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# Coordinated Bargaining with Multinational Firms by American Labor Unions

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THE SPECTACULAR RISE TO DOMINANCE of multinational corporations in the business world has not yet been matched by the development of strong countervailing forces in government and labor. The recent energy crisis demonstrated the helplessness of Western governments to control fully those activities of multinational oil companies located or dealing in their countries which might affect the welfare of their citizens and the preparedness of their defense forces. Similarly, national union movements cannot match the great multinationals in terms of resources and strategic advantages.

The call for coordination of efforts between various national labor movements has come from many sources. Some of this coordination might be expressed through cooperation and collaboration between the relatively well-developed labor movements in the major home countries and the nascent or adolescent labor movements of the Third World. In order for this to happen, however, trade unionists in the home countries may have to give up some of the nationalistic and isolationistic feelings that may arise when workers see jobs and capital being exported out of the national job market for multinational investment and expansion. Additionally, given the varying legal frameworks governing collective bargaining in both host and home countries, some attention must be directed to legal restrictions on the various actions that might be required of participants in coordinated bargaining across national lines.

In this article, the author proposes to view the relationship of the American legal framework to American unions which might wish to participate in such coordinated bargaining. The United States is undoubtedly a leading home country for multinationals, and the participation of American unions in any strategy for multinational coordinated bargaining on a wide scale would thus seem necessary to long-term success.

## Proposals for Coordinated Bargaining

Various proposals for the nature of international collective bargaining coordination have been put forward in recent years. They fall naturally into several distinct categories.

The first category might be called "The Tactics of Exhortation." Within this group would fall proposals that American unions intercede at American corporate headquarters for foreign unions which are having labor relations problems with overseas subsidiaries of American firms. Particularly in cases where multinationals refuse to recognize local unions in Third World host countries, it is suggested that American unions might "apply pressure on corporate headquarters" to grant such recognition. Another suggested tactic falling in this category would be the organization of consumer boycotts by American unions to apply pressure to multinationals with which foreign unions have disputes.

Another category could be called "The Tactics of Cooperation." Into this category would come exchange of information between various national unions, agreements on common bargaining goals, and various solidarity actions in the event of labor disputes between the unions of one nation and a given multinational. Although some of these tactics pose no problem for American unions from a legal viewpoint, others are dealt with specifically in American labor law.

A final category would be "The Tactics of Coordination." This category includes various efforts to achieve bargaining at the international level between coalitions of national unions and multinationals. As preliminaries to such bargaining, various observers of the situation suggest the co-

ordination of demands to be presented to multinationals in the course of bargaining at the national or local plant level. Chief among these are common expiration dates in all plants of the multinational, seen as the first step towards achieving worldwide bargaining. As part of this coordination, observers from various foreign unions might come into the negotiations between American unions and the home country operation of the multinationals headquartered in America.

Another demand suggested for this coordination of bargaining is that overtime attributable to production shifts to avoid the effects of foreign strike pressure be banned by American collective agreements. Additionally, it is suggested that American unions strike in solidarity with foreign unions on major issues of interest to all, such as hours, wages, and company-wide policies on terms and conditions of employment. This category of strategy provides the most problems from a legal perspective.

There is, of course, the possibility that American unions might in the end decide to reject coordination in favor of a more nationalistic road. The support of organized labor for the late Burke-Hartke Bill might be evidence of such a trend of thought. A prime strategy in such a case would be bargaining over decisions by American-based multinationals to export jobs or capital.

### The Multinational and Labor Law

Before one can analyze the legal restrictions on unions or multinationals engaged in collective bargaining, one must decide which law does and should apply.

Clearly, American unions dealing with American-based multinationals come under American labor law. It is not so clear, however, to what extent foreign-

based multinationals come under American labor law in their dealings with American unions. In 1971, the Institute of International Law, meeting in Zagreb, Yugoslavia, resolved that the operations of multinational corporations would be subject to the legislative restrictions and requirements of host countries in regard to labor matters, but this resolution, of course, carries no official weight and is merely recommendatory.

Given the nature of America's Labor-Management Relations Act and its developed interpretation in regard to disclosure of information and secondary economic action, the question of the degree of the law's applicability to foreign-based multinationals is acute. Can American unions demand in the course of bargaining to see the consolidated financial statement of a Japanese or Dutch multinational and expect the American courts to enforce their demand? Similarly, will American courts enjoin as secondary action a coordinated international strike against a foreign-based multinational if there is no immediate labor dispute between American unions and the multinational's American subsidiary? These questions have yet to be authoritatively resolved by the courts, and consequently any answers proposed now are speculative pending the development of actual controversies along these lines.

Standing in the way of coordination is the contention of the multinationals that, for legal purposes, they do not even exist. This interpretation of national corporate law holds that each subsidiary of the multinational is an independent corporation, chartered in its country of operation. Such an interpretation, if embraced by American courts in labor cases, would make almost all solidarity tactics secondary, and thus illegal, for American unions, as each national operation of the multinational would

be deemed a separate employer and all the provisions of the Labor-Management Relations Act with regard to secondary action would presumably apply.

Clearly, the legal definition of the multinational is a subject of great importance to American labor, and the lack of a worldwide legal framework for corporate activity and labor relations creates a void in which unions must proceed cautiously.

For the purposes of this article, we will assume that American labor law applies to the multinational, whether based in America or in foreign countries, when it deals with American labor unions. However, the reader should bear in mind the arguments made above against complete applicability in the case of foreign-based multinationals, as it may become crucial to the development of labor relations in this area.

### **Tactics for Worldwide Bargaining: Expiration Dates**

As long as the multinational can carry on operations in one country while taking a strike in another, national unions will be unable to exert the same sort of economic pressure by striking them as they can exert on a single plant domestic firm. Thus, coordination of bargaining to insure that all unions facing a multinational are engaged in negotiations simultaneously on the same key issues is a major goal of advocates of international bargaining. The most practical means of achieving this may be the attainment of common expiration dates for all labor agreements and prior agreement among national unions that all will strike if such dates cannot be achieved in negotiations. This raises two critical points of law for American unions: can they hold out through impasse to a strike over the



issue of expiration dates (i.e., contract length); and given that the multinational has countered this strategy by giving in to the American union demand and holding out on the foreign union demand, can the American union strike in concert with unions of other countries that have not been able to attain the same date? The first question is more easily answered by an examination of the development of such bargaining demands in purely American negotiations, while the second requires, at this point, a speculative answer.

It is not completely clear whether a union must, publicly, solemnly deny any intention of expanding the certified bargaining unit in order to insulate an unyielding demand on contract duration from unfair labor practice charges. As with many points of law in this area, lower courts disagree and the Supreme Court has yet to make an authoritative ruling.

However, the Fifth Circuit Court of Appeals has suggested that the subject of common expiration dates may be so important to the mandated issues of hours, wages, and working conditions that its importance overrides the "apparent" expansion of bargaining units.

"... [A] common expiration date of all ... contracts had a vitally important connection with the 'wages, hours and other terms and conditions of employment' of the employees at each plant. Without a common expiration date, any union striking for a new contract on a different date might have to 'bail with a sieve' while the employer shifted its production activities to the other plant or plants. With a common expiration date, it is

obvious that each union might be able to negotiate a more advantageous new contract for the employees represented by that union."<sup>1</sup>

This statement by the court, which embraces the argument of advocates of coordinated bargaining that unions are powerless against multiplant employers without some coordination of their efforts, would seem to indicate that holding out for common expiration dates is an activity protected by American law. But the National Labor Relations Board (NLRB) has resisted blatant assaults on "the integrity of a bargaining unit" since the court's 1962 decision,<sup>2</sup> leaving the question still open to authoritative resolution.

It appears that on its own, an American union bargaining with an employer in more than one unit will incur the censure of the NLRB if it tries to obtain common terms, such as an expiration date, over the resistance of the employer through striking. But whether such censure will survive court appeal is as yet open to speculation. All of this is, of course, complicated when the other units are beyond the jurisdiction of the Board, as would be the case in coordinated bargaining with multinationals. A letter-of-the-law interpretation might hold that, as the duration of the contract is a mandatory bargaining subject, and as the American plants of the multinational corporation are the whole corporation for the purposes of American labor law, the union may strike over any mandatory subjects it wishes, since demands presented by foreign unions to foreign subsidiaries are outside the scope of American judicial cognizance. As

<sup>1</sup> *U. S. Pipe and Foundry Co. v. NLRB*, 370 U. S. 919, 45 LC ¶ 17,658 (CA-5, 1962).

<sup>2</sup> *AFL-CIO Joint Negotiating Committee (Phelps Dodge)*, 184 NLRB No. 106, 1970 CCH NLRB ¶ 22,225.

long as the employer does not give in to the American union's demand, the American union is free to continue its strike, provided that the employer cannot demonstrate bad-faith bargaining by the union. Of course, such an interpretation rests on the assumption that the American courts and the NLRB will ignore, as irrelevant, labor relations occurring simultaneously outside the scope of their jurisdiction, and such an assumption might be proven false in the future.

The situation becomes more complex if and when the employer gives in to the American union but not to its foreign counterparts. May an American union resist returning to work and thus undermine the bargaining position of its foreign partners? Once again, the current state of case law, lacking a Supreme Court decision, is contradictory on the point in question.

The Sixth Circuit Court of Appeals held in 1963 that a union could not hold up signing a contract for one plant pending negotiations at another.<sup>3</sup> The NLRB, deciding a 1970 case, held that the failure of a union to ratify a strike settlement pending negotiations in another unit of the same company was illegal.<sup>4</sup> But the Third Circuit Court seems to have taken an opposite position in a 1972 case, saying that a demand for "simultaneous settlement of all contracts" was a mandatory subject for bargaining.<sup>5</sup> If the Third Circuit ruling is upheld, unions could insist upon holding up final settlement of a contract until all units bargaining with a company had settled.

Thus, while one might speculatively assign to unions the legal advantage

in a situation where the employer has refused to concede on the expiration date issue to an American union, the case for the union is less certain when the employer seeks to defeat this strategy by conceding to the Americans and holding out on the foreigners. If the American plants of the multinational constitute the whole corporation for purposes of American labor law, then once the employer has given in to the union, there are no legal grounds for it to continue holding out, since there are no other units within the cognizance of the NLRB or the courts where a labor dispute still exists; to hold out in support of a foreign ally union would thus be a refusal to bargain, subject to NLRB censure and issuance of a court-enforceable remedial order.

Even if one endorses the Third Circuit's somewhat startling doctrine that a union may continue to hold out when no points of contention remain in its negotiations with the unit employer while contention remains in other units, one would be hard put to justify such doctrine in a situation where all the units over which the Board and the courts may exercise jurisdiction lack such contentious differences. Clearly, in both cases (the employer settling and the employer holding out), it is the definition of the "employer" and the jurisdiction of the law which must be altered if a coordinated international holdout for common expiration dates is to enjoy full participation from American unions. This same definitional problem is at the crux of the international strike issue generally.

<sup>3</sup> *Standard Oil Co. v. NLRB*, 322 F. 2d 40, 48 LC ¶18,444 (CA-6, 1963).

<sup>4</sup> *Longshoremen (ILA) (Lykes Bros. Steamship Co.)*, 181 NLRB No. 89, 1970 CCH NLRB ¶21,707.

<sup>5</sup> *Joint Negotiating Committee v. NLRB*, 459 F. 2d 374, 68 LC ¶12,817 (CA-3, 1972).

## Tactics for Worldwide Bargaining: Strikes and Boycotts

International strikes and consumer boycotts have been suggested as possible tactics for dealing with multinational corporations. For example, if a union is striking a multinational for recognition in a Latin American country and the multinational transfers work to its American plant, the American union at that plant might refuse to handle the extra work or strike in sympathy with the foreign union. Similarly, the American union might stimulate an American boycott of the company's goods, either in the "hot-cargo" sense or in terms of a wide-scale public consumer boycott. Each of these tactics runs up against one and the same problem in American labor law—the ban against secondary economic activity by unions.

If a multinational corporation is recognized as one worldwide employer, then action by an American union might be primary and conceptually permitted in light of American case law. But if the multinational is deemed a separate employer in each country where it is chartered, solidarity action by American unions would most likely be secondary and thus uniformly prohibited under American law.

Since this question of separate versus single employer is so basic to the legal problems involved, an examination of the treatment of multi-plant employers within the United States may shed light on the complexities of the situation, for domestic unions have been grappling with shifting definitions of primary and secondary employers ever since the 1947 enactment of the secondary action

ban. The 1959 amendments to the Labor-Management Relations Act, adding a ban on picketing with regard to consumer boycotts, further complicates the picture.

A secondary boycott is a situation in which a union undertakes economic action (strike, boycott, publicity, etc.) against one employer to exert pressure upon another employer with whom the first does business. Whether the two employers are truly separate employers is the main issue in a secondary boycott case. (In the construction industry, the problem of whether employees working for a subcontractor are employees of the general contractor for purposes of economic action has consumed the interest of lawyers, courts, unions, and employers for more than 25 years.) What about firms that are commonly owned but separately administered? What about subsidiaries integrated into a single production process but separately managed? What about divisions of large corporations which engage in completely separate production processes but have some degree of common management at the very top? The Board and the courts have had to deal with all of these situations—situations which are applicable to the problem of defining the international employer.

In 1966, the NLRB decided that when two companies have common ownership but are administered separately, the ban on secondary boycotts applies to a union which seeks to bring pressure on one company to influence its dispute with the other one.<sup>6</sup> Thus, if the stockholder group is the only link between the two companies, they are separate employers within the United States. Since the initial ex-

<sup>6</sup> *Drivers Local 639, Teamsters*, 158 NLRB No. 129, 1966 CCH NLRB ¶ 20,459.



pansion of multinational corporations frequently takes the form of investing in a foreign corporation without initially altering its management or production policies, it is conceivable that some multinationals fall into this category.

In the same year, however, a Massachusetts District Court decided that a union could picket an entirely separate, neutral company which was handling struck goods. No secondary boycott ban would apply, said the court, because the goods were being picketed rather than the company.<sup>7</sup>

In 1968, a Maryland District Court held that common ownership does not necessarily mean common control. Echoing the NLRB's 1966 ruling, the court said that subsidiaries of a corporation are separate employers if they are separately administered. Unions seeking concessions from one subsidiary of a corporation were banned from striking another subsidiary to exert pressure.<sup>8</sup>

In 1969, the NLRB tried to give guidance to unions and employers on what criteria contributed to a separate employer determination.<sup>9</sup> The Board listed the following criteria in the course of deciding a Teamsters case: no actual or active common control; no appreciable integration of operations and management policies; no common labor policy; no employee exchange; separate managements; interchange of goods and services treated as transactions between separate companies (i.e., if one subsidiary needs a part produced by the other, it pays

the market price and the books of the corporation reflect a transfer in credit from one division to the other).

Presumably, all these characteristics would have to be present to make the subsidiaries separate employers. In 1970, a New York District Court modified these criteria by softening the last point, so that subsidiaries could supply each other with "limited services" at cost and still remain separate employers. However, the court, as if in compensation for this leeway, specified a further characteristic of "separateness"—independent hiring practices.<sup>10</sup>

The NLRB, in a case affirmed by the District Court of Appeals in the District of Columbia, went further than this by asserting that "divisions" could be treated as separate employers if the above standards were fully met, with special regard being given to the setting of labor policy.<sup>11</sup> This decision was almost immediately modified by another Board decision that commonly owned, nonintegrated affiliates with a single chief administrative officer were not necessarily a single employer when the other standards of "separateness" were met. In fact, the Board did not even accept the union arguments in the case that the two organizations in question were ally employers (i.e., separate employers doing so much business with each other that secondary boycott restrictions would not apply).<sup>12</sup>

The 1966 standards of the NLRB were specifically upheld in 1970 by the Seventh Circuit Court of Appeals, which

<sup>7</sup> *Hoban v. United Electrical, Radio and Machine Workers of America, Local 205*, 54 LC ¶ 11,640 (DC Mass., 1966).

<sup>8</sup> *Penello v. TV & Radio Artists*, 291 Fed. Supp. 409, 59 LC ¶ 13,044 (DC Md., 1958).

<sup>9</sup> *Teamsters Local 126*, 175 NLRB No. 86, 1969 CCH NLRB ¶ 20,781.

<sup>10</sup> *Kaynard v. Local 810, Teamsters*, 63 LC ¶ 10,960 (DC N. Y., 1970).

<sup>11</sup> *Los Angeles Newspaper Guild*, 185 NLRB No. 25, 1970 CCH NLRB ¶ 22,255; *TV & Radio Artists*, 185 NLRB No. 26, 1970 CCH NLRB ¶ 22,256; *TV & Radio Artists*, 462 F. 2d 887, 68 LC ¶ 12,618 (CA D of C, 1972).

<sup>12</sup> *Hospital & Institutional Workers, Local 250*, 187 NLRB No. 28, 1971 CCH NLRB ¶ 22,561.



commented further that the burden of proving separateness falls on unions rather than employers, since the burden of proof should fall on the party that seeks an exception to statutory language.<sup>13</sup>

In 1972, however, the Second Circuit Court decided that the Board's criteria were not valid as sole determinants of separateness. The court cited the Supreme Court's frequent cautioning against mechanical applications of rules. But, in the time-honored tradition of saying one thing idealistically and then acting in a practical manner, the court enunciated several distinct principles of its own for separateness: nonexisting daily contact, lack of common ownership, and nonintegrated production. In the spirit of the court's opinion, these criteria would not be mechanically applied. The Second Circuit Court, like the Seventh Circuit Court, would look for evidence of neutrality and/or entanglement on a case-by-case basis.<sup>14</sup>

Although the Seventh and Second Circuit decisions leave us with two sets of criteria for determining separateness, the main lines of judicial reasoning are clear. Common ownership, while not irrelevant, is not controlling in making the determination. Common administrative personnel at the very top may not bar a finding of separateness without supporting evidence. Integrated production and integrated personnel policy yield a single employer label. The burden of establishing that subdivisions or subsidiaries are part of one, single employer falls on the union.

When these criteria are applied to multinational corporations, it is clear that some will be single employers and some will not. Multinationals which expand abroad by investing but

leave management in local hands could survive this sort of separateness test, especially if corporate headquarters does not intrude into setting personnel policy. A multinational which starts an overseas facility from scratch and institutes its own centrally-determined personnel policies may well be a single employer under current criteria, even though those centrally-determined policies are modified to fit local laws and customs.

Interchange of middle level management, especially in multinationals where such management has extensive direct contact with union-represented employees, may be a criterion for finding singleness. Another would be integration or duplication of production; an employer whose American plants are idled by a labor dispute in France or Britain is logically a single employer and, by the same token, an employer whose stock is not depleted by an American stoppage because he can increase production in Mexico or Canada and import inventory is certainly a single employer.

What is most important here is obviously the practical consideration of whether a strike aimed at the American plant will have an effect on labor relations in the foreign plant—this, at least, seems to be the logic of the singleness/separateness dichotomy. If American union pressure on the American operation of a multinational has all the appearance and effect of primary action (as in a case of allied employers in a domestic dispute), then certainly the secondary bans would be logically inappropriate.

However, no case has yet been reported where the Board or an American court has made such a determination, and in all likelihood an American

<sup>13</sup> *NLRB v. Teamsters Local 126*, 64 LC ¶ 11,258 (CA-7, 1970).

<sup>14</sup> *NLRB v. Local 810, Teamsters*, 460 F. 2d 1, 68 LC ¶ 12,697 (CA-2, 1972).

court asked to do so would demur on the issue of sovereignty. American minimum wage laws are not binding on General Motors in its Australian plants or Ford's of Europe; the standards of the Occupational Health and Safety Act do not apply to International Paper's Canadian operations; Magnavox pays no American social security taxes on its Japanese payroll. If multinationals are to be bound by American labor law to the slightest degree in their foreign operations, even to the extent of recognizing a multinational as a single employer for the purposes of the Section 8(b)(4) secondary action ban, then all American labor law would arguably be applicable.

If an American labor board or court were to take cognizance of a strike over hours in France and cite it as justification for letting American workers strike when no dispute over mandatory subjects exists in the American unit, the corporation suffering the strike would be in a terrible spot, unsure of which nation's law applies to which of its policies and operations. Without a body of international labor law on wages, hours, collective bargaining, and strikes, there is no foreseeable jurisdictional basis for an American court to make a single employer determination in the case of foreign and domestic operations of multinationals.

It follows that in matters of solidarity strikes and boycotts, American unions which attempt to participate may be hauled into court and enjoined under Section 8(b)(4). The unions, arguing that they were joining in primary action, would be told that unions must have an issue in the unit to strike, and there being no point of contention in the unit regarding wages, hours, and conditions of employment

of the American workers they represent, there are no grounds for a labor dispute. Since, under existing law, the American plants of a multinational are probably the whole corporation with regard to taxes, labor law, social legislation, and safety provisions, the courts would have ample precedent for making such a ruling.

Of course, a union might argue that the overseas strike affects the working conditions of the employees it represents. This contention would be easy to prove if the multinational carried on some sort of integrated production process. For example, if a European assembly plant strike resulted in less hours in a components plant for American workers (or, more to the point, produced American layoffs), the union might strike over that issue and argue that its dispute was indeed with the American employer. But secondary boycott rules cover more than strikes; other forms of pressure, such as picketing and consumer boycotts, are also affected, and these may be very effective forms of solidarity action.

The Supreme Court's 1964 decision approving "product picketing"<sup>15</sup> leaves an opening for this sort of action, but the door would seem to be shut by a 1973 NLRB decision that picketing of the parent company in a labor dispute with a wholly-owned subsidiary is a secondary boycott where the parent company has no active control over the subsidiary's day-to-day operations and labor relations policies.<sup>16</sup> Thus, only highly integrated, centrally managed multinationals would be logical candidates for such parent company strikes. In short, solidarity actions by American unions are only feasible where the relationship with the employer is such that no legal action

<sup>15</sup> *NLRB v. Fruit & Vegetable Packers*, 337 U. S. 58, 49 LC ¶18,898 (S. Ct., 1964).

<sup>16</sup> *Packinghouse Employees Union*, 203 NLRB No. 113, 1973 CCH NLRB ¶25,361.

would be brought against the union for, at present, the union would most likely be enjoined from continuing its action if it were brought to court.

### **Tactics for Worldwide Bargaining: Information Exchange**

Although information exchange between unions is unhampered by labor relations law in America, the legal framework does relate to the means by which unions may obtain financial information about multinationals. Because the NLRB and the courts have held the refusal to supply relevant information as an unfair labor practice on the part of employers, the negotiation process in America might become a source of information valuable on an international exchange level. Also, since employers are obligated to meet with representatives of the employees' choosing for purposes of collective bargaining, proposals that observers from foreign unions take part in the bargaining sessions in America confront no legal obstacles.

Of course, the definition of what information is indeed relevant for purposes of collective bargaining and thus lawfully obtainable by the union is central to the value of this tactic. If unions can compel the production of detailed information on the multinational's international operations, they can provide valuable input into international information-sharing. The NLRB and the courts have gradually widened the scope of information that employers must give to unions in order to avoid refusal to bargain charges. A brief review of 20 years' worth of

widening illustrates the possible directions this process may take.

In 1954, the NLRB ruled that an employer's burden of providing information was met by providing a current financial statement and a summary of his operations and business prospects. The NLRB denied a union's request in this case for information on the employer's outside investments.<sup>17</sup> In 1955, the Fifth Circuit Court widened the scope of obtainable information to include specific wage data on unit employees.<sup>18</sup> In 1956, the Supreme Court held that the NLRB could require employers to substantiate claims that they were unable to pay for union demands if such claims were made in bargaining. Substantiation would include the production of financial records.<sup>19</sup>

In 1958, the Seventh Circuit Court expanded this duty to provide information to relevant financial information concerning contract administration between negotiations. Unions had to demonstrate the relevance of requested information, however.<sup>20</sup>

In 1963, the NLRB held that an employer had to open his books to the union if he claimed that a proposed settlement would put him out of business and the union demanded proof.<sup>21</sup> Also, in the same year the Board held that in some circumstances data on employees not in the unit was relevant to the union's legitimate bargaining needs.<sup>22</sup> The Third Circuit Court affirmed this NLRB principle in 1965, when it required a company to furnish information on administrative employees not in the unit.<sup>23</sup> Taking its cue from

<sup>17</sup> *McLean-Arkansas Lumber Co.*, 109 NLRB 1022 (1954).

<sup>18</sup> *NLRB v. Item Company*, 220 F. 2d 956, 27 LC ¶ 69,103 (CA-5, 1955).

<sup>19</sup> *NLRB v. Truitt Mfg. Co.*, 351 U. S. 149, 30 LC ¶ 69,932 (S. Ct., 1956).

<sup>20</sup> *J. I. Case Co. v. NLRB*, 253 F. 2d 149, 34 LC ¶ 71,360 (CA-7, 1958).

<sup>21</sup> *Taylor Foundry Corp.*, 141 NLRB 765, 1963 CCH NLRB ¶ 12,200.

<sup>22</sup> *Hollywood Brands*, 142 NLRB 304, 1963 CCH NLRB ¶ 12,278.

<sup>23</sup> *Curtiss-Wright Corp. v. NLRB*, 347 F. 2d 61, 51 LC ¶ 19,768 (CA-3, 1965).



the court, the NLRB went further in 1966, saying that data "as to salaries and fringe benefits in comparable jobs (in nonunit plants) would be relevant to the Union in framing contract proposals covering employees within the unit."<sup>24</sup>

Up to this time, the NLRB had required employers to prove inability to pay and to substantiate claims of potential bankruptcy by providing relevant financial data to unions. In 1966, the Ninth Circuit Court approved the Board's further requirement that employers substantiate claims that giving in to the union would damage their competitiveness.<sup>25</sup> The same court broadened disclosure the next year, holding that the employer could be required to provide the union with management salary data if it raised an ability to pay argument in bargaining.<sup>26</sup> When the employer's cryptic data proved unhelpful to the union in that case, the NLRB went to court again, and the Ninth Circuit Court held later that year that explanations were in order, as "reasonably relevant" to enabling the union to perform its duties as a bargaining agent intelligently.<sup>27</sup>

The NLRB finally went all the way with the substantiation issue in 1967. Supporting the NLRB's claim that a union can demand verification of virtually any management claim in negotiations, the Third Circuit Court stated: "Good-faith bargaining requires that relevant factual statements made during the course of . . . bargaining be supported, on request, by available proof

as to their accuracy."<sup>28</sup> At the same time, however, the Fourth Circuit Court upheld the NLRB's decision in another case that the employer must make an assertion (at least on the ability to pay argument) if the union were automatically to get the data. If the employer made no such claim, the union sustained a severe burden of showing the relevancy of data to its bargaining needs.<sup>29</sup>

In 1969, the Sixth Circuit Court upheld an NLRB ruling that an employer had to provide the union with data on recently-transferred nonunit employees so that the union could determine whether the employer was eroding unit work by moving it outside the unit. Significantly, the court and the Board held that the preservation of unit work is a mandatory subject for bargaining.<sup>30</sup>

To an employers' association claim that it did not have to furnish the union with data that the union could collect on its own, the Board replied in 1970 that "a union's right to wage information from an employer is not affected by the fact that it might obtain such information elsewhere." The employers' association had argued that the union could get the requested wage data directly from its members.<sup>31</sup>

The Board held in 1971 that an employer had to supply information on wages and conditions at a new plant where it had relocated work previously done in the unit.<sup>32</sup> Also in that year, the Board held that an employer need

<sup>24</sup> *Goodyear Aerospace Corp.*, 157 NLRB No. 45, 1966 CCH NLRB ¶ 20,247.

<sup>25</sup> *NLRB v. Western Wirebound Box Co.*, 356 F. 2d 88, 53 LC ¶ 11,006 (CA-9, 1966).

<sup>26</sup> *Metlox Mfg. Co. v. NLRB*, 378 F. 2d 728, 54 LC ¶ 11,719 (CA-9, 1967).

<sup>27</sup> *Metlox Mfg. Co. v. NLRB*, 56 LC ¶ 12,416 (S. Ct., 1968).

<sup>28</sup> *International Telephone and Telegraph v. NLRB*, 382 F. 2d 366, 56 LC ¶ 12,101 (CA-3, 1967).

<sup>29</sup> *Furniture Workers v. NLRB*, 388 F. 2d 880, 57 LC ¶ 12,462 (CA-4, 1967).

<sup>30</sup> *NLRB v. Rockwell-Standard Corp.*, 410 F. 2d 953, 60 LC ¶ 10,124 (CA-6, 1969).

<sup>31</sup> *Building Construction Employers Association*, 185 NLRB No. 8, 1970 CCH NLRB ¶ 22,233.

<sup>32</sup> *Royal Norton Mfg. Co.*, 189 NLRB No. 71, 1971 CCH NLRB ¶ 22,891.



not claim inability to pay for the union to receive financial data; if other circumstances indicated that ability to pay was an unspoken issue, the union could request the data.<sup>33</sup>

Thus, the union's "burden of relevance" seems to have lightened considerably over the years. In 1954, unions had to establish that any data on employees less public than an annual financial statement was reasonably necessary to its performance of statutory bargaining functions to obtain the information, and could not request information on the employer's outside investments. In 1972, the Board was ordering the release of information on nonunit employees on the basis of a union's belief that it was potentially relevant to the issue of eroding unit work. In 1973, the Board went even further, holding that an employer must release information on his financial condition so that the union could knowledgeably attack the employer's allegedly economically-motivated decision to transfer unit work from one plant to another.<sup>34</sup>

If this review of union access to financial information indicates anything, it is that unions have developed the legal ability to extract almost any information faintly relevant to bargaining from employers through legal action abetted by the NLRB. It is therefore surprising that a trial balloon on international data sent aloft by the I. U. E. in 1969 was quickly shot down by the NLRB. The I. U. E. proposed the following contract clause to General Electric in its negotiations.

"The Company shall not transfer or relocate any of its operations covered by this agreement to a foreign country, nor shall it establish any plant

or facility in any country to perform any of the operations customarily performed by employees covered by this contract."<sup>35</sup>

This clause is presumably a mandatory subject of bargaining, given the NLRB's rulings on the erosion of unit work. One would consequently expect that the NLRB would honor the union's request for information on the location of GE's foreign plants, the identification of overseas plants doing work similar to that done in American plants, financial data on those plants, and plans to transfer or relocate overseas work that would be covered by the clause. All of this information, with the possible exception of the financial data, would be presumptively relevant to negotiations on the clause. But the union's request, contested by GE, was stopped short at the Regional Director level as "not presumptively relevant." When the union appealed this decision, General Counsel Arnold Ordman backed up his Regional Director's decision.

"With respect to the alleged refusal to supply information regarding foreign operations, such information under the circumstances was not deemed presumptively relevant and there was no clear showing that the information was necessary to bargain over the proposed contract provision to broadly prohibit the transfer of unit work to overseas locations. Moreover, the evidence failed to establish that the Company was in fact carrying out such transfers."<sup>36</sup>

This statement immediately prompts two questions. Under what circumstances would such information be relevant? Certainly, a clause worded as above could not be incorporated into the collective bargaining agreement

<sup>33</sup> *Palomar Corporation*, 192 NLRB No. 98, 1971 CCH NLRB ¶ 23,352.

<sup>34</sup> *American Needle and Novelty Co.*, 206 NLRB No. 61, CCH NLRB ¶ 25,869.

<sup>35</sup> Duane Kujawa, "Foreign Sourcing Decisions and the Duty to Bargain Under the NLRA," *American Labor and the Multinational Corporation*, at 256-257.

<sup>36</sup> *Ibid.*

without some mutual stipulations as to existing facilities engaged in work of the type to be covered by the clause, and at least nonfinancial data on such facilities is clearly related to the ensuing negotiations. Secondly, how could the union prove that such transfers were taking place without the requested data? Only by comparing American and foreign output relative to American markets could the union demonstrate whether work destined for United States markets and formerly produced in American plants had been shifted to foreign plants.

Reading between the lines of Ordman's statement, one might conclude that the NLRB was reluctant in 1969 to get into an international field where its jurisdiction was doubtful. GE could have argued that its overseas subsidiaries were autonomous corporations chartered in foreign sovereign states, beyond the jurisdiction of American law, and GE would probably be correct in making such an argument, given the current void in international labor law. The single employer/separate-employer issue thus intrudes even here; just as the NLRB would not compel Westinghouse to supply the I. U. E. with data it had obtained from GE, so it would not try to compel GE in America to supply data from GE elsewhere. Overseas operations were inviolate, secure behind the fictional shield of the separate corporation, and the I. U. E. was denied information that, on its face, appears relevant to a mandatory subject of bargaining, the erosion of unit work.

Of course, the NLRB has widened its definition of relevance since 1969. But that widening seems to have stopped short of requiring the sort of disclosure sought by the I. U. E. in its dealings with GE. Since the passage of Landrum-Griffin in 1959, the union's financial affairs and processes have

been substantially an open book, a matter of public record. But corporations, by consolidating their international financial statements, can hide that information which is most relevant to individual unions when they file their annual statements with the Securities and Exchange Commission and the stock exchanges or publish their annual shareholder reports.

Collective bargaining on mandatory subjects such as unit work transfer may be the only legitimate device for unions to obtain such information, not only for themselves but for those overseas unions which may not have in their countries the legal framework within which such information may be legally extracted. If there is any area in which the legal fictions surrounding multinationals are likely to fall on arguments of equity, it is the area of disclosure of information, and the trend of NLRB decisions, combined with the timeliness of the disclosure issue in many related fields of government and finance, makes it likely that this is where the first crack in the shield may occur, despite the I. U. E. case.

## Conclusions

Of the suggested tactics for coordinated bargaining by national unions with multinational corporations, we have considered the legal problems involved in three types of participation by American unions: the quest for common expiration dates, the support of foreign unions through strikes and boycotts, and the extraction of information in negotiations. In the case of expiration dates, we have seen that American union participation is possible but limited by tactics the employer might take to render union action illegally secondary.

In the case of strikes and boycotts, we have seen that unless unions can

persuade the NLRB and the courts to ignore national boundary lines and declare multinationals single employers such actions would be most likely prohibited by the secondary action bans in American law. We have seen also that, while unions can demand much in the way of information disclosure during bargaining sessions, they have not yet pierced the legal shield protecting the foreign interests of American corporations from revelation. Indeed, in the case of a multinational with American operations but a foreign home base, one imagines that the NLRB would be even more reluctant to compel the surrendering of foreign information on operations and labor policies.

The legal machinery mandating collective bargaining in America may in the end prove useless to American unions who wish to participate fully in internationally-coordinated bargaining. If such should prove to be the case, American unions may have to rely upon the same voluntarist economic resources with which they organized the skilled trades prior to the 1935 Wagner Act to gain a share in international bargaining with multinationals. Alternatively, of course, there is the possibility that some world body, perhaps the United Nations, might establish a legal framework for such labor relations, but it is a possibility that is not even faintly foreseeable at present. [The End]

### **PRESIDENT SIGNS OSHA APPROPRIATION**

On December 7, the President signed a bill appropriating \$102,006,000 for OSHA for fiscal 1975. The bill provides that citations for recordkeeping violations may not be issued to employers with fewer than 11 employees. This expands the recordkeeping exemption from the present level of seven or fewer employees until June 30, 1975, when the appropriation ends.

The OSHA funds were contained in the fiscal 1975 appropriations bill for the Departments of Labor and Health, Education and Welfare. The measure also contained nearly \$32 million for NIOSH for the fiscal year which began last July 1.

The final version of the bill dropped an amendment passed earlier by the House to exempt from OSHA inspections employers with 25 or fewer employees. During a House-Senate conference to work out differences between the versions passed by both chambers, the ban on inspections of small employers was dropped and the increase in the recordkeeping exemption was added. The final version of the bill contained funds for 1,100 OSHA compliance officers.

Final Congressional action occurred when the House adopted the report of the conference committee by a 352-25 vote and the House adopted it on a 68-17 roll call.