

**Warner Press, Inc. and Graphic Communications  
Local 17, a/w Graphic Communications Inter-  
national Union. Case 25-CA-19781**

February 28, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On May 1, 1990, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

Contrary to our dissenting colleague, we agree with the judge, for the reasons set forth by him, that the Respondent was under no obligation to furnish the Union with the requested information regarding the cost to provide a dental plan, a vision plan, a dollar prescription card, and "preferred provider option" (PPO) benefits.<sup>1</sup> As found by the judge, these benefits were not being provided by the Respondent to any of its employees, the Respondent had not included these benefits in its bargaining proposal at the time of the Union's request,<sup>2</sup> and the Union had not proposed that the Respondent add these benefits to the Respondent's proposal. Under these circumstances, the Respondent had no obligation under Section 8(a)(5) to provide the requested information.

Our dissenting colleague would require the Respondent to furnish the requested information because the information was "relevant to the Union in formulating its bargaining position" and was "a logical response to the Respondent's rejection of its Health and Welfare Fund proposal." Had the Respondent furnished the requested information, according to our dissenting colleague, the Union may have modified or abandoned its proposal. Such reasoning obscures the issue in this case.

Although the information would no doubt help the Union in formulating its bargaining proposals, we agree with the judge's statement that "[w]hat is of

help to the Union in framing its demands does not define Respondent's obligations." As the judge correctly noted, the Respondent is under no obligation "to do [the Union's] research . . . merely to help the Union decide whether to seek those benefits." The General Counsel presented no evidence that the Union attempted to obtain this cost information but was unable to do so. Indeed, the judge found that the information was easily ascertainable by the Union.<sup>3</sup> Thus, under these circumstances, the Union is simply attempting to force the Respondent to do its "homework," and the Act does not require the Respondent to do so. We agree with our dissenting colleague that there is nothing unreasonable in a party's investigation of the costs of a proposal before it puts the proposal on the table. What is unreasonable, however, is to force the other party to conduct the investigation.<sup>4</sup>

Our dissenting colleague also faults the judge's finding that the General Counsel failed to show that the requested information existed and that it was in the Respondent's possession. He reasons that because such matters are affirmative defenses for which the Respondent bears the burden of proof and because the judge dismissed the complaint after the General Counsel's presentation of its affirmative case, the judge's finding is premature. In the circumstances of this case, we find that the judge's finding was proper.

As the judge noted, the logical implication of the Union's request that the Respondent obtain the cost information from its insurance agent is that the Respondent did not at that time have the information in its possession, and neither the General Counsel nor the Union has ever advanced a contrary contention. Thus, without taking issue with our colleague's statement of the burden of proof, his rejection of the judge's finding under the facts of this case amounts to the elevation of form over substance. Further, neither the General Counsel nor the Union has been prejudiced by the judge's finding. Once the judge found that the Respondent was under no obligation to furnish the requested information, the issue of whether the Respondent possessed the information was not necessary to the resolution of the case and thus further evidence was not warranted.

Accordingly, we find that the Respondent's refusal to furnish the requested information did not violate the Act, and we adopt the judge's dismissal of the complaint.

<sup>1</sup> At the beginning of negotiations for a successor collective-bargaining agreement, the Union proposed that the Respondent participate in the Indiana Graphic Communications Union's health and welfare fund, which included, *inter alia*, these four benefits. The Respondent rejected this proposal, stating that it was not interested in the fund and that its cost was too high. The Respondent then submitted its own proposal that did not include these four benefits.

<sup>2</sup> The Respondent subsequently proposed group health insurance coverage through the Sagamore Health Network that provided a 90/10-percent PPO benefit with a \$5 prescription card and provided the Union with the cost information for this proposal.

<sup>3</sup> As a trustee of the fund, Union President Robert Clements could have obtained the cost to the funds of these benefits. In addition, the General Counsel made no claim that the Union could not have obtained the information directly from the Respondent's insurance agent.

<sup>4</sup> Although our dissenting colleague correctly points out that under Board law an employer may not escape its obligation to provide information requested by the union because the union could obtain that information from other sources, that legal proposition is applicable only where the Board has determined that the employer in fact has an obligation under Sec. 8(a)(5) to provide the requested information. In the present case, the General Counsel failed to establish this threshold requirement.

## ORDER

The complaint is dismissed.

MEMBER DEVANEY, dissenting.

The complaint in this case alleges that, during bargaining negotiations, the Respondent violated Section 8(a)(5) and (1) by refusing to supply relevant information to the Union. The judge dismissed the complaint at the close of the General Counsel's case on the grounds that the General Counsel had not established that the requested information was relevant to the negotiations. The judge also found that the General Counsel had not established that the information existed or was in the Respondent's possession. Unlike my colleagues, I do not agree that dismissal of the case at this stage of the proceedings is appropriate.

During negotiations, the Union proposed that the Respondent contribute to its health and welfare fund. The fund included a variety of benefits not presently available to unit employees and would cost the Respondent not less than \$267 per month per employee. The Respondent rejected the Union's proposal, stating that the fund offered more benefits than the Respondent was interested in and would cost too much. The Union responded by requesting information regarding the costs for the Respondent's present insurance carrier to provide four specified benefits (all included in the health and welfare fund). The Respondent refused to provide this information.

It is beyond doubt that the duty to bargain "includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' statutory bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). A liberal discovery standard, the relevancy test focuses on whether the information will aid the union in performing its statutory duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1957); *Safeway Stores v. NLRB*, 691 F.2d 953 (10th Cir. 1982). If the information would aid the union in performing those duties, it is relevant and must be provided, absent a legitimate defense.

Applying this standard, I have little difficulty in finding that the General Counsel met the burden of establishing that the requested information was relevant to the Union in formulating its bargaining position. When the Union proposed that the Respondent contribute to its health and welfare fund, the Respondent rejected that proposal because the fund offered more benefits than the Respondent was interested in and was too expensive. The Union responded by requesting information regarding how much it would cost the Respondent's present insurance carrier to provide four

specified benefits, all of which were included in the rejected proposal.

The Union's request for information was a logical response to the Respondent's rejection of its health and welfare fund proposal. The Union clearly was attempting to obtain information so as to meet the Respondent's "too many benefits" and cost objections. The judge concluded that the information was not relevant because the Union did not specifically propose that the Respondent add the four specified benefits to its present insurance package. The Union was attempting to determine the economic consequences of such a proposal before formally making the proposal. In the give and take of bargaining, it is not unreasonable for a party to first investigate whether a bargaining proposal is feasible prior to formally proposing it at the bargaining table. If the Respondent had provided the requested information, the Union may have modified its proposal or determined that a formal bargaining proposal would undercut its attempt to obtain other benefits of more importance to the unit employees.

For these reasons, I would find that the General Counsel met his burden of showing that the requested information was relevant to the bargaining negotiations.<sup>1</sup>

The judge also found that the General Counsel had failed to show that the requested information existed and was in the possession of the Respondent. Such matters are defenses to the alleged unfair labor practice and the Respondent bears the burden of proof on these matters.<sup>2</sup> Because the judge dismissed the complaint prior to the presentation of the Respondent's case and any rebuttal evidence by the General Counsel, the record is insufficient to determine whether the Respondent can meet that burden.<sup>3</sup> Accordingly, I would reverse the judge and would remand the case for a further hearing.

<sup>1</sup>The majority relies on the absence of evidence that the Union first attempted to obtain the information from some other source prior to making its information request. An employer, however, may not escape its obligation to produce relevant information by asserting that the union could obtain that information from other sources. Board precedent is directly to the contrary. See, e.g., *New York Times Co.*, 265 NLRB 353 (1982); and *Sonat Marine*, 279 NLRB 100, 102 fn. 5 (1986).

<sup>2</sup>The duty to provide information includes the duty to make a reasonable effort to obtain the information or explain why the information is not available. *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 33 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983). See also *McDonnell Douglas Corp.*, 224 NLRB 881, 889-890 (1976), and *WCCO Radio*, 282 NLRB 1199 (1987), enfd. 844 F.2d 511 (8th Cir. 1988).

<sup>3</sup>My colleagues claim that the "logical implication" of the Union's request that the Respondent obtain the cost information from its insurance agent is that the Respondent did not have the information, yet my colleagues characterize my dissent as elevating "form over substance" in rejecting the judge's finding that the Respondent did not have the information. I believe it is inappropriate to decide issues by "logical implication" where the party who has the burden on the issue, here the Respondent, has not yet presented its evidence on that issue.

*Mark T. Dabertin, Esq.*, for the General Counsel.  
*Jack H. Rogers, Esq.* and *Clare M. Sproule, Esq.* (*Barnes & Thornburg*), of Indianapolis, Indiana, for the Respondent.  
*Robert Clements*, of Indianapolis, Indiana, President and Business Manager of the Charging Party.

## DECISION

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. This unfair labor practice proceeding involves the refusal of Respondent Warner Press, Inc., to furnish information to Charging Party Graphic Communications Local 17, a/w Graphic Communications International Union (the Union), allegedly in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. The Union filed its unfair labor practice charge against Respondent on February 17, 1989,<sup>1</sup> and the complaint issued on April 28. The hearing was held in Indianapolis, Indiana, on February 15, 1990. After the General Counsel presented his case-in-chief, Respondent moved to dismiss the complaint on the ground that no violation of the Act had been proved. I reserved decision on the motion and adjourned the hearing. I now conclude that Respondent has not violated the Act and dismiss the complaint.

Jurisdiction is conceded. Respondent admits, and I find, that it is an Indiana corporation engaged in commercial publishing and printing and has its office and principal place of business in Anderson, Indiana, and a facility in Alexandria, Indiana. During the year preceding April 28, Respondent sold and shipped from its Indiana facilities to points outside Indiana and purchased and received at its facilities from points outside Indiana products, goods, and materials valued in excess of \$50,000. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In approximately 1977 the Union was certified as the exclusive bargaining representative of the following unit, originally solely applicable to the employees at its Anderson facility and in 1987 extended by agreement to include the Alexandria employees:

All production and maintenance employees of the Respondent at its Anderson and Alexandria, Indiana facilities, including regular part-time employees, janitors, and plant clerical employees, but excluding all office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

Since 1977 Respondent recognized the Union and bargained with it, reaching successive agreements, the most recent of which was effective from January 25, 1986, to January 18, 1989. I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Solely for the purpose of this motion, because I did not permit Respondent to present its case, I will deem truthful the testimony of Robert Clements, the Union's president and business agent, and one of the members of the Union's negotiating committee, both of whom testified on behalf of the

General Counsel.<sup>2</sup> At negotiations for a new contract to succeed the one expiring on January 18, one of the Union's demands was that Respondent participate in the Indiana Graphic Communications Health and Welfare Fund (the Fund), a jointly administered fund to which employers make monthly contributions for each of their employees. Specifically, the Union proposed that Respondent make contributions to the Fund "sufficient . . . to guarantee the integrity of the present benefits and maintain the status quo as to its current operations," but in no event would Respondent's contributions be less than \$267.65 per month per employee. Because the trustees of the Fund had the right to increase the contributions and to add benefits, the contribution rate could increase. Respondent countered on a "variety" of occasions or "several times" that it was not interested in the Fund and that the cost of the Union's proposal was too high.

The Union never withdrew its proposal that Respondent contribute to the Fund. While the Union was holding firm for its proposal, Respondent was equally firm in proposing to provide its own health benefits. What gives rise to this proceeding is Clements' demand, first made on January 11 and renewed on January 12, 13, and 30, that Respondent find out from its insurance carrier the costs of providing to the employees four benefits which were provided by the Fund: "a dental plan"; a vision plan, which is a separate plan located in Indiana providing optical benefits; a \$1 prescription card, with which no prescription would cost more than \$1; and a "PPO" benefit ("preferred provider option"), which would permit employees to be cared for at certain hospitals and by certain named physicians at reduced cost.<sup>3</sup> These four benefits were provided by the Fund, but they were not benefits which were provided by Respondent to any of its employees and were not benefits that were proposed by Respondent. Respondent's counsel, Jack Rogers, replied that Respondent was not interested in those benefits, that he would give cost information only about Respondent's own proposals, and that he did not have to supply cost information about matters which were not even proposals.

The premise of Rogers' last objection was correct. The Union never proposed that these four benefits be added to what Respondent proposed or that it would accept Respondent's benefits proposal if Respondent added these benefits. Because these proposals had never been made, it follows that Respondent never rejected them because of their cost. Rather, the posture of the negotiations was that the Union was proposing that Respondent become a party to the Fund, which provided, among many benefits, the four at issue here. Respondent replied that it was not interested and that the cost

<sup>2</sup>In addition, I ruled that the testimony of another member of the committee would be cumulative, based on counsel for the General Counsel's representation that the member's testimony would support the testimony of the two other witnesses. Obviously, if exceptions are filed to this Decision and it is reversed, Respondent would have the right to call witnesses to refute the testimony of the General Counsel's witnesses; and I would consider all testimony and not feel bound by the findings here.

<sup>3</sup>Clements did not specify what dental or vision benefits he wanted Respondent to cost out. He said that he had given Respondent copies of various Fund documents which contained that information, although his testimony was imprecise as to when that material had been supplied. From certain of the questions asked by Respondent's counsel, I glean that Respondent, if permitted to do so, would have taken issue with Clements' testimony; but that may be a mistaken impression. I am assuming in this decision that Respondent was aware of what benefits Clements was referring to when he made his demand for cost information.

<sup>1</sup>All dates refer to the year 1989, unless otherwise stated.

was too high, so the Union asked Respondent what those four benefits would cost. I find that, in light of Respondent's lack of interest in these four benefits, their cost was not needed by the Union "for the proper performance of its duties as the employees' bargaining representative," *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); "to enable [it] to understand and intelligently discuss the issues raised in bargaining." *San Diego Newspaper Guild v. NLRB*, 546 F.2d 863, 866 (9th Cir. 1977). However, the General Counsel theorizes that:

The Union sought to negotiate for a different insurance plan, which provided the four items for which it now seeks costs. Knowing that the Respondent had objected to the "cost" of the Union's proposed plan, the Union could reasonably anticipate a similar objection to any proposal to provide increased coverage under the Respondent's proposed plan. If, however, the Union were to be provided the information on the actual cost of such increased coverage under the Respondent's plan, it could formulate an economic proposal to meet the Respondent's anticipated cost objection (e.g., agreeing to reduced proposals in some economic areas to compensate for the increased insurance costs, or simply holding out for increases if the cost was not in fact too great).

This contention implicitly recognizes that the Union's demand is not relevant until Respondent makes its anticipated cost objection. All that the General Counsel's case shows is that Respondent objected only to the Fund's minimum cost of \$267.65 per employee per month, and not to the specific benefits involved or the cost of each benefit or all of them. Equally important, Respondent objected to the Union's proposal that it become a party to the Fund for another reason: it simply was not interested in the Fund. It did not want to provide all the benefits that the Fund provided, not necessarily just the four benefits that the Union was thinking about. I refuse to project or "anticipate" how Respondent would have reacted to the Union's counterproposal of the four benefits, although I note that Respondent proposed prescription and PPO benefits (and supplied cost information) on January 30. If an employer, such as Respondent, merely states that it is not interested in providing certain benefits, their cost has not been placed at issue; and Respondent may legally refuse to produce the information.

There are two other significant problems with the complaint and the General Counsel's evidence. There was no showing that the requested information existed and that Respondent had such material. Rather, the Union was asking Respondent to consult a third party, its insurance carrier, who was to compute how much these benefits would cost if they were added to Respondent's proposal for benefits. Thus, the Union was aware that Respondent did not have control of this type of information, but had to go to another source. Also implicit in the Union's request is its understanding that a computation had to be made by the carrier to determine the amount to charge for each employee so that the benefits

could be paid and sufficient reserves retained in the event that the actuarial computations proved inaccurate.

Employers have an obligation to furnish relevant and necessary information to union representatives during contract negotiations. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The normal rule, and all the Board decisions relied on by the General Counsel agree,<sup>4</sup> is that an employer must produce existing information in its control relating to actual, not potential, terms and conditions of employees. However, Board law does not require a party to negotiations to produce information outside of its control. *American Commercial Lines*, 291 NLRB 1066 (1988); *Food & Commercial Workers Local 1439 (Layman's Market)*, 268 NLRB 780 (1984); cf. *Plasterers Local 346 (Brawner Plastering)*, 273 NLRB 1143 (1984).

Here, the Union was asking Respondent to do its research, to conduct actuarial studies to determine the prospective use and resulting cost of the four benefits in the event that Respondent rejected them because of their cost. The General Counsel cites no authority or rationale for the proposition that Respondent is responsible to answer every information request of the Union. Respondent may be required to produce terms of actually existing benefits and other terms and conditions of employment, providing that they would be helpful to the bargaining process, including arbitration. But the cost of benefits not asked for and not in existence, merely to help the Union decide whether to seek those benefits, is assuredly not within the contemplation of the decisions cited by the General Counsel.

What is of help to the Union in framing its demands does not define Respondent's obligations. It may be helpful to the Union, in pursuing its wage demands, to know about wage rates and cost-of-living increases in the printing industry during the last 10 years; but I am convinced that the General Counsel would not attempt to force Respondent to research that issue for the Union. The question here is whether the Union can sit back and make Respondent do its homework, or whether the Union, which has the essential information, must act as a responsible negotiator and prepare its own arguments.<sup>5</sup> I find that the Act does not require Respondent to obtain this material and conclude that there has been no violation of the Act. I hereby grant Respondent's motion to dismiss the complaint.

<sup>4</sup> For example, the General Counsel places principal reliance on *WCCO Radio*, 282 NLRB 1199 (1987), enfd. 844 F.2d 511 (8th Cir. 1988), which involved a demand for the specific compensation of all unit members. Similarly, *Washington Hospital Center*, 270 NLRB 396 (1984) (job evaluation data); *E. I. du Pont Co.*, 268 NLRB 1031 (1984) (wages of nonunit employees); *Borden, Inc.*, 235 NLRB 982 (1978), enfd. in relevant part 600 F.2d 313 (1st Cir. 1979) (cost per employee for benefit plans and number of employees participating in another plan); *Kroger Co.*, 226 NLRB 512 (1976) (identity of the employees affected by the employer's new 24-hour schedule).

<sup>5</sup> This is particularly appropriate in this proceeding, where the information about the cost of the four benefits is easily ascertainable by the Union. Clements is a trustee of the Fund and has direct access to the cost figures of these benefits. *Brawner Plastering*, supra at 1145. Conceivably, if Respondent supplied these benefits through its own carrier, the cost might be different; but the cost of the benefits does not become an issue until Respondent makes it an issue.

On these findings of fact and conclusions of law and the entire record, and my consideration of the briefs submitted by the General Counsel and Respondent,<sup>6</sup> I issue the following recommended<sup>7</sup>

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<sup>6</sup>Respondent attached to its brief various documents which it claims should have been included in the formal papers received in evidence in this proceeding. Respondent had an adequate opportunity to object to the contents of the formal papers when they were offered in evidence, but did not do so. I have not considered these documents and have not received them in evidence,

## ORDER

The complaint is dismissed.

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nor have I considered any of the arguments that Respondent makes in its brief based on those documents.

<sup>7</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.