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COMMENT

Unions' Right to Information About Occupational Health Hazards Under the National Labor Relations Act*

Michelle C. Mentzer†

Recent union efforts to gain disclosure of the identity of workplace chemicals under the NLRA section 8(a)(5) duty to supply information have been met with a number of employer defenses, including trade secrecy. After a critical analysis of a trilogy of recent Board opinions in this area, the author proposes first, that health hazard information be considered presumptively relevant to unions' representational functions; and second, that employers be required thoroughly to substantiate claims of trade secrecy before unions are required to bargain over methods of disclosure to protect that secrecy. The identity of chemicals to which workers are exposed should always be obtainable in some manner or another.

I

INTRODUCTION

A. The Importance of Being Informed

The issue of workers' right to know about occupational health hazards has received much legislative1 and administrative2 attention in

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* The author wishes to thank Professor Jan Vetter and Larry Drapkin for their advice and assistance in the preparation of this comment.
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1. At least seven state legislatures have passed some form of worker right-to-know law since 1980: California, CAL. LAB. CODE §§ 6360-6399.9 (West 1982); Connecticut, CONN. GEN. STAT. ANN. § 31-40c (West 1972); Maine, ME. REV. STAT. ANN. tit. 26, § 1701-1707 (1974); Michigan, MICH. COM. LAWS ANN. § 408.1011 (1967); New York, N.Y. LAB. LAW § 875-883 (McKinney 1977); West Virginia, W. VA. CODE § 21-3-18 (1982); Wisconsin, WIS. STAT. ANN. § 101.58 (West 1973). Other state and municipal governments have considered or are considering the enactment of worker right-to-know legislation.
recent years, and is currently being explored within the framework of collective bargaining under the National Labor Relations Act (NLRA). This comment focuses on recent union efforts to bring health and safety information within the terms of the section 8(a)(5) duty to bargain in good faith—specifically, the duty to supply information.

The right to know about occupational health risks has become a major point of concern for several reasons. Access to information is crucial, first, because health hazards are frequently invisible. Many toxic substances have no sensory characteristics signalling their lethal effects, and diseases resulting from exposure often carry no immediate symptoms and have long latency periods. Moreover, many occupational diseases create clinical symptoms indistinguishable from the ordinary diseases of life, making it difficult for a physician to recognize and effectively treat them. While some diseases have been linked to specific occupational exposures, many more are not recognized as such, since a lack of knowledge of what substances workers are exposed to makes it difficult to discover cause-effect relationships.

Personal autonomy—the worker's interest in making free and informed decisions in an area of vital personal concern—provides a second reason for informing workers about the inherent risks of their

4. Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1976), provides:
   
   It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . .

Section 8(d), 29 U.S.C. 158(d) (1976), provides:

   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 . . .


8. Among the most well-recognized cases of occupational disease are asbestosis and the lung cancer mesothelioma resulting from inhalation of asbestos fibers; the liver cancer angiosarcoma from exposure to vinyl chloride; pneumoconiosis (black lung) from inhalation of coal dust; the lung disease silicosis from inhalation of silica dust; and byssinosis (brown lung) from inhalation of cotton dust. See Ashford, supra note 5, at 75-80.

jobs. Without full knowledge of these risks, workers cannot be said to have accepted them voluntarily or to have knowingly undertaken them in exchange for higher compensation. Furthermore, workers may fail to follow precautionary measures if they are unaware of the magnitude of the risk involved in exposure.

The absence of knowledge about risks also creates an economic unfairness to the worker and his or her family who, under the current workers’ compensation system, carry most of the economic burden of occupational disease. The U.S. Department of Labor estimates that only five percent of employees severely disabled by occupational disease receive workers’ compensation, and those who do receive only about one-eighth of their lost wages. Of course, workers’ compensation provides no recompense for the intangible costs of pain, suffering and a shortened life.

This economic unfairness to the worker means that the employers do not bear the full social costs, or externalities, of their activities. They have correspondingly little economic incentive to reduce health risks and a positive incentive to prevent the release of information that would show that an injury was job-related. On the other hand, where risks are known to workers, the exaction of extra compensation for facing those risks creates an incentive for employers to make expenditures to abate them.

Finally, the lack of exposure information makes it difficult for collective bargaining representatives to bargain intelligently about health and safety issues—to make demands in this area or to trade them off.

11. Id. at 1801-02.
13. Some reasons for the undercompensation of this system include: the difficulty of recognizing and reporting a disease as occupationally caused; the legal problems of proving causation even where it is statistically well-established; and generally low awards under workers’ compensation statutes. See Ashford, supra note 5, at 411-16; D. Berman, Death on the Job 67-69 (1978).
14. DOL INTERIM REPORT, supra note 6, at 3-4 (1980).
15. See, e.g., N.Y. WORK. COMP. LAW § 14 (McKinney 1965); CAL. LAB. CODE §§ 4451-4855 (West 1971); ILL. ANN. STAT. ch. 48, §§ 172.42-.43 (Smith-Hurd 1969).
16. See Ashford, supra note 5, at 408, 417.
17. Yale Note, supra note 10, at 1802, citing recent studies finding that where workers are aware of the risks of their jobs, market forces do lead to higher wages in risky professions. The studies cited are Nichols & Zeckhauser, Government Comes to the Workplace: An Assessment of OSHA, PUB. INTEREST, Fall 1977, at 43; M. Bailey, Reducing Risks to Life 35-47 (1980); R. Smith, The Occupational Safety and Health Act 28-30 (1976).

Together with economists, courts have long spoken of a connection between risks and wages. See Farwell v. Boston & W. R.R. Co., 45 Mass. (6 Met.) 49, 57 (1842) (a servant “takes upon himself the nature and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly”).
for other benefits. Unions cannot assess the adequacy of an employer’s preventive measures without knowing the nature of the substances to which employees are exposed.

B. Protection versus Empowerment

Problems of the workplace have traditionally been approached in one of two ways. The Fair Labor Standards Act of 1938 is an example of legislation designed to protect the worker: it forbids certain employment practices (e.g., child labor) and sets minimum standards of conduct for employers (e.g., minimum wages and maximum hours). The National Labor Relations Act of 1935, on the other hand, was designed to empower workers by creating a set of legal rights to better enable them to negotiate collectively for their own terms and conditions of employment.

The problem of health and safety in the workplace has been approached in both of these ways. Under the empowerment approach of the NLRA, health and safety are considered “conditions of employment” and thus they constitute a mandatory subject of bargaining. The Occupational Safety and Health Act, on the other hand, is primarily protective in nature. Workers are protected from occupational hazards by the Act’s general duty clause and by specific exposure and administrative standards. The Act also contains some elements of the empowerment approach: workers may demand inspections and participate in both inspections and enforcement proceedings.

The Occupational Safety and Health Administration (OSHA) has expressed the view that Congress considered worker safety and health to be “too important to be resolved solely by the interplay of private economic forces and the rules established for economic warfare.” The object of the NLRA, says OSHA, is to assure a fair bargaining process,

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18. See also infra text accompanying notes 77-78, 87-90.
19. Id.
27. Section 8(e), 29 U.S.C. § 657(e) (1976).
not necessarily to assure safe and healthful working conditions. OSHA sees its protection approach as being complementary to the NLRA's empowerment approach in that the OSHA rules put a "solid foundation" under the process of collective bargaining over safety and health issues.

The solidity of this foundation has recently come into question with the sharp drop in enforcement of OSHA standards, the conceded inability of the rulemaking process to keep pace with the number of known and new toxic substances being introduced into the workplace each year, and the proposed relaxation of a number of OSHA standards. As the government's resources and commitment to enforcement diminish and the regulatory process becomes politically vulnerable, empowerment becomes the more attractive avenue for the promotion of health and safety. The less workers can trust public regulation to protect them against occupational hazards, the more need there is to gain information about these hazards in the private arena of collective bargaining.

This comment explores recent union efforts to gain disclosure of

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<th>Serious</th>
<th>Willful</th>
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<tr>
<td>FY 1980</td>
<td>44,284</td>
<td>1,114</td>
<td>3,484</td>
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<tr>
<td>FY 1981</td>
<td>32,239</td>
<td>531</td>
<td>2,185</td>
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<tr>
<td>FY 1982</td>
<td>25,003</td>
<td>153</td>
<td>1,396</td>
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<td>(projection based on citations for first 8 months of FY 1982)</td>
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30. Id
31. Id
32. OSHA Federal Compliance Activity Reports for Fiscal Years 1980, 1981 and 1982 show a precipitous decline in the number of citations issued for serious, willful and repeat violations (reports are available from the OSHA Office of Information and Consumer Affairs, Washington, D.C.):

33. The National Institute for Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances listed 45,156 toxic substances as of January 1981. About 1,500 new substances are added to the Registry each quarter. OSHA has adopted industry consensus standards for approximately 400 toxic substances, but promulgated only 24 regulations from 1971 to 1980 and no new carcinogenic substance standards since that time. The rulemaking process has been slow and extremely cumbersome. OSHA concedes that it has resources "for the comprehensive regulation in the foreseeable future of only a very small percentage of the toxic chemicals found in the workplace." 45 Fed. Reg. 35,212, 35,258 (1980). OSHA has also stated that "the dedication of OSHA's health standards staff to [reviewing standards with a view to reducing unnecessary burdens] will occupy the full time and energies of the staff for at least two years."


35. See L. Bacow, BARGAINING FOR JOB SAFETY AND HEALTH 56-58 (1980).
health hazard information under section 8(a)(5) of the National Labor Relations Act—the duty to bargain in good faith—which entails a duty to supply information relevant to the bargaining process. The comment argues that while recent National Labor Relations Board (Board) decisions have correctly rejected most employer defenses to disclosure of this information, the Board has not given adequate guidance to the parties in ordering them to negotiate about the disclosure of claimed trade secret chemical identities.

II

DISCLOSURE OF HEALTH HAZARD INFORMATION UNDER SECTION 8(a)(5) OF THE NLRA

A. Development of the Duty to Supply Information

As early as 1936, the Board stated that the communication of facts peculiarly within the knowledge of either party was part of the duty to bargain in good faith. The Supreme Court first recognized the duty to supply information in the 1955 case of NLRB v. Truitt Manufacturing Co., in the context of an employer's failure to substantiate its claim of financial inability to pay increased wages. Since the early decisions on this subject, the types of information recognized as relevant have expanded to include: wage data; industry wage surveys; merit and bonus program data; time study data; insurance, pension and health plan information; job classifications and job descriptions; data on overtime hours; employee names and addresses; layoff informa-

45. See Prudential Ins. Co. v. NLRB, 412 F.2d 77 (2d Cir. 1969).
UNIONS' RIGHT TO INFORMATION

46 seniority lists, 47 probation policies, 48 training data, 50 and equal employment opportunity data. 51 Information on employees and others outside of the bargaining unit may sometimes be relevant, 52 and the union may be permitted to validate company studies under some circumstances by doing its own in-plant study. 53 The duty to supply information pertains not only to the period of contract negotiations, but continues during the term of the agreement for purposes of administering and policing the current contract and preparing for future negotiations. 54

Employers have often refused to furnish relevant data on the grounds that it is confidential, but the Board and courts have not generally sustained this defense. 55 Where it has been sustained, the employer has demonstrated an interest in confidentiality that was thought to outweigh the union's interest in gaining access to the information. 56

In 1979, the Supreme Court faced the issue of confidentiality in Detroit Edison Co. v. NLRB. 57 In that case, 58 the union requested copies of a personnel aptitude test and the answer sheets of ten employees who had failed to gain promotion on the basis of the test. Those ten subsequently filed grievances. The union sought this information in order properly to pursue the grievances. During the course of arbitra-

46. See Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983 (1st Cir. 1966).
47. See NLRB v. Gulf Atl. Warehouse Co., 291 F.2d 475 (5th Cir. 1961).
49. See Texaco, Inc. v. NLRB, 407 F.2d 754 (7th Cir. 1969).
53. See Fafnir Bearing Co. v. NLRB, 362 F.2d 716 (2d Cir. 1966); Winn-Dixie Stores, 224 N.L.R.B. 1418, 92 L.R.R.M. (BNA) 1625 (1976), modified on other grounds, 567 F.2d 1343 (5th Cir. 1978).
56. See Kroger Co. v. NLRB, 399 F.2d 455 (6th Cir. 1968) (union's request for operating ratio data would have exposed non-relevant matters such as advertising, purchasing, pricing and capital outlay); United Aircraft Corp., 192 N.L.R.B. 382, 77 L.R.R.M. (BNA) 1785 (1971), modified on other grounds, 534 F.2d 422 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976) (confidentiality of employee medical records honored unless and until that individual's physical capacities become relevant to some particular problem); American Cyanamid Co., 129 N.L.R.B. 683, 47 L.R.R.M. (BNA) 1039 (1960) (company's offer of in-plant-only use of documents fulfilled its duty to bargain in good faith where requested job evaluation sheets contained confidential information on manufacturing techniques and processes).
57. 440 U.S. 301 (1979).
58. The facts of Detroit Edison are set out id. at 303-12.
tion, the company made available some sample questions and raw scores with names deleted. But it contended first, that the actual test questions were a valuable tool, developed at substantial cost, whose value would be lost if not kept secret; and second, that employee confidentiality would be breached if names were disclosed in conjunction with test scores. The union refused the company’s offer to disclose the name and score of any employee from whom the union obtained consent.

The Administrative Law Judge (ALJ) ordered direct disclosure of employee names together with their scores, but disclosure of the test questions and answers only to an outside psychologist working as an intermediate agent between the company and the union.59 This latter condition was rejected by the Board, which reasoned that the use restrictions in the ALJ’s order would be sufficient to protect test secrecy.60 The Court of Appeals for the Sixth Circuit enforced the Board’s order without modification.61

The Supreme Court treated the two confidentiality claims separately. As to the secrecy of the test itself, the Court held that the Board’s protective use restrictions were not enough to insure confidentiality where, because of the procedural posture of the case,62 no effective sanctions were available in the event of violation.63 On the employee confidentiality issue, six justices held that "the Union’s need

59. Id at 309-10.
60. Detroit Edison Co., 218 N.L.R.B. 1024, 89 L.R.R.M. (BNA) 1515 (1975). Under the ALJ’s restrictions the union was given the right to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests or otherwise use them for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests.

440 U.S. at 311 n.9. After the conclusion of the arbitration, the union was required to return all copies of the test to the company. Id. at 311.
62. [T]here is substantial doubt whether the Union would be subject to a contempt citation were it to ignore the restrictions. It was not a party to the enforcement proceeding in the Court of Appeals, and the scope of an enforcement order under § 10(e) is limited by Fed. Rule Civ. Pro. 65(d) making an injunction binding only “upon the parties to the action . . . and upon those persons in active concert or participation with them. . . .” The Union, of course, did participate actively in the Board proceedings, but it is debatable whether that would be enough to satisfy the requirement of the Rule. Further, the Board’s regulations contemplate a contempt sanction only against a respondent, and the initiation of contempt proceedings is entirely within the discretion of the Board’s General Counsel. Effective sanctions at the Board level are similarly problematic. To be sure, the Board’s General Counsel could theoretically bring a separate unfair labor practice charge against the Union, but he could also in his unreviewable discretion refuse to issue such a complaint. Moreover, the Union clearly would not be accountable in either contempt or unfair labor practice proceedings for the most realistic vice inherent in the Board’s remedy—the danger of inadvertent leaks.

440 U.S. at 315-16 (citations omitted; ellipses in original).
63. Id. at 311-17. The Court divided five to four on this point.
for the information was not sufficiently weighty to require breach of the promise of confidentiality to the examinee..."64 After balancing the interests of the parties in this fashion, the Court held that the company's offer of conditional disclosure had satisfied its statutory obligations under section 8(a)(5).65

In three cases decided together in 1982—Minnesota Mining & Manufacturing Co.,66 Colgate-Palmolive Co.,67 and Borden Chemical Co.68—the Board had the opportunity to consider Detroit Edison's bearing on a union bargaining request for workplace chemical data. The cases held that Detroit Edison clearly required the Board to "balance a union's need for [assertedly confidential] information against any 'legitimate and substantial' confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information."69

B. Factual Background of Minnesota Mining70

In 1977, in response to the discovery of sterility among union members working with the pesticide dibromo chloropropane (DBCP) at an Occidental Chemical plant in California, the Oil, Chemical & Atomic Workers (OCAW) initiated a campaign to gain disclosure of hazard information at many of its organized plants.71 The International Union sent 560 locals a form letter requesting company disclosure. One hundred ten of the locals72 chose to send the letter on their own stationery to their company representatives. More than half of the 110 companies furnished the information in some form or another.73

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64. Id. at 317.
65. Id.
70. The three cases which are the focus of this comment, Minnesota Mining, Colgate-Palmolive and Borden Chemical, were issued simultaneously by the Board. Since the Board treated Minnesota Mining as the lead case, it alone is discussed where the issue under discussion is common to all three cases. Similarly, the parties to the three cases are referred to in the singular as "union" and "company." Where it is necessary to differentiate individual cases, companies or unions, they are referred to by name.
71. Colgate-Palmolive Co., No. JD-(SF)-61-79, slip op. at 2 (March 27, 1979) (Board ALJ decision) [hereinafter cited as Colgate-Palmolive (ALJ)].
72. According to a union official, the low response rate was due to a number of factors, including local union autonomy; fear of confronting the company on this issue; prior possession of the information; and varying levels of awareness about the existence of health hazards in the plant. Interview with Steven Wodka, former OCAW Health and Safety Representative (Denver), June 16, 1982.
73. Colgate-Palmolive, 261 N.L.R.B. No. 7, slip op. at 5 n.6, 109 L.R.R.M. (BNA) at 1354 n.6.
OCAW filed section 8(a)(5) charges against two of the companies that had refused—the Minnesota Mining & Manufacturing Co. and Colgate-Palmolive Co.

The letter requested the following data:74

1. morbidity and mortality statistics on all past and present employees;
2. the generic name (chemical name, as opposed to trade name or code number) of all substances used and produced at the plant;
3. results of clinical and laboratory studies of any employee undertaken by the company, including the results of toxicological investigations regarding agents to which employees may be exposed;
4. certain health information derived from insurance programs covering employees, as well as information concerning occupational illness and accident data related to workers' compensation claims;
5. a listing of contaminants monitored by the company, along with a sample protocol;
6. a description of the company's hearing conservation program, including noise level surveys;
7. radiation sources in the plant, and a listing of radiation incidents requiring notification of state and federal agencies; and
8. an indication of plant work areas which exceed proposed National Institute for Occupational Health heat standards and an outline of the company's control program to prevent heat disease.

The Borden Chemical case arose out of a narrower request from the International Chemical Workers Union (ICW), which had been in contact with OCAW about the initiative.75 In that case, the International's Vice President made a written request for a list of "all materials and chemicals" which union members handled by trade or code names as well as by generic names.76 The ICW request was limited to item (2) of the OCAW request.

C. The Companies' Defenses Considered

1. Relevance of the Requested Information

In passing on the 8(a)(5) charges, the Board agreed with the unions, the General Counsel, and the ALJs that the requested health and safety data was relevant to the unions' performance of their statutory obligations as bargaining agents, since "health and safety are terms and conditions of employment regarding which an employer is obligated to

74. As summarized by the Board. Minnesota Mining, 261 N.L.R.B. No. 7, slip op. at 3, 109 L.R.R.M. (BNA) at 1346. Full text of the OCAW letter is set out in Minnesota Mining & Mfg. Co., No. JD-124-79, slip op. at 8-10 (March 13, 1979) (Board ALJ decision) [hereinafter cited as Minnesota Mining (ALJ)]; Colgate-Palmolive (ALJ), supra note 71, slip op. at 3-4.

75. Interview with Steven Wodka, supra note 72.

76. Borden Chemical, No. JD-(SF)-87-79, slip op. at 7 (Apr. 25, 1979) [hereinafter cited as Borden Chemical (ALJ)].
bargain upon request." The Board reasoned further that "Local 6-418 can hardly be expected to bargain effectively regarding health and safety matters if it, unlike Respondent, knows neither those substances to which the unit employees are exposed nor previously identified health problems resulting therefrom."78

2. Trade Secrets

The Board then turned to the company's trade secrets defense and the recent Supreme Court ruling in Detroit Edison, that union interests in arguably relevant information do not necessarily predominate over all other interests, however legitimate.79 The Board rejected the company's blanket assertion that its entire inventory of raw materials and products was confidential in nature. Instead, the Board entertained the confidentiality claim only for the handful of chemicals whose very identity conveyed valuable proprietary information.80

However, the Board refrained from passing on this claim and also from engaging in the balancing of union and company rights discussed in Detroit Edison. Recognizing instead that because of the company's prior blanket refusal the parties had not yet had an opportunity to negotiate, the Board ordered the parties to bargain in good faith regarding conditions under which the needed information may be furnished to the union with appropriate safeguards protective of the company's legitimate proprietary interests.81 The Board acknowledged that its deferral of the issue might prove only temporary:

[If] the Union and Respondent are unable to reach agreement on a method whereby their respective interests would be satisfactorily protected, these parties may be before us again . . . . If necessary, we shall undertake the task of balancing . . . in accordance with the principles set forth in the Supreme Court's Detroit Edison decision.82

3. The Union's Need to Know

The Board's holdings implicitly disposed of other company defenses,83 including one of some significance. Borden raised a defense to

79. Detroit Edison, 440 U.S. at 318.
83. Id. These defenses included: burdensomeness of the request, Minnesota Mining (ALJ), supra note 74, slip op. at 15; waiver by contract, id. at 17; failure to pursue contractual remedies, Borden Chemical (ALJ), supra note 76, slip op. at 23; existence of alternative sources of informa-
the "relevance" of the requested information. It argued that the raw data, standing alone, would not enable the union to focus on the matter of prime concern—the adequacy of the company's protective measures.84 Borden contended that the union did not "need to know" the list of chemicals for four reasons: (1) the chemical list per se would not facilitate criticism or evaluation of the company's protective measures; (2) the company's professionally qualified personnel had already determined the toxic properties of the substances in the plant and had developed protective measures and shared this knowledge with the employees; (3) the union's contract negotiators had, heretofore, conducted numerous, wide-ranging and productive negotiations concerning health and safety without a complete raw materials and chemicals list; and (4) the company's current prophylactic measures met specified OSHA requirements as well as those of other government agencies.85

The ALJ rejected this argument on both legal and policy grounds. First, he noted that the "necessity" for information bears on a determination of its relevance to the union's negotiating function only when the information is not already deemed presumptively relevant. Since plant safety practices constitute "conditions of employment," data concerning them is presumptively relevant, and the union need not demonstrate its precise usefulness to any particular problem or controversy.86

The ALJ also emphasized that the union did, in fact, have a distinct "need to know" the requested information. First, without the data the union could not evaluate the adequacy of the company's protective measures or suggest alternative procedures. The company's stated policy was to consider safety procedures adequate until a "man problem" arose, taking "into account the necessity of having the job done in a most expedient way."87 Since there could be valid differences of opinion on the adequacy of a given safety procedure, the ALJ held that the union needed to know the information in order to bargain over alternative procedures.88

Second, since the company's program focused only on already-known toxicological hazards, the union had a need to know what chemicals its workers were handling in order to facilitate discovery of previously unrecognized hazards:

Neither Respondent's plant workers, nor their collective bargaining representative—within my view—should be required to wait, however,
for some never-previously-recognized hazard's significant manifestation, within Respondent's workforce, before suggesting, urging, or bargaining for new or improved protective measures. Pedestrians need not wait to be hit, before leaping for the curb.\textsuperscript{89}

Third, the ALJ stated that the union should not be required to rely on the correctness or sufficiency of the company's "hazard code" designations or its stated compliance with its contractual commitment to make "all reasonable provision" for worker safety and health: "Respondent's claim, that its protective measures have been—empirically—proven sufficient to preserve workers' health, and promote workplace safety, would have to be taken on faith. . . . Complainant Union cannot be faulted for some unwillingness to rely upon Respondent's conceded "good intentions" merely."\textsuperscript{90}

4. \textit{Fulfillment of the Duty to Bargain}  

Another defense of interest was Colgate's assertion that it had already fulfilled the duty to bargain in its prior negotiations with the union. Colgate contended that it had not unqualifiedly refused to furnish the requested data, but rather had offered to discuss and share information with the union regarding specific situations.\textsuperscript{91} The ALJ dismissed the contention that this offer had fulfilled Colgate's good faith bargaining duty, stating: "The Board . . . has rejected the contention that the right to relevant information is dependent upon the existence of a particular controversy or the processing of a specific grievance."\textsuperscript{92}

5. \textit{Confidentiality of Employee Medical Records}  

A final defense that was raised in \textit{Minnesota Mining} and \textit{Colgate} did receive Board attention. The companies objected to the disclosure of employee medical records on the grounds that they were confidential and private, and therefore should not be released without the employee's consent.\textsuperscript{93} The Board acknowledged the principle of physician-patient confidentiality, but noted that the union desired only aggregate, statistical information, and was willing to accept medical records with personal identifying characteristics deleted.\textsuperscript{94} The Board therefore found that the union's need for the medical information outweighed any minimal intrusion upon employee privacy implicit in the use of aggregate data, and held that the company had violated section

\textsuperscript{89} Id. at 22.

\textsuperscript{90} Id.

\textsuperscript{91} Colgate-Palmolive (ALJ), \textit{supra} note 71, slip op. at 10.

\textsuperscript{92} Id. (citing Westinghouse Elec. Corp., 239 N.L.R.B. 106, 99 L.R.R.M. (BNA) 1482 (1978)).

\textsuperscript{93} Minnesota Mining, 261 N.L.R.B. No. 2, slip op. at 14-15, 109 L.R.R.M. (BNA) at 1349.

\textsuperscript{94} Id.
8(a)(5) by not making the "sanitized" records available to the union.95

The Board's reasoning in Minnesota Mining soon will undergo judicial scrutiny. Petitions for review in all three cases have been consolidated in the D.C. Circuit, and oral argument is expected in the spring of 1983.96

III
ANALYSIS
A. Four Models of Disclosure

In rejecting most of the company's defenses, the Board also rejected the various models of disclosure on which they were based. There is no agreed-upon meaning of "disclosure": information may be supplied in a mediated, conditional manner, or it may be supplied directly. Four models of disclosure were proposed in the Minnesota Mining trilogy. While the Board has opted for direct disclosure of most of the information, it left open the possibility that another model might be appropriate—in light of Detroit Edison—in the case of confidential, proprietary information.

1. Government as Surrogate of the Worker

Manufacturers and employers are required to make their premises and certain records available to OSHA, and on the basis of information gathered here and in the standard-setting process OSHA regulates the exposure level of selected chemicals.97 This process of standard-setting and enforcement has been proposed by representatives of industry as a form of disclosure in which the government receives the information in the worker's stead: "As a surrogate of the individual worker, government agency's technical experts make the decisions (through regulations) to put a limit on exposure. Then, by virtue of the general prohibitions or restrictions, the worker is assured that the exposure will not present a significant harm."98

Borden suggested this approach when it argued that the union did not need to know the requested information, since the company was

95. Id. The ALJ in Minnesota Mining raised the point that the company itself did not observe the confidentiality of employee medical records, but rather made them available to certain management and personnel employees. Minnesota Mining (ALJ), supra note 74, slip op. at 14. See also Brief to the ALJ on Behalf of the General Counsel, Minnesota Mining, at 13, Minnesota Mining, 261 N.L.R.B. No. 2, 109 L.R.R.M. (BNA) 1345 (1982).

96. Oil, Chemical & Atomic Workers v. NLRB, Nos. 82-1418, 82-1419, 82-1420, 82-1589, 82-1743, 82-1940 (D.C. Cir. filed 1982).


complying with all specific requirements of OSHA and other government agencies. Therefore, the only "relevant" information for the union would be "the procedures and practices developed by the company to limit employees' exposure to predetermined and federally-approved safe levels of hazard."

This approach to disclosure is open to a number of criticisms. The standard-setting process has been slow and extremely cumbersome, and has resulted in only a very few exposure standards being set compared with the number of known toxic substances in the workplace. This situation is not likely to change in the foreseeable future. The information that is disclosed to workers about the few chemicals that OSHA does regulate is minimal and underplays the known risks. Furthermore, workers are largely unaware of the presence of these OSHA-regulated chemicals in their workplaces, since the substances and mixtures containing them are identified only by a proliferation of trade names.

This model of disclosure via government as surrogate of the worker is only as adequate as the government's regulation. Given the vulnerability of the regulatory process to changes in political and economic priorities, this model is not an acceptable one. The Board properly rejected it, stating that its holding rested "not upon the obligations imposed by other agencies and statutes [OSHA] but solely upon the bargaining obligations imposed by the National Labor Relations Act."

2. Employer as Filter of Information

The management approach to informing workers about health hazards has traditionally been to filter to employees only that information which the company feels is useful in protecting against unnecessary exposure. Proponents of this approach believe that any more

99. Borden Chemical (ALJ), supra note 76, slip op. at 19.
101. See supra note 33.
102. Id.
103. For instance, the required container label for vinyl chloride, a known human carcinogen, calls it merely a "Cancer-Suspect Agent," 29 C.F.R. § 1910.1017(l)(4) (1982), and the warning on asbestos, also a known human carcinogen, says only that "Breathing Asbestos Dust May Cause Serious Bodily Harm," 29 C.F.R. § 1910.1001(g)(2)(ii) (1982).
104. Yale Note, supra note 10, at 1796 n.27.
105. See supra text accompanying notes 32-35.
107. Under this model, hazard information goes through a filtering process on its way to the affected employee:
technical information would be overwhelming and confusing, and that scientific information is of little help to the worker in following prophylactic procedures.\textsuperscript{108}

Borden urged this approach when it argued that the requested raw data would be "irrelevant and misleading" to union members\textsuperscript{109} and that its own professional staff had already determined the toxic properties of all substances in the plant.\textsuperscript{110} Therefore, "all the employee needed to know were a few simple handling and hygiene practices to assure the maximum health and safety protection."\textsuperscript{111}

Proponents of this information-filtering approach, including OSHA in its recently proposed rule on Hazard Communication,\textsuperscript{112} emphasize that the message to the worker must be simple and easily followed.\textsuperscript{113} Increased awareness of risk, it is believed, may create
confusion and anxiety that do nothing to help workers protect themselves and may in fact be counterproductive.\textsuperscript{114} While there are several forms that a message of this sort might take,\textsuperscript{115} all of them focus on the worker's immediate rather than long-term need for information. The theme of this approach is that the company has done what it must do, and now it is up to the worker to follow instructions and prevent accidental exposure.

This model of information disclosure ignores workers' interest in autonomous decision-making concerning their lives and health.\textsuperscript{116} Furthermore, it is antithetical to the fundamental structure of collective bargaining, where neither party is bound to rely on the other to protect its own interests. Disclosure of this sort focuses solely on immediate precautions which, while crucial, constitute only one of the possible goals of disclosure. Such a model cuts off unions' use of hazard information to promote the discovery of previously unrecognized cause-effect relationships between exposure and illness. It is therefore an unsatisfactory approach to disclosure and was properly rejected by the Board.

3. \textit{Use of Professionals as Intermediaries}

Another model of information disclosure involves the use of physicians, industrial hygienists or other health professionals as intermediaries between management and workers. This is conceived of as a way to limit disclosure of sensitive, proprietary information to disinterested persons who are bound by professional ethics not to disclose it. The recently proposed OSHA Rule on Hazard Communication employs this model of disclosure where trade secret information is

\begin{center}
\begin{tabular}{ccc}
Precautionary Steps & Precautionary Steps & Precautionary Steps \\
\textit{+} & \textit{+} & \textit{+} \\
Warning & Warning & Warning \\
\end{tabular}
\end{center}

\begin{center}
\begin{tabular}{ll}
"Wear Rubber Gloves When Handling" & \\
"Caution: Wear Rubber Gloves When Handling" & "Caution: May Cause Severe Skin Irritation. Wear Rubber Gloves When Handling"
\end{tabular}
\end{center}

The first message tells workers the steps they need to take, according to the company's industrial hygienists, to protect themselves from accidental exposure. The second and third messages add a warning and some health effects information respectively, thereby increasing workers' awareness of risk.

\textsuperscript{115} Consider the following three messages:
\textsuperscript{116} See supra text accompanying notes 10-12.
involved.\textsuperscript{117} Although this model has not yet been suggested by any of the parties in \textit{Minnesota Mining}, it looms in the background due to its prominence in \textit{Detroit Edison}.

In \textit{Detroit Edison}, Justice White, writing for a four-person dissent, criticized this approach, stating that the majority's tacit approval of the use of an intermediate psychologist was incompatible with the role of the union as exclusive bargaining representative:

\begin{quote}
[I]t is fundamentally at odds with the basic structure of the bargaining process. Congress has conferred paramount representational responsibilities and obligations on the employees' freely chosen bargaining agent. Yet the Company's alternative would install a third party psychologist as a partner, if not primary actor, in promotion-related grievance proceedings.\textsuperscript{119}
\end{quote}

If a similar proposal comes before the Board, the Board should consider carefully whether the balancing of needs necessitates overriding the concerns expressed by Justice White, as the majority decided it did in \textit{Detroit Edison}.

4. \textit{Direct Disclosure to Workers and Unions}

The Board opted to require direct disclosure to the union of all chemical identities except asserted trade secrets.\textsuperscript{120} Under the model of direct disclosure, which was employed by OSHA in two rules written during the Carter Administration,\textsuperscript{121} the requesting party receives in-

\begin{itemize}
\item \textsuperscript{117} 47 Fed. Reg. 12,092 (1982). Under the proposed rule, the disclosure of trade secret chemical identities for all but the most seriously hazardous substances involves the use of a physician as intermediary. (The provision on the most hazardous substances is similar to the one discussed \textit{infra}, text accompanying notes 179-81.) Under the proposed rule, employers are required to disclose trade secret chemical identities only to an employee's treating physician. The information would be provided on a confidential basis, and the physician would first have to state in writing (except in an emergency situation) that the patient's health problems may be the result of occupational exposure.

\item \textsuperscript{118} \textit{See supra} text accompanying notes 57-65. This approach has been recommended for use in \textit{Borden}. Comment, \textit{Union's Right to Information vs. Confidentiality of Employer Trade Secrets: Accommodating the Interests Through Procedural Burdens and Restricted Disclosure}, 66 Iowa L. Rev. 1333, 1350-51 (1981) (recommending the use of a neutral chemical analyst) [hereinafter cited as Iowa Comment].

\item \textsuperscript{119} \textit{Detroit Edison}, 440 U.S. at 324.

\item \textsuperscript{120} \textit{Minnesota Mining}, 261 N.L.R.B. No. 2, slip op. at 22, 109 L.R.R.M. (BNA) at 1351.

\item \textsuperscript{121} The OSHA Rule on Access to Employee Exposure and Medical Records stated the policy behind the rule's use of direct disclosure: "The most immediate purpose behind this standard is to enable workers to play a meaningful role in their own health management . . . [T]here are no assurances that anyone else will protect their health with equal vigor or determination." 45 Fed. Reg. 35,212, 35,213 (supplementary information).

Rather than focusing only on immediate protection, the rule envisions a long-term, active use of scientific information by workers and unions that is absent from the other models of disclosure discussed \textit{supra}. Access to this information will enable workers and unions "to become directly involved in the discovery and control" of occupational disease and to "uncover patterns of health impairment and disease." \textit{Id}. The rule provides for almost unlimited access by an employee to his
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formation on equal terms with the disclosing party. Thus, the Board in *Minnesota Mining* held that “the Union has a right to know, at least to the extent of Respondent's knowledge as reflected in certain of the information requested, of perceived dangers or likelihood of harm.”

The Board correctly decided that where there are no legitimate countervailing interests disturbed by direct disclosure, the health and safety interest of employees will best be served by the fullest form of disclosure.

B. Ambiguity and the Order to Bargain

1. Failure to Require Substantiation of the Trade Secrecy Claim

The Board strongly expressed its desire, in keeping with the policies of the NLRA, to allow the parties an opportunity to reach an accommodation through collective bargaining before intervening to balance their countervailing rights. However, the Board’s failure clearly to define the scope of the required bargaining process makes the success of such negotiations dubious.

Each party can take from the Board's ambiguous opinion a different and conflicting notion of what, if any, substantiation of the trade secrecy claim is required. For its part, the union can assert that the company must first substantiate its trade secrecy claim before the union

or her own exposure (environmental and biological) and medical records, and similar access by designated representatives or unions to exposure records. A representative's access to personal medical records is conditioned on specific written consent of the employee, who may limit the terms of access in any way he or she wishes.

The trade secrets provision, discussed *infra*, text accompanying notes 174-78, rejects a case-by-case balancing of employer and employee interests when it comes to certain vital information. The rule allows access to be conditioned on a confidentiality agreement, but states that “where the competing interests irreconcilably clash, the interest in employee safety and health prevails.” *Id.* at 35,218.

The second information disclosure rule proposed under the Carter Administration was published as a proposed rule, 46 Fed. Reg. 4412 (1981), and was subsequently withdrawn under Reagan, 46 Fed. Reg. 12,020 (1981). Under this Proposed Rule on Hazard Identification, employees and their representatives were to be given access to the employer's scientific files on hazardous substances in the plant, the standards for the maintenance of which were set forth in the rule. The container labels required by the rule included the Chemical Abstracts Service (CAS) number of the substance, which is unique to a given chemical and allows direct entry into the scientific literature. The rule also specified a set of hazard warnings to be used, varying with the nature of the hazard.

The trade secrets provision allowed deletion by the employer of process and mixture information, as well as chemical identity in the case of non-hazardous chemicals, or those for which hazard determinations had not yet been made. The chemical identity of a hazardous substance could not be withheld in the name of confidentiality, though a secrecy agreement could have been required. 29 C.F.R. § 1910.20 (1982).


is required to negotiate over protecting that secrecy. Such substantiation, as discussed by the ALJs, requires demonstrating, first, that the use of certain plant chemicals is proprietary information whose value depends on its confidentiality, and second, that disclosure to the union creates a likelihood of disclosure to competitors.

The company, on the other hand, can insist that its secrecy interest has already been recognized by the Board, which ordered the parties to negotiate only over methods of protecting it. The company can further argue that substantiation before the union of its secrecy claim cannot have been commanded, since this would involve revealing the very secrets it has a right to protect.

The Board’s language is so vague that both positions can be argued and the parties stand little chance of getting past this opening hurdle in the negotiations without further Board or judicial clarification. The union can point out that the Board in Borden stated only that the claimed confidential information “appears, at least on its face, to raise legitimate and substantial company interests possibly requiring a finding that Respondent need not disclose the information, or at least not unconditionally disclose it.” Also, in Minnesota Mining the Board expressly found that the company had not substantiated its claim. Since the Board stated in all three opinions that “[s]ubstantiation of various positions asserted by the parties would, obviously, be an important element” of any future evaluation of the parties’ good faith bargaining, the union would be justified in insisting that the secrecy claim must initially be demonstrated. Though the Board never stated that the “various positions” that need substantiation include the secrecy claim, this can be inferred. Moreover, while this may mean that the claim would have to be substantiated before the Board should the parties fail to agree, it does not necessarily mean that it must be substantiated during the negotiations themselves.

The company, for its part, can find support for its position in the fact that the Board expressly ordered the parties to negotiate as to “con-

124. See Minnesota Mining (ALJ), supra note 74, slip op. at 14; Borden Chemical (ALJ), supra note 76, slip op. at 30-31; Fraser, Trade Secrets and the NLRA: Employees’ Right to Health and Safety Information, 14 U.S.F. L. REV. 495, 512-13 (1980).

125. See Minnesota Mining (ALJ), supra note 74, slip op. at 13; Borden Chemical (ALJ), supra note 76, slip op. at 34-37; Fraser, supra note 124, at 512-13.

126. See infra text accompanying notes 151-54, for discussion of a possible resolution of this issue.

127. This comment will argue that the union has the more reasonable interpretation. See infra text accompanying notes 137-54.


130. Id.; Borden Chemical, 261 N.L.R.B. No. 6, slip op. at 7, 109 L.R.R.M. (BNA) at 1361; Colgate-Palmolive, 261 N.L.R.B. No. 7, slip op. at 18 n.30, 109 L.R.R.M. (BNA) at 1358 n.30.
ditions under which information may be furnished to the Union while maintaining appropriate safeguards to protect Respondent's legitimate interests.” Further support comes from Colgate, where the Board stated that the company's claims of confidentiality, “as substantiated by record evidence, may operate as a legitimate justification for refusal to furnish relevant information.” Indeed, Borden asserts that the ALJ already made the critical finding that the requested information is a trade secret. However, this assertion rests on dubious grounds.

The Board is to be faulted for neither requiring a factual finding on the trade secrecy issue, nor clearly stating whether the issue had to be proved at the bargaining table, before the Board in the event of a failure of bargaining, or not at all. Even more importantly, the Board failed to say what would satisfy the requirement of “substantiation.” Will the company have to make out the elements of a traditional trade secrecy claim? Will the company be required to list and justify its claim as to each chemical so that the union can answer these claims? Or will the presentation be made in camera for the Board to evaluate without union participation?

The Board should have expressly required the company to substantiate its secrecy claim to the union as part of its good faith obliga-

133. Brief, supra note 100, at 7-8.
134. The ALJ only stated in dicta that the trade secret claim could not be gainsaid, and that the General Counsel had not contested it. Borden Chemical (ALJ), supra note 76, slip op. at 31. The ALJ did not need to rely on this, however, since he found that in any case the company had not substantiated the second part of its confidentiality claim, i.e., that there was some likelihood of harmful re-disclosure by the union. Id. at 34-37. The ALJ's enumeration of six findings on the issue did not include the one asserted by Borden in its brief. Id. at 37-38.
135. The Board may have felt that it was merely following the precedent of its 1963 decision in Ingalls Shipbuilding, 143 N.L.R.B. 712, 53 L.R.R.M. (BNA) 1406 (1963), where it ordered a company to bargain over conditions for disclosing claimed confidential information even though the company, as here, had not substantiated that claim. However, Ingalls Shipbuilding was a different and simpler case. It involved an order to segregate the pertinent wage data from “business information that does not pertain to wage determinations” contained together in the requested rate books. Id. at 718, 53 L.R.R.M. (BNA) at 1409 (emphasis added). (While the union did not expressly request the rate books, the company treated the request for bonus system information as a request to see its rate books. Id. at 713, 53 L.R.R.M. (BNA) at 1407.) In the present case, by contrast, the requested data and the claimed trade secret data are one and the same—the generic names of chemicals used and produced in the plant. Minnesota Mining, unlike Ingalls Shipbuilding, squarely posed a demand to disclose the claimed trade secrets themselves.
136. The important factors in this case might be: (1) The use of the chemical represents some degree of advance in the field, R. MILGRIM, TRADE SECRETS § 2.08[2] at 2-88 (1977); (2) It provides the owner with a distinct competitive advantage or unique result, id. § 2.03 n.5, at 2-22; (3) The owner has demonstrated the intent and taken steps to maintain secrecy, R. CALLMAN, 14 THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES 50 (4th ed. 1981); (4) The information is not available to others through investigation or other fair means, id. at 58; and (5) The other party will use or disclose the secret to the owner's detriment, MILGRIM, § 7.07[1] at 7-93.
tion in negotiations. Several policy considerations dictate this approach. First, the union should not be required to negotiate for or to receive limited or conditional disclosure if the requested information is not, in fact, sensitive. The company's countervailing interest must first be demonstrated before the union's statutory right is compromised to accommodate it. Second, as a matter of general law, the burden rests on the party asserting the privilege to prove that he or she in fact possesses a trade secret. This policy should apply a fortiori where the privilege is asserted against a statutory right to disclosure, not merely a legal use of the information.

The particular facts of this case provide further reasons for requiring prior substantiation of the secrecy claim. First, the claim itself is unusual. Generally, protection is afforded to aspects of a manufacturing process or percentages in a formula, while mere ingredient information is unprotected. Here the union requested only the names of ingredients. The company claimed that advantages are derived from using some ingredients which its competitors may not know about or may be unable to procure. Of these specially advantageous ingredients, many are already ascertainable through reverse engineering, a process whereby competitors analyze one another's finished products to discover their ingredients and eventually produce "product matches." However, manufacturers point out that certain catalysts and intermediate agents will not appear in detectable form in the final product. Given the scant likelihood that there are many chemicals whose mere identities are trade secrets, not ascertainable through reverse engineering, the company should be required to demonstrate that such chemicals do exist.

137. See Milgrim, supra note 136, § 7.07[1].
138. For instance, under the Freedom of Information Act, where the trade secrecy exemption (or any of the other exemptions) is asserted against the requester's statutory right to disclosure, the exemptions must be construed narrowly. Washington Research Project, Inc., v. Department of Health, Educ. & Welfare, 504 F.2d 238, 244 (D.C. Cir. 1974) ("The burden of proof is on the agency opposing disclosure, and the exemptions therefrom are to be narrowly construed."); Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971) ("The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly.").
139. In products liability cases in federal courts, for instance, the plaintiff may have discovery of the defendant's ingredients, but not of its manufacturing process, Milgrim, supra note 136, § 7.06[1][i] and cases cited at id. n.10. The New York Court of Appeals takes a slightly different approach, requiring that before gaining discovery of ingredient information, the plaintiff must first prove that disclosure of ingredients is indispensable to his or her case. Id. and cases cited at id. n.12.
140. Borden Chemical (ALI), supra note 76, slip op. at 31.
A second reason for requiring substantiation in this case is that the current version of the trade secrets claim was never fully litigated before the Board. The company consistently pressed a blanket claim of secrecy—that every ingredient in the plant was confidential, proprietary information—and the General Counsel in turn argued against this broad claim. At no time did the company articulate which chemicals it believed were of a confidential character or present arguments to this effect. Only when pressed during cross-examination did spokespeople for Colgate and Minnesota Mining narrow their claim to contend that there were a small number of chemicals in their plants whose presence alone constituted a trade secret not readily ascertainable from the finished product. Since this narrow trade secrecy claim was not fully argued by the parties, and since the General Counsel did not have any technical information to enable him to examine this claim, further substantiation should be required.

Third, there is an anomaly in the Borden case that was not addressed by the Board and was only mentioned in passing by the General Counsel in his brief. Borden argued that it need not furnish the requested list because the information was already available to the union through other means. Indeed, Borden described in full detail how any employee (including most of the union officials, who were also employees) could acquire the requested information by matching posted code numbers with storage containers, and sometimes by obtaining an OSHA form from a manufacturer. It is well established

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144. Colgate’s medical toxicologist estimated that three to four percent of the 150 substances used in the plant constituted trade secrets. Colgate-Palmolive (ALJ), supra note 71, slip op. at 7-8. Minnesota Mining’s patent liaison officer estimated that five or ten of approximately seven hundred items produced in the plant and one raw material used there constituted trade secrets. Minnesota Mining, 261 N.L.R.B. No. 2, slip op. at 17, 109 L.R.R.M. (BNA), at 1350. Borden did not make an estimate, but instead gave the example of a secret ingredient used in the buff colored ink of the Coors Beer can, which they claim gives it a special quality unmatched by competitors. Borden Chemical (ALJ), supra note 76, slip op. at 31.
145. Answering Brief, supra note 143, at 3.
146. Brief, supra note 100, at 92-93; Borden Chemical (ALJ), supra note 76, slip op. at 25-26.
147. In order to “ascertain each and every material or chemical used or stored in the plant,” an employee:

- would simply get the code number of the material contained on the batch order, go to the location in the plant where the item is stored, find the material and thereby have a full description of the supplier, item and safe handling procedures. Moreover, for those substances which have trade names, the individual could request from the supplier an OSHA Form 20 which contains the physical property information, health hazard data, special handling requirements for the particular materials, and the common or generic name of the chemical names contained therein.

Brief, supra note 100, at 92-93. However, the ALJ disputed the ease with which employees could obtain the OSHA Form 20 from manufacturers. Borden Chemical (ALJ), supra note 76, slip op. at 25-26.
that trade secrecy does not exist where the claimed confidential information is readily available to others through proper means.\textsuperscript{148} It is therefore difficult to reconcile Borden's assertion that every bit of the requested data is already available to the union with its claim that all or even some of the data is a closely guarded trade secret which would be lost if disclosed.

Finally, it is likely that this litigation will extend over several years, complicating the determination of the trade secrets issue. Six years after the union's request was first made, the parties are about to argue an appeal in what may be only the first of several rounds of judicial and Board determinations in the case.\textsuperscript{149} As time passes, the company's inventory of chemicals is likely to change, allowing the company to revise or expand if necessary the list of chemicals which it claims are confidential. While the Board admonished the company that it would not tolerate any uncalled-for expansion of the list,\textsuperscript{150} if the company is not required to substantiate its current claim it will be difficult for the Board to exercise this kind of control. If proof is not timely required, the exemption for proprietary information could become a loophole in the law.

The Board and the courts have at their disposal a tool for substantiating confidentiality claims that has been developed under the trade secrets exemption\textsuperscript{151} and other exemptions of the Freedom of Information Act.\textsuperscript{152} A party seeking disclosure of information under that act may request a list which details and justifies each item that is claimed as a trade secret or is otherwise exempt from disclosure. This list is known as the \textit{Vaughn} index, after the leading case of \textit{Vaughn v. Ro-}

\textsuperscript{148} "If a third party, through his own efforts, investigations or other fair means, obtains knowledge of the secret, it ceases to be such." \textsc{Callman, supra} note 136, at 58.

\textsuperscript{149} \textit{See supra} note 96. The Board clearly anticipated further unfair labor practice charges arising out of this case: "We recognize that, if the Union and Respondent are unable to reach agreement on a method whereby their respective interests would be satisfactorily protected, these parties may be before us again." \textit{Minnesota Mining}, 261 N.L.R.B. No. 2, slip op. at 17, 109 L.R.R.M. (BNA) at 1350.

\textsuperscript{150} Respondent's Witness Perlson testified that he could think of only a very limited number of substances the mere names of which might constitute trade secrets. While there may be substances in addition to those mentioned by Perlson possibly constituting trade secrets, we regard the approximate figures recited by him as a rough guide to the number of generic names which may legitimately be exempt from disclosure pursuant to this order. Consequently, any number of generic names substantially at variance with the evidence adduced by Respondent in this regard will be most carefully scrutinized. \textit{Minnesota Mining}, 261 N.L.R.B. No. 2, slip op. at 18, n.24, 109 L.R.R.M. (BNA) at 1350 n.24.

\textsuperscript{151} Respondent's Witness Perlson testifed that he could think of only a very limited number of substances the mere names of which might constitute trade secrets. While there may be substances in addition to those mentioned by Perlson possibly constituting trade secrets, we regard the approximate figures recited by him as a rough guide to the number of generic names which may legitimately be exempt from disclosure pursuant to this order. Consequently, any number of generic names substantially at variance with the evidence adduced by Respondent in this regard will be most carefully scrutinized. \textit{Minnesota Mining}, 261 N.L.R.B. No. 2, slip op. at 18, n.24, 109 L.R.R.M. (BNA) at 1350 n.24.

\textsuperscript{152} Similar admonitions were delivered in the \textit{Borden} and \textit{Colgate} opinions. \textit{Borden Chemical}, 261 N.L.R.B. No. 6, slip op. at 4 n.6, 109 L.R.R.M. (BNA) at 1360 n.8; \textit{Colgate-Palmolive}, 261 N.L.R.B. No. 6, slip op. at 16 n.25, 109 L.R.R.M. (BNA) at 1357 n.25.

\textsuperscript{151} 5 U.S.C. \textsection{} 552(b)(4) (1976), which provides:

\textsuperscript{b) This section does not apply to matters that are . . .

\textsuperscript{4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. . .

\textsuperscript{152} 5 U.S.C. \textsection{} 552 (1976).
which established the requester’s right to a substantiation of the government’s confidentiality claims. The *Vaughn* index has been required in trade secrecy cases where private parties have submitted confidential information to government agencies which they do not wish disclosed to competitors.154 This requirement of substantiation discourages false trade secrecy claims and gives the requester some ability to argue intelligently about the status of the information. It should be required *a fortiori* under section 8(a)(5) of the NLRA, where the requesting union not only has a general public right to disclosure, as under the Freedom of Information Act, but also requires the information for the fulfillment of its statutory role as bargaining representative.

2. Failure to Define the Scope of Negotiations

The Board also failed to give adequate guidance on the broader question of whether the company is now under a “duty to disclose”—where negotiations will concern only the form and manner of disclosure—or merely a “duty to negotiate in good faith”—where disclosure itself is in question. As with the trade secrets substantiation issue,155 the Board decided to postpone the resolution of this issue in order to give the parties an opportunity to reach an accommodation between themselves. However, due to the conflicting interpretations which the parties can give to the Board’s ambiguous opinion, the mandated negotiations are likely to founder.

Ironically, the concurring and dissenting opinions spell out these two possible interpretations. Member Jenkins, in his dissent,156 took the following position:

153. 523 F.2d 1136 (D.C. Cir. 1975).
154. See Pacific Architects & Engineers, Inc. v. Renegotiation Board, 505 F.2d 383, 384 (D.C. Cir. 1974) (confidential sales and tax data; *Vaughn* index required in order to “prevent an agency from thwarting the intent of the Freedom of Information Act by making ‘conclusory and generalized allegations of exemptions’”); Iglesias v. Central Intelligence Agency, 525 F. Supp. 547, 558-559 (D.D.C. 1981) (confidential commercial information gathered with promise not to reveal sources; government is required to show “specific factual or evidentiary material”; “conclusory and generalize allegations of ‘competitive harm’ are unacceptable”); Comstock Int’l (U.S.A.), Inc. v. Export-Import Bank, 464 F. Supp. 804 (D.D.C. 1979) (specific factual evidentiary material is required to support the application of the trade secrets exemption). See also Pennzoil v. Federal Power Comm’n, 534 F.2d 627 (5th Cir. 1976) (natural gas reserve information; court must balance the public need for the information against the private interest in secrecy even where the information is covered by an exception); Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) (government should provide particularized and specific justification requiring relatively detailed analysis); Lamont v. Department of Justice, 475 F. Supp. 761 (S.D.N.Y. 1979) (Congress did not intend the court passively to accept even the most sincere statements justifying nondisclosure without having a factual basis supporting the claimed exemption).
155. See supra text accompanying notes 124-54.
156. Member Jenkins concurred in one part of the majority’s opinion and dissented in the part under discussion herein. Minnesota Mining, 261 N.L.R.B. No. 2, slip op. at 28, 109 L.R.R.M. (BNA) at 1352.
Once it is determined that Respondent must furnish the requested information, I would leave to the parties to determine between themselves the conditions under which the Union's right of access to such information may be accommodated to Respondent's proper concern not to have business information of a confidential character revealed to its competitors.157

Member Hunter, in his concurring opinion, articulated the other possible interpretation of the Board's order:

Respondent does not have a duty to disclose information otherwise relevant which would constitute a trade secret or damage its competitive position, but only to bargain in good faith over the request for such information, including the feasibility of disclosing such information in a manner that will adequately safeguard its legitimate proprietary interests.158

In essence, Member Jenkins has put the risk of a good faith failure to agree on the company, while Member Hunter has put that risk on the union. They would now order the parties to negotiate to accommodate their respective interests in light of these determinations.

By contrast, the majority refused to make any such determination before first affording the parties an opportunity to reach an accommodation on their own.159 The majority thus refrained from enunciating the kind of general rule that would have placed a fulcrum under the balancing test mandated by Detroit Edison, tipping it one way or another in case of equally well-substantiated interests. The Board made no policy determinations of this kind, emphasizing instead that "[t]he accommodation appropriate in each individual case would necessarily depend upon its particular circumstances."160

The Board believed it was responding to the Supreme Court's directive in Detroit Edison, where the Court stated that the duty to supply information—as well as the type of disclosure that will satisfy that duty—turns upon the circumstances of the particular case.161 In its advocacy of case-by-case decisions, the Court stated that it was rejecting any absolute policy preference of union over company interests:

The Board's position appears to rest on the proposition that union interests—in arguably relevant information must always predominate over all other interests, however, legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here. There are situations in which an employer's conditional offer to disclose may be warranted.162

158. 261 N.L.R.B. No. 2, slip op. at 26, 109 L.R.R.M. (BNA) at 1351 (emphasis added).
159. Id. at 19, 109 L.R.R.M. (BNA) at 1350.
160. Id.
162. Id. at 318 (citations omitted).
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By rejecting a hypothesized "absolute rule" which took no account of one party's interests, the Court did not necessarily proscribe general rules of limited scope that are fashioned to deal with particular classes of cases. The Board would have been well within the teachings of Detroit Edison if it had adopted one of the limited general rules articulated by Members Jenkins or Hunter\textsuperscript{163} to deal with the class of cases where a union's need for health hazard information is met with a company claim of trade secrecy. This would have defined the scope of negotiations and better enabled the parties to fulfill the Board's order that they endeavor "to develop necessary methods and devices for the information exchange through the traditional collective bargaining mechanism."\textsuperscript{164}

The Board should have held that the company must furnish the requested data, but that the union does not have a right to receive the data in the form and manner requested in all cases.\textsuperscript{165} Where the company has demonstrated that disclosure to the union will endanger the confidentiality of a well-substantiated trade secret, the parties should be required to bargain in good faith over protective measures. In adopting this course the Board would be following its precedent in Ingalls Shipbuilding Co., cited with approval in Minnesota Mining.\textsuperscript{166} In Ingalls Shipbuilding the company had refused to furnish incentive wage data on the grounds of confidentiality. The Board held:

We leave it to the good faith of the parties, now that Respondent has been \textit{clearly apprised that it must supply} incentive wage data of the kind set out above, to determine between themselves the \textit{conditions} under which the Council's [union's] right of access to such data may be accommodated to the Respondent's proper concern not to have business information of a confidential character revealed to its competitors.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{163} See supra text accompanying notes 157-58.
\item \textsuperscript{164} Minnesota Mining, 261 N.L.R.B. No. 2, slip op. at 19, 109 L.R.R.M. (BNA) at 1350.
\item \textsuperscript{165} A long line of cases has held that an employer may sometimes raise a defense to disclosing relevant information in the precise form or manner requested by the union. See, e.g., NLRB v. Milgo Indus., Inc., 567 F.2d 540, 543 (2d Cir. 1977) (employer not required to make available copy of a health insurance plan that union could obtain by telephone call to insurer); Emeryville Research Center v. NLRB, 441 F.2d 880 (9th Cir. 1971) (requested form of disclosure burdensome to compile and would have disclosed sources of information secured upon assurances of confidentiality); Cincinnati Steel Castings Co., 86 N.L.R.B. 592, 24 L.R.R.M. (BNA) 1657 (1949) (oral instead of written form). But see General Elec. Co. v. NLRB, 466 F.2d 1177 (6th Cir. 1972) (company required to disclose industry-wide wage survey in its exact form despite promise of confidentiality to employers who submitted the data); Fafnir Bearing Co. v. NLRB, 362 F.2d 716 (2d Cir. 1966) (company's data inadequate substitute for union conducting its own in-plant time study); General Elec. Co., 186 N.L.R.B. 14, 16-17, 75 L.R.R.M. (BNA) 1265 (1970) (videotape inadequate substitute for in-plant evaluation of job classifications).
\item \textsuperscript{166} Minnesota Mining, 261 N.L.R.B. No. 2, slip op. at 19 n.25, 109 L.R.R.M. (BNA) at 1350 n.25 (citing Ingalls Shipbuilding, 143 N.L.R.B. 712, 53 L.R.R.M. (BNA) 1406 (1963)).
\item \textsuperscript{167} Ingalls Shipbuilding, 143 N.L.R.B. at 718, 53 L.R.R.M. (BNA) at 1409 (footnote omitted) (emphasis added).
\end{itemize}
If the Board was then called upon to evaluate the respective good faith of the parties, it would have to decide which offers regarding methods of disclosure accord with good faith bargaining, and which, when rejected by the other side, constitute a failure to bargain in good faith. The Board would have before it the various proposals of the parties, which might include confidentiality promises, Board protective orders restricting use, the use of a neutral intermediary, or private confidentiality contracts providing for damage remedies. The Board would need to consider the appropriateness of each of these methods and the effectiveness of their sanctions and remedies.

The Board would judge the respective good faith of the parties as the Supreme Court did in Detroit Edison: by evaluating the proposed forms of disclosure in light of the strength of the union's need for the information on the one hand, and the company's need to maintain confidentiality on the other. In performing this balancing of interests, the Board should also consider how the issue has been resolved by its sister agency OSHA in the last two Administrations.

OSHA has twice dealt with the issue presented in Minnesota Mining—once under the Carter Administration and once under the Reagan Administration. Under Carter, OSHA promulgated a rule on Access to Employee Exposure and Medical Records, which stated

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168. For discussions of the appropriateness and effectiveness of various methods of protected disclosure, see Fraser, supra note 124, at 517-23; Iowa Comment, supra note 118, at 1347-51.

169. Borden already requires each of its employees to sign a document known as the "shop rules," which provides for discipline or discharge if an employee "[makes] known to unauthorized persons any conversation or information concerning Company processes, equipment or business without written permission of the works manager." "Borden also requires its management, supervisory and union-member employees to sign a "Trade Secrets Agreement" in which the signer agrees "not to use or divulge without consent, any confidential information acquired through his connection with Borden, including but not limited to, formulas, processing techniques, prices, customer lists and promotion plans." Brief in Support of Respondent's Exception to the Decision of the ALJ at 51. Borden Chemical, 261 N.L.R.B. No. 6, 109 L.R.R.M. (BNA) 1358 (1982).

170. See Detroit Edison Co., 218 N.L.R.B. 1024, 89 L.R.R.M. (BNA) 1515 (1975), enforced, 560 F.2d 722 (6th Cir. 1977), reversed, 440 U.S. 301 (1979) (Board's protective order restricted use of personnel aptitude test, see supra note 60). See also American Cyanamid Co., 129 N.L.R.B. 683, 47 L.R.R.M. (BNA) 1039 (proposed restriction to in-plant only use was tacitly approved by the Board). For the Supreme Court's discussion in Detroit Edison of the efficacy of Board protective orders where the union is not party to enforcement proceedings at the court of appeals, see supra note 62.

171. See Detroit Edison, 440 U.S. at 309 (offer by company to release aptitude test information to independent industrial psychologist selected by the union); Iowa Comment, supra note 118, at 1347, 1351 (recommendation of a neutral chemical analyst as intermediary in Borden Chemical).

172. See Fraser, supra note 124, at 1349-50. See also infra text accompanying notes 177-81.

173. See supra notes 168 and 170.

174. The Carter Administration standard was challenged by industry and unions in federal district court in Louisiana, Louisiana Chemical Ass'n v. Bingham, 550 F. Supp. 1136 (W.D. La. 1982), and in the D.C. Circuit, Industrial Union Dep't, AFL-CIO v. Marshall, Nos. 80-1550 and
that an employer may delete trade secret process and mixture information from records requested by employees or unions, but may not delete a chemical's identity. The rule added that a written confidentiality agreement may be required of the requester as a condition to gaining access to the information, but that such a requirement may not be used as a pretext for more onerous requirements such as the posting of penalty bonds, liquidated or punitive damages clauses, or other preconditions.

Under Reagan, OSHA has proposed that this rule be revised. The new trade secrets provision states that an employer may delete not only trade secret process and mixture information, but also a chemical's identity, unless the chemical is considered at that time to be a carcinogen, mutagen, teratogen, or a cause of significant irreversible damage to human organs or body systems. Access to the names of these more seriously hazardous chemicals may be conditioned upon acceptance of a confidentiality contract. Such a contract may restrict use (including forbidding disclosure of the information to anyone other than a treating or consulting physician) and may provide for any legally appropriate relief for competitive harm resulting from a breach.

The Board in Colgate noted that the Carter OSHA rule, which came into effect in August, 1980, requires the company to furnish the union with the same data that the union has requested under section 8(a)(5). However, the Board stressed that its holding relied "not

80-3575 (D.C. Cir. filed 1980). The district court in Louisiana upheld the standard, and that decision has been appealed, Nos. 80-1178, 80-1199 and 80-1201 (5th Cir. filed January 3, 1983). However, proceedings in the D.C. Circuit have been stayed pending OSHA's revision of the standard.

175. The definition of "exposure records" includes, where no formal exposure records exist, any document which reveals the identity of a toxic substance or harmful physical agent, such as a shop manual or purchase record. 29 C.F.R. § 1910.20(c)(5) (1980); 45 Fed. Reg. 35,212, 35,262 (1980) (supplementary information).


179. 47 Fed. Reg. 30,420 (1982). Hearings on the proposed rule were held in the fall of 1982, and a final rule is expected to be published in the spring of 1983.

180. Id. at 30,437.

181. Id.


183. Colgate-Palmolive, 261 N.L.R.B. No. 7, slip op. at 9-10 n.13, 109 L.R.R.M. (BNA) at 1356 n.13. The overlap between the Board’s decision in Minnesota Mining and the OSHA Access Rule caused OSHA to rethink whether the union access provision of its rule was really necessary. Legal Times of Washington, D.C., Apr. 19, 1982, at 4, col. 1. The agency has decided to retain the provision in its proposed revision of the rule, 47 Fed. Reg. 30,420, 30,428 (1982) (proposed changes).

The agency’s decision can be justified on the grounds that there are several significant differences between the two methods of access: the OSHA rule provides direct access without a collec-
upon the obligations imposed by other agencies or statutes, but solely upon the bargaining obligations imposed by the National Labor Relations Act," and that the existence of other avenues of access did not, in the absence of special circumstances, affect the parties' section 8(a)(5) obligations. While the Board, of course, should not abandon its enforcement of section 8(a)(5) and need not defer to any of the OSHA provisions, the Board is not precluded from considering the way in which this agency and the Congress (in other pieces of legislation) have resolved some of the same questions about trade secrets that the Board now faces.

Finally, although the Board relies heavily on Detroit Edison, it should consider carefully the factual distinctions which may necessitate a different balancing of interests in Minnesota Mining. First, in Detroit Edison the company had already demonstrated before the Board that the test was a valuable and costly tool which would lose its value if disclosed to potential test-takers. The company also raised and the Court recognized the confidentiality interest of past test-takers who had gotten low scores and would not wish them revealed, especially after having received a promise that their scores would remain confidential. By contrast, the company in Minnesota Mining maintained, against the findings of the ALJ and the Board, that its entire inventory of chemicals constituted a trade secret. Unlike the claim in Detroit Edison, the company's trade secrecy claim in Minnesota Mining was an

tive bargaining demand; not all employees covered by OSHA are covered by the NLRA, including approximately three-quarters of the workforce, which is not unionized; the rule places the costs of retrieval and copying on the employer alone, whereas under the Board's decision the union might have to bargain over sharing these costs; the OSHA rule has different trade secrets provisions than does the Board's decision thus far in Minnesota Mining; and the OSHA trade secrets provisions would not vary based on the facts of a particular case, as will the Board's decisions.

It is also important to note that under the proposed revision of the OSHA rule, with its narrower definitions of "exposure record" and "toxic substance," much less data would be available than under the Board's ruling. 47 Fed. Reg. 30,420, 30,430, 30,434 (1982).

186. The OSHA rule's trade secrets provision merits consideration, since the rulemaking process was conducted with the benefit of extensive testimony and commentary from representatives of labor, industry, government and medicine. 45 Fed. Reg. 35,213 (1980).
187. See General Counsel's argument to this effect. Answering Brief of Counsel for General Consent to Respondent's Exceptions and Brief in Support of These Exceptions at 2-4, Borden Chemical, 261 N.L.R.B. No. 6, slip op. at 20, 109 L.R.R.M. (BNA) at 1358.
188. Detroit Edison, 440 U.S. at 313.
189. Id. at 306.
190. The companies have petitioned for review of the Board's order. See Oil, Chemical, & Atomic Workers v. NLRB, Nos. 82-1418, 82-1419, 82-1420, 82-1589, 82-1743, 82-1940 (D.C. Cir. filed 1982).
unusual one and was not substantiated before the Board.\footnote{191} Second, the union in \textit{Detroit Edison} already had obtained much of the data about the test that it needed, including a set of sample questions and raw scores with employees' names deleted.\footnote{192} Furthermore, it could obtain the correlated name-score information by asking for the consent of the employees who had filed the grievances, which the Court saw as a minimal burden.\footnote{193} In \textit{Minnesota Mining}, on the other hand, the union has received no information about the substances to which employees are exposed.\footnote{194} It argued persuasively to the Board that it is not in a position to bargain intelligently about health and safety matters until it receives this data.

Third, while the union in \textit{Detroit Edison} demonstrated that it needed the requested information in order properly to pursue certain promotion grievances, the union in \textit{Minnesota Mining} has made a showing of need that may be seen as going well beyond the ordinary need for information.\footnote{195} The Board described at length the company's regular use and production of substances which are caustic, which may emit beta radiation, and which are known or suspected as mutagens, carcinogens, and sterilization agents.\footnote{196} The Board found that employees are not always instructed on handling procedures\footnote{197} or apprised of the range of risks inherent in handling these substances.\footnote{198} The Board also found that the company had used its own warning labels in place of much stronger warning labels supplied by vendors.\footnote{199} The Board in \textit{Colgate} and the ALJ in \textit{Borden} similarly noted that employees at those

\begin{itemize}
\item \footnote{191}{See supra text accompanying notes 139-44.}
\item \footnote{192}{Detroit Edison, 440 U.S. at 308.}
\item \footnote{193}{Id. at 308, 319.}
\item \footnote{194}{Borden argues that the information was already available to the union through investigations in the plant and requests for certain OSHA forms from Borden's supplier. See supra text accompanying notes 146-47. However, the ALJ rejected the claim that the union could readily gain access to these OSHA forms, and ruled that the suggested process was significantly burdensome. Borden Chemical (ALJ), supra note 76, slip op. at 25-27.}
\item \footnote{195}{The General Counsel noted in his brief that the information sought does not merely bear upon the non-promotion of certain employees and the reasons underlying that decision, but rather goes to the health and safety conditions of an entire unit of employees and the ability of those employees' bargaining representative to intelligently bargain about those conditions. Answering Brief of Counsel for General Counsel to Respondent's Exceptions and Brief in Support of these Exceptions at 4, Borden Chemical, 261 N.L.R.B. No. 6, 109 L.R.R.M. (BNA) 1358 (1982).}
\item \footnote{196}{Minnesota Mining, 261 N.L.R.B. No. 2, slip op. at 9 nn.12-13, 109 L.R.R.M. (BNA) at 1348 nn.12-13.}
\item \footnote{197}{Id.}
\item \footnote{198}{Id.}
\item \footnote{199}{The example given by the Board is that while the vendor's label on a drum of dimethyl disulfide reads: Danger—Flammable

Vapor may be hazardous or fatal if swallowed. Use with adequate ventilation.

\textit{Id.}, the company's warning reads only:

\begin{itemize}
\item Has a strong, disagreeable sulfur odor. Irritating to the eyes and skin. Avoid inhalation of vapors which will cause temporary headache. Wear rubber gloves for handling.
\end{itemize}
\end{itemize}
plants may be exposed to potentially carcinogenic and otherwise hazardous substances.\textsuperscript{200} In reaching its decision on the issue of the union's need to know the requested information, the Board concluded:

Few matters can be of greater legitimate concern to individuals in the workplace, and thus to the bargaining agent representing them, than exposure to conditions potentially threatening their health, well-being, or their very lives. . . . Local 6-418 can hardly be expected to bargain effectively regarding health and safety matters if it, unlike Respondent, knows neither those substances to which the unit employees are exposed nor previously identified health problems resulting therefrom.\textsuperscript{201} This showing of need is significantly stronger than the showing made by the union in \textit{Detroit Edison}.

Finally, the risk of improper redisclosure by the union of the company's assertedly confidential data is less in \textit{Minnesota Mining} than it was in \textit{Detroit Edison}. In that case, employees stood to benefit directly from improperly using the test questions and answers to gain promotion. Even in that case, four Justices of the Supreme Court agreed with the Board and the court of appeals that the union had strong incentives to prevent improper or accidental disclosure. The union would be loath to jeopardize its longstanding relationship with the company or to face the consequences of such action before the Board, which exercises continuing authority over the union's affairs, including its future requests for information.\textsuperscript{202} In \textit{Minnesota Mining} the union had an added disincentive to redisclosure in the fact that a loss of competitive position for the company could mean a loss of jobs for union members.\textsuperscript{203} This important factual distinction, along with those discussed above, argues for a balancing of interests in \textit{Minnesota Mining} different from that ultimately struck by the Supreme Court in \textit{Detroit Edison}.

3. \textit{Lack of Guidance for Future Parties}

The Board left open two important issues which might prudently have been resolved for the future based on the facts of \textit{Minnesota Mining}.

First, although the Board made arguments leading to the conclusion that the requested list of chemicals was \textit{presumptively} relevant, it

\textit{Id.} The Board notes that "the record does not establish whether [the Company] apprises all employees using raw materials of the content of the warnings supplied by the vendor." \textit{Id.} at n.14.

200. Colgate-Palmolive, 261 N.L.R.B. No. 7, slip op. at 9 n.11, 109 L.R.R.M. (BNA) at 1355 n.11; Borden Chemical (ALJ), \textit{supra} note 76, slip op. at 18.


203. Borden Chemical (ALJ), \textit{supra} note 76, slip op. at 36. The ALJ rejected the argument that the union, which also represents the employees of some of Borden's competitors, might have conflicting loyalties as to those other employees when it came to job preservation. \textit{Id.} and cases cited therein.
refrained from expressly applying the presumption in this case. The presumption of relevance, which was first applied to wage information, means that the requested information is of a type that is presumed to be relevant to the union's duties as collective bargaining representative. Therefore, the requesting union need not demonstrate its precise usefulness in each case. The Board has long required disclosure of items of information related to "hours, and other terms and conditions of employment" on the same basis as wage information, since they too concern "the core of the employer-employee relationship."

In Minnesota Mining, the Board repeated the well-established rule that health and safety issues come within "terms and conditions of employment" and are therefore mandatory subjects of bargaining. From this reasoning it would follow that health and safety data is presumptively relevant, not just relevant in this particular case. Although the ALJ in Borden found presumptive relevance and the Board expressly adopted his findings on relevance, the Board omitted the word "presumptive" from its opinion and did not comment upon it.

In its discussion of relevance, the Board mentioned particular health threats at the Minnesota Mining plant and noted the prominence of health issues in past collective bargaining between the par-
ties. In noting these findings, the Board failed to indicate whether it relied on them to conclude that the information was relevant, or whether relevance had been established from the simple fact that the requested information concerned a mandatory subject of bargaining.

This ambiguity may present a problem in the future for unions requesting the same data at other plants. If the plants are not known by the union to contain any particularly hazardous substances, and health has not been a prominent bargaining issue in the past, the union may have difficulty demonstrating the need for a list of all raw materials and products. Since the Board in Minnesota Mining stressed that the union's need was "not merely speculative," it is open to question what the Board would do if a union's need was "merely speculative" and not as effectively demonstrated as it was in this case.

The Board should have held that data relating to health and safety conditions is presumptively relevant to the requesting union's representational functions. This follows as a legal conclusion from the fact that health and safety are mandatory subjects of bargaining. It also follows from the strong congressional policy of prevention in the area of occupational disease. Thus, even where—and perhaps particularly where—there is is no prior knowledge of health problems related to chemical exposure, a union should have access to the list of chemical substances to which employees are now or have previously been exposed. The purpose of disclosure of health information is not confined to protection against known toxicological risks:

Such narrowly-focused knowledge, clearly, could never promote or facilitate discoveries with respect to whether specific "materials and chemicals" handled within Respondent's plant may present potential hazards not yet manifested within Respondent's workforce, never pre-

214. Id.
215. Even in the absence of a presumption of relevance or a demonstration of specific need, health and safety data should be found relevant to the proper performance of the union's representational functions and thus subject to disclosure. The standard of relevance under § 8(a)(5) is a broad discovery-type standard, see supra note 205, for the reason that all possible ways in which the requested information may become important cannot be foreseen. See Northwest Publications, Inc., 211 N.L.R.B. 464, 466, 86 L.R.R.M. (BNA) 1345, 1347 (1974).

Despite the seeming likelihood that a similar request would pass this broad, permissive test of relevance, the Board has injected an element of uncertainty that will make it more difficult for unions to make their case and more likely that employers will use the absence of specifically demonstrable need in order to delay or avoid disclosure.

216. See supra text accompanying notes 204-11.
217. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976). One of the Act's stated purposes is to assure healthful working conditions "by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety." Id. § 651(b)(6).
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viously recognized within a laboratory, and thus not yet cognizably forestalled.\textsuperscript{218}

The second issue which might prudently have been resolved for the future on the basis of the facts in Minnesota Mining is likely to present greater problems. By failing to require substantiation of the company's trade secrecy claim before sending the parties off to negotiate measures to protect that secrecy,\textsuperscript{219} the Board has invited other companies in the same position to claim larger percentages of their inventories as trade secret.\textsuperscript{220} This potential loophole in the law of disclosure may allow companies to draw unions into lengthy bargaining sessions, unfair labor practice litigation, and even contractual liability for the redisclosure of information that may not truly be confidential. The financial resources and the bargaining energy needed to obtain information under the Board's decision may serve to detract from the ability of unions to bargain for actual gains in the area of workplace health.\textsuperscript{221}

The Board should have enunciated the standards by which trade secrecy claims will have to be proved, as well as the point at which the company will be required to do so in order to fulfill its obligation to bargain in good faith.\textsuperscript{222} This would have limited the possibility of unnecessary delay and denial of health hazard information in the future.

IV

Conclusion

Knowledge of the identity of chemicals to which employees are exposed is crucial to a union's representational functions in the area of health and safety. The Board should extend the concept of the presumptive relevance of requested information—a concept developed in

\textsuperscript{218} Borden Chemical (ALJ), supra note 76, slip op. at 21 (emphasis in original).

\textsuperscript{219} See supra text accompanying notes 124-36.

\textsuperscript{220} See supra note 144.

The Reagan Administration's proposed revision of the OSHA Rule on Access to Employee Exposure and Medical Records, 47 Fed. Reg. 30,420, 30,429 (1982), recognizes the great potential for manufacturers "overclassifying" their chemicals as trade secret:

\begin{quote}
[Whether or not a chemical's identity is a trade secret is basically a matter of an employer's self-definition. Therefore, permitting non-disclosure of trade secret identity without any offsetting obligation could result in overclassification of chemicals as trade secrets. \ldots OSHA possesses neither the capacity nor expertise to act as a screen of all information which an employer is to disclose to employees and claims to be trade secret.]
\end{quote}

Id. Cf. Minnesota Mining, 261 N.L.R.B. No. 2, slip op. at 27 n.30, 109 L.R.R.M. (BNA) at 1351-52 n.30 (Member Hunter concurring): "If [the parties] cannot agree, we are then faced with the very difficult question of how the Board will determine the validity of a trade secret defense since this is an area in which we have little experience."

\textsuperscript{221} See Yale Note, supra note 10, at 1795.

\textsuperscript{222} See supra text accompanying notes 137-50.
the context of other mandatory subjects of bargaining—to the subject of health and safety.

In cases where a union's right to the requested information is met with an employer claim of confidentiality, the Board should require thorough substantiation of that claim. Where the claim is substantiated, the parties should be clearly apprised of the employer's duty under section 8(a)(5) to disclose the information in some manner or another, and should be required to bargain in good faith over alternative methods of disclosure that would protect any legitimate proprietary interest in secrecy.