boston Herald-Traveler Corp. v. NLRB, 223 F.2d 58 (1st Cir. 1955); NLRB v. Whitin Machine Works, 217 F.2d 593 (4th Cir. 1954); NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947 (2d Cir. 1951).

[7] Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (6th Cir. 1963); NLRB v. F. W. Woolworth Co., 352 U.S. 938 (1956); J. I. Case Co. v. NLRB, 253 F.2d 149 (7th Cir.); NLRB v. Item Co., 220 F.2d 956 (5th Cir. 1955); Boston Herald-Traveler Corp. v. NLRB, 223 F.2d 58 (1st Cir. 1955); NLRB v. Whitin Machine Works, 217 F.2d 593 (4th Cir. 1954).

[8] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

stated that failure to grant the union access to the plant for the purpose of conducting time studies constituted a failure to bargain in good faith.

This ruling granting the union access to company property raised the question of the right of the company to close its doors to outsiders. In meeting this issue, the court found it necessary to reason around the holding in *NLRB v. Otis Elevator Co.*[9] In that decision, revising an NLRB order to permit union time studies on company property, this same circuit court stated that while there is a duty to furnish time study information to a union, the employer was not required "to open its plant to union representatives to enable them to make new time studies. . . ."[10] To allow non-employee union representatives to enter the plant would be an "invasion" of the company's property rights which should not be allowed.

Yet, even with such apparently unambiguous statements, the court distinguished *Otis* in at least two respects. First, the company in *Otis* rejected not only the request of the union to make its own time study, but also the request for written time study information in the company's possession. Thus, the court found that it was impossible to determine whether the union needed to conduct its own studies. Second, the court held that whatever additional information the union required beyond the company's data could be obtained from interviews with union members. In the instant case, however, the court stated that the information needed to evaluate the company's data, while subjective in nature, was "nevertheless within the Company's exclusive control."

In its desire to let the principle of stare decisis rule, the court is seemingly drawing some fine distinctions to overcome its earlier wording in *Otis.* In actuality, it appears that the instant case overturns *Otis* for all intents and purposes.

Thus, it seems that an employer's property rights can no longer be asserted to prevent a union from conducting its own time study. This would probably not be true, however, where the employer establishes that such studies would "severely disrupt production." The problem was not met here, for the company charged only that

---

[9] 208 F.2d 176 (2d Cir. 1953).
[10] *Id.* at 177.
[11] Fafnir Bearing Co. v. NLRB, 362 F.2d 716 (2d Cir. 1966).

some employees might be distracted, an argument which the court readily dismissed as inconsequental.

The court predicated much of its reasoning on the property "invasion" issue on the fact that union representatives have been granted access to company premises under other circumstances covered by the National Labor Relations Act. These include the right to use company property for organizational purposes,[12] and for soliciting membership.[13] There is some weakness in this argument, for in these instances, non-employee union members were granted access only to non-production areas. The court dispensed with this by saying that to forbid access to production areas in this case would be "contrary to the purpose Congress intended the [National Labor Relations] Act to serve."

The company presented one other argument in this case which should be considered. It contended that since the governing agreement with the union failed to mention independent time studies, this constituted a waiver, preventing the union from raising the issue.

Generally speaking, for a union to waive its right to information, it must do so "clearly and unmistakably." Thus, silence normally will not be construed as a waiver of the right to information simply because the right was not established in the collective bargaining contract.[14] In keeping with this principle, it has been held that no waiver occurred where the right to wage information was "needed to administer the bargaining agreement," and therefore "was a right which it had under section 8(d) of the National Labor Relations Act.[15]

On the other hand, a waiver may be effected where a union, during negotiation, contracts for some information and abandons its contract demands for certain additional information.[16] The

---

[12] NLRB v. Stowe Spinning Co., 336 U.S. 226 (1946).

[13] NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948).

[14] NLRB v. Perkins Machine Co., 326 F.2d 488 (1st Cir. 1964); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (6th Cir. 1963); J. I. Case Co. v. NLRB, 253 F.2d 149 (7th Cir. 1958); NLRB v. New Britain Machine Co., 210 F.2d 61 (2d Cir. 1954); NLRB v. J. H. Allison Co., 165 F.2d 766 (6th Cir. 1948).

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

[16] Hearst Corp., 113 NLRB 1067 (1955).

union cannot then demand this additional information. Its right has been waived.

Many developments are occurring in labor law concerning the duty to bargain in good faith. In the instant case, there is further extension of the duty to bargain in post contractual relations where there is a grievance-arbitration clause. Furthermore, there is an expansion of the employer's duty to provide information to the union so that it now includes the granting of access to company property for union conducted time studies. Consequently, the trend toward a wider duty to bargain continues apace, with this case marking its latest step.

Edward Perry Johnson

Labor Relations—Employer's Duty to Bargain Over Subcontracting—Waiver

One type of maintenance work at Allied Chemical involved scheduled repairs, such as machine improvement and minor construction. In the past this work had been performed both by company employees and outside contractors. During negotiations leading to the collective bargaining agreement, the union attempted to secure a commitment from the employer which would have restricted the company's right to unilaterally subcontract this type of work. After full discussion of the issue, the union consented to a contract which did not include the restriction. Two months after the collective bargaining agreement was signed by the parties, the union requested the employer to notify and bargain with it respecting the company's decisions to subcontract this type of maintenance work. The company refused to notify the union before the work was subcontracted. No employees in the maintenance department were laid off or discharged as a result of the employer's unilateral subcontracting. The union filed a section 8(a)(5)[1] charge with the National Labor Relations Board.

---

[1] "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . . ." Labor Management Relations Act (Taft-Hartley Act), § (8)(a)(5), 61 Stat. 136 (1947), 29 U.S.C. 158(a)(5) (1964).