Plough, Inc. *and* International Chemical Workers Union Local No. 194. Case 26-CA-8664

July 21, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On December 31, 1981, Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The issue here is whether Respondent violated Section 8(a)(5) and (1) of the Act by refusing, as requested, to furnish the International Chemical Workers Union Local No. 194, herein called the Union, with the following information:

> (1) "a complete list of all chemical . . . substances in use in this plant by [their] generic and trade names . . . along with any hazardous warnings or instructions associated with these substances, including material hazard sheets . . ." and (2) ". . . the results of all physicals taken by employees in the various departments dating back to May 13, 1975."

The Administrative Law Judge found that all of the information requested by the Union was clearly relevant and necessary to the Union in fulfilling its representative functions. He found no merit to Respondent's claim that it was not obligated to provide a list of all chemical substances because it would contain data of a confidential, proprietary, and/or trade secret nature, finding instead that Respondent's "fear of disclosure" was "unsubstantiated" given that the Union was only seeking a list of chemicals and not formulas or ratios of chemicals within products. He also found no merit to Respondent's other claim that the Union had, under the collective-bargaining agreement, waived its right to all of the requested information and that it would be too burdensome and costly for Respondent to provide the chemical information. He therefore found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the information concerning the chemicals.

With regard to the requested "results of all physicals," the Administrative Law Judge found merit to Respondent's defense that, under the particular circumstances of this case, the concern over the confidentiality of medical records outweighed the potential benefit to the Union of having the results of the physical examinations. He found that the requested information would lose much of its value if all of the identifying data were deleted. On the other hand, Respondent had been providing the Union with a summary of occupational illnesses, as set out on a form provided by the Occupational Safety and Health Administration (OSHA). He found that this summary would tend to serve the same purpose as the requested information. He therefore found that Respondent did not violate Section 8(a)(5) and (1) of the Act when it refused to provide the results of physicals.

At the time of the Administrative Law Judge's Decision, the Board had not yet issued its decisions in *Minnesota Mining and Manufacturing Company,*[1] and two companion cases, *Borden Chemical, a Division of Borden, Inc.,*[2] and *Colgate-Palmolive Company.*[3] In those cases the Board established the respective rights and obligations of the parties for the disclosure of health and safety information. The Board specifically found that information like that requested here was relevant to the union's function as the employees' collective-bargaining representative. The Board also recognized its obligation under *Detroit Edison Co.* v. *N.L.R.B.*[4] to balance the union's need or the health and safety information against the legitimate concerns of the respondent. These cases are controlling here, since they involve virtually identical requests for information, arising, as here, in the context of a long-time bargaining relationship.[5]

In *Minnesota Mining and Manufacturing Company, supra,* the Board also found that the respondent was obligated to furnish a list of chemical substances, by generic or trade names, similar to the one requested here.[6] The Union in the instant case has also requested any warnings or instructions, including material hazard sheets. To the extent that the Union has a right to a list of the chemical substances it also has a right to any information associated with the substances.

The Board also recognized, however, a company's legitimate concern for protecting confidential, proprietary, and/or trade secret information from

[1] 261 NLRB 27 (1982).
[2] 261 NLRB 64 (1982).
[3] 261 NLRB 90 (1982).
[4] 440 U.S. 301 (1979).
[5] The Union here has represented certain of Respondent's employees for over 50 years.
[6] *Minnesota Mining and Manufacturing Company, supra.*

disclosure. As in the controlling cases, the Respondent here has asserted a legitimate and substantial justification which, on its face, could possibly require a finding that Respondent need not disclose some information, or at least not unconditionally disclose it. We therefore shall revise the Administrative Law Judge's recommended Order and order Respondent to turn over to the Union a list of those chemical substances used by the bargaining unit to which it asserts no trade secret defense, as well as any warnings or instructions, including material hazard sheets.

With respect to those substances which Respondent claims constitute confidential trade secret information, however, we shall, in accord with our decision in *Minnesota Mining and Manufacturing Company, supra*, and the procedure set forth therein, give the parties themselves an opportunity, through collective bargaining, to reach some agreement viewed satisfactory by both regarding conditions under which the needed information may be furnished to the Union with appropriate safeguards protective of Respondent's confidentiality, proprietary, and trade secret interests.

In so doing we recognize, as we stated in *Minnesota Mining and Manufacturing Company, supra*, 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. If the issue of whether the parties have bargained in good faith is presented to us, we will, of course, look to the totality of the circumstance in determining whether both have bargained in good faith.[7] If necessary, we shall undertake the task of balancing the Union's right of access to data relevant to collective bargaining with Respondent's expressed confidentiality concerns in accordance with the principles set forth in *Detroit Edison Co., supra*. We believe, however, that first allowing the parties an opportunity to adjust their differences best effectuates the Act's policy of maintaining industrial peace through the resolution of disputes by resort to the collective-bargaining process.

With respect to the medical confidentiality question, we recognized in *Minnesota Mining and Manufacturing Company* that the employer has a legitimate and substantial interest in ensuring that the release of medical information not violate the physician-patient privilege and/or the confidentiality of individual employee medical reports. In order to protect employee confidentiality, we ordered respondent to turn over the medical information "to the extent that that information does not include individual medical records from which identifying data have not been removed."[8] The Administrative Law Judge in the instant case found that the information requested here—results of physicals—would largely lose its value if identifying data were deleted. We do not agree. In any event, that is a judgment best made, not by the Board, but by the requesting party. We therefore find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to supply the bargaining agent with the results of employee physicals in the bargaining unit, dating from May 13, 1975, to the extent that that information does not include individual medical records from which identifying data have not been removed.[9]

AMENDED CONCLUSIONS OF LAW

Based on the foregoing, the Board adopts the Administrative Law Judge's Conclusions of Law, as modified below:

Substitute the following for Conclusions of Law 5 through 7:

"5. By failing and refusing to provide the Union with a complete list of chemical substances in use in the above unit by their respective generic and trade names—except those substances which constitute proprietary or trade secrets—along with any hazardous warnings and instructions associated with the substances, including material hazard sheets, pursuant to the Union's request, Respondent has failed and refused to bargain collectively with the Union and has thereby engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, as amended.

"6. By failing and refusing to provide the Union with the results of employee physicals in the bargaining unit, dating from May 13, 1975, to the extent that such information does not include individual medical records from which identifying data have not been removed, Respondent has violated Section 8(a)(5) and (1) of the Act, as amended.

"7. The unfair labor practices specified affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended."

AMENDED REMEDY

We adopt the Administrative Law Judge's recommended remedy except for paragraph 2 for which we substitute the following:

"Having found that Respondent unlawfully refused to provide the Union with information with

[7] Substantiation of various positions asserted by both parties would obviously be an important element of any such evaluation.

[8] *Minnesota Mining and Manufacturing Company, supra*.

[9] With respect to the other defenses raised by Respondent of waiver, costliness, and burdensomeness, we adopt the findings of the Administrative Law Judge.

respect to the chemical substances used in the bargaining unit and the results of employee physicals, subject to the limitations previously stated, we shall require that the Respondent be affirmatively ordered to provide the Union with such information."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Plough, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a) and reletter paragraph 1(b) as 1(c):

"(a) Refusing to bargain collectively with International Chemical Workers Union Local No. 194 as the exclusive bargaining representative of its employees by refusing to furnish the Union a complete list of all chemical substances in use in the bargaining unit by generic and trade names—except those substances which constitute proprietary or trade secrets—along with any hazardous warnings or instructions associated with said substances, including any material hazard sheets.

"(b) Refusing to bargain collectively with International Chemical Workers Union Local No. 194 as the exclusive bargaining representative of its employees by refusing to furnish the Union with the results of physicals in the bargaining unit, dating from May 13, 1975, to the extent that such information does not include individual medical records from which identifying data have not been removed."

2. Substitute the following for paragraph 2(a):

"(a) Furnish the Union, or its designated representatives, upon request, the information described in paragraphs 1(a) and (b), above."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively with International Chemical Workers Union Local No. 194 as the exclusive bargaining representative of our employees in the unit listed below by refusing to furnish the Union with a complete list of chemical substances in use in the unit by their generic and trade names—except those substances which constitute proprietary or trade secrets—along with any hazardous warnings or instructions associated with such substances including material hazard sheets.

WE WILL NOT refuse to bargain collectively with International Chemical Workers Union Local No. 194 as the exclusive bargaining representative of our employees in the unit listed below by refusing to furnish the Union with the results of employee physicals in the bargaining unit, dating from May 13, 1975, to the extent that such information does not include individual medical records from which identifying data have not been removed. The appropriate collective-bargaining unit is:

> All production, plant maintenance, machine shop, warehousing, garage mechanics, shipping, receiving, garage, boiler room, and printing plant service employees of the Company at its plants at 3022 Jackson Avenue, Memphis, Tennessee, 1248 Warford Street, Memphis, Tennessee, 2491 Mathews Street, Memphis, Tennessee, and 1178 Pope Street, Memphis, Tennessee, but excluding printers, bookbinders, typographers, over-the-road truck drivers, cafeteria employees, watchmen, guards, office and clerical employees, professional and technical employees and supervisors as defined in the Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL, upon request, furnish to the Union the requested information described above.

PLOUGH, INC.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge: This case was heard before me in Memphis, Tennessee, on October 29 and 30, 1981. The charge was filed on October 2, 1980,[1] by International Chemical Workers

[1] All dates are in 1980, unless otherwise stated.

Union Local No. 194, herein called the Union, and the complaint was issued on April 15, 1981, alleging that Plough, Inc., hereinafter called the Respondent or Company, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein called the Act. The Respondent's timely filed answer admits certain allegations of the complaint but denies the commission of any unfair labor practices. The primary issue presented by this case is whether the Respondent refused to bargain collectively in good faith with the Union by refusing to provide the Union on and after June 10 with information requested by the Union regarding chemical substances in use in the plant and the results of physical examinations of employees.[2]

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Respondent, and the Union, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business in Memphis, Tennessee, where it has been engaged in the manufacture of consumer health and beauty aids. In the course and conduct of its business operations, which utilizes plant facilities at a number of Memphis addresses, the Respondent annually sells and ships from its Memphis, Tennessee, facilities goods and materials valued in excess of $50,000 directly to points outside the State of Tennessee. It also annually purchases and receives at its Memphis, Tennessee, facilities, products, goods, and materials valued in excess of $50,000 directly from points outside the State of Tennessee. The Respondent, by its answer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent's answer further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union has been the collective-bargaining representative of certain of the Respondent's employees for over 50 years. The collective-bargaining unit in which the Union is currently recognized is made up of about 450 to 500 employees. The unit, which I find appropriate, is set forth in the most recent collective-bargaining agreement between the Respondent and the Union, effective from August 15, 1981, through and including August 14, 1984. It is as follows:

> All production, plant maintenance, machine shop, warehousing, garage mechanics, shipping, receiving, garage, boiler room, and printing plant service employees of the Company at its plants at 3022 Jackson Avenue, Memphis, Tennessee, 1248 Warford Street, Memphis, Tennessee, 2491 Mathews Street, Memphis, Tennessee, and 1178 Pope Street, Memphis, Tennessee, but excluding printers, bookbinders, typographers, over-the-road truck drivers, cafeteria employees, watchmen, guards, office and clerical employees, professional and technical employees and supervisors as defined in the Labor Relations Act.

The current collective-bargaining agreement, like the two proceeding collective-bargaining agreements, contains a provision relative to the health and safety of employees including the maintenance of a health and safety committee for the promotion of safe, sanitary, and healthful working conditions. The committee is composed of representatives of both management and the Union, with the Union portion of the committee made up of five employee-members. Under the contractually established procedure, the committee meets with the Respondent once a month except where additional meetings are requested and approved for the purpose of discussing health, safety, and sanitary problems.

It is undisputed that on May 13, Terry Teal, an employee and the then chairman of the Union's health and safety committee, gave the Respondent's representative on the committee, Benny Ferrell, who is the Respondent's current manager of physical distribution, a letter requesting certain information including, *inter alia*, specifically the following:

> A complete list of all chemicals [sic] substances in use in this plant by its generic and trade names is also necessary, along with any hazardous warnings or instructions associated with these substances, including material hazard sheets.
>
> The committee also requests the results of all physicals taken by employees in the various departments dating back to May 13, 1975.

Teal testified for the General Counsel that Ferrell took the letter, looked at it, and told him that he would get back with him later on it.

It is undisputed that at the next monthly meeting of the health and safety committee on June 10, Leonard Gilley, the assistant director of labor relations, responded to the Union's request and provided certain information. However, with respect to the request for a list of chemical substances, Gilley stated, according to Teal, that trade secrets were involved and he would not "give it up." However, Gilley did state, still according to Teal, that there was a list of hazardous chemicals in the office of William Gooch, the Respondent's director of health and environmental protection, and Teal could look at

[2] During the hearing, the Respondent and the Union reported an agreement had been reached with respect to providing the information pertaining to the results of the physicals. Accordingly, and with due regard to the General Counsel's opposition to a partial settlement of the case, I stated on the record that I would be inclined to dismiss the allegation of the complaint pertaining to the refusal to provide the information on the physicals if the Charging Party sought such dismissal following actual receipt of the information. I, nevertheless, allowed the record to be completed on the issue. The Charging Party in its brief related that the parties had been unable to commit their agreement to writing. The Charging Party made no motion to dismiss, and, on the contrary, argued the merits of the issue in the brief. I conclude the settlement failed and that the issue is ripe for judgment.

that list but he could not have the list. Gilley further explained that it would be too costly for the Employer to supply a list of chemical substances and cited, for example, the use of salt in the cafeteria which, to comply with the Union's request, would have to be broken down into components. Teal replied that the Union just wanted the chemicals in use at the plant and not what employees were eating from the cafeteria.

Gilley told Teal that employees could see what was coming into the plant and could get the information that way. However, Teal replied that while they could see some of the drums coming in they were marked with trade names of the contents and it would be difficult to get the chemical content from the trade name. In any event, Gilley did not supply the information requested regarding the chemicals nor did he promise to subsequently supply the information.

With respect to the request for the results of the employee physicals, Gilley told the committee that that material was confidential. Teal testified he then told Gilley that the Union did not want the names of the employees, "just the departments and the results where we could look at it and see which department is having medical problems, and being absent, maybe they're being sick or [Note: of ?] what they are working with." Gilley continued in his refusal, although Gilley testified, without contradiction, that he stated the results of an employee's physical could be surrendered to a third party upon receipt of a written release of the employee.

Following the failure of the Respondent to supply the Union with the requested information regarding chemicals at the June 10 meeting, the Union through its recording secretary at the time, Lavern McCain, wrote the Respondent a letter dated June 19 in which she noted that Gilley had orally refused to provide the information requested by the Union. The letter went on to state that the Union needed the information "in order to properly represent our employees in bargaining collectively with the Company." The letter observed that the Union was entitled to the information as a matter of law, and renewed the "request for that information." Finally, the letter concluded that, if the Respondent failed to provide the information within 10 days after receipt of the letter, the Union would consider the failure as "an outright refusing [sic] to bargain in good faith," and threatened "appropriate action."

Gilley testified that he replied to McCain's letter by letter dated June 23, sending the letter to McCain's home address which had appeared on her letter. In the letter, Gilley claimed that he had supplied the Union with much of the information requested and stated that the subject of "chemical substances was discussed." Finally, the letter stated "the issue of whether or not information was supplied to the Union's safety committee by Mr. Gilley is therefore not acknowledged by the Company." McCain denied receiving Gilley's letter and Teal denied Ferrell's testimony that he read the contents of the letter to the union safety committee at one of the subsequent safety committee meetings."[3]

It is clear that the Respondent did not provide the Union with either a list of chemical substances in the plant or the results of physical examinations at any time between June 23 and October 1. On the latter date, according to the testimony of Jerry Levine, an International representative of the Union, a meeting took place between certain of the union representatives; including Levine, Horace Perry, then president of the Union, Ron Stavely, the Union's vice president at the time, McCain, Gary Meuchel, a former official of the Union, Ralph Brannon, an International vice president of the Union, and Company Representatives Gilley and Gooch. Levine's testimony, supported by that of Perry and McCain, was that at the meeting the Union reiterated the importance of its receipt of the information regarding the chemical substances that had been requested on two previous occasions. Gooch refused to give the Union the list of chemical substances, saying that this was in the hands of their legal counsel and they had been informed by their counsel that this information was proprietary in nature and could not be provided. According to Levine, neither Gilley nor Gooch, at this meeting, asked why the Union needed the information and the Union did not expressly state a reason other than a reference by Perry to some experience with toxic fumes which had nauseated employees on previous occasions. Further, according to Levine, it was not until the evening of October 1 that Gilley telephoned him and asked him for the first time why the Union thought it was necessary to have a list of chemicals. Levine explained that the Union had a list on file at headquarters of the chemicals their people were exposed to or could be exposed to, and with that knowledge information could be supplied to the employees regarding precautions they should take in working with such chemicals. Levine added that if employees were subjected to potential diseases as a result of exposure to various chemicals such exposure could necessitate some changes in pension plans and retirement plans, sick leave programs, and absentee control programs. Levine further told Gilley that there were many areas, including seniority, that could be affected as a result of employee exposure to certain chemicals and the potential harm done to them. Levine's conversation with Gilley ended with Levine agreeing to telephone Gilley to discuss the subject further the following morning.

As arranged, Levine again talked to Gilley on October 2 and Gilley orally provided Levine with a list of some eight chemicals which were required to be reported by the Respondent to the Government under applicable laws and regulation. Gilley further indicated that he would provide the list of eight chemicals to Levine in writing and later did so by letter dated October 6.[4] No contention was made by the Respondent that the list supplied to th Union was a complete list of chemicals used by it. On the contrary, based on undisputed record evidence, the Respondent utilized in excess of 500 chemical substances in its Memphis facilities, both in the manufac-

[3] While not critical to the resolution of the issues here, I would credit Teal's testimony over Ferrell's claim that Ferrell read the letter to the committee. Teal impressed me as a candid and honest witness. Ferrell's testimony, on the other hand, was vague and equivocal. Ferrell's recollections were too frequently prefaced with "I believe" or "I think," and I conclude they were unreliable.

[4] Resp. Exh. 4.

turing process and in the cleaning and maintenance work performed in the facilities.

While the Union filed the charge herein on October 2, there appeared to have been no further general discussion between the parties with respect to the Union's request for information on the chemical substances until the period in August 1981 when the parties were engaged in negotiations on a new collective-bargaining agreement. According to Levine's testimony, however, when the subject of a list of chemicals came up in those negotiations, Levine and John Whitcomb, the Respondent's director of employee and labor relations and its chief negotiator at the sessions, mutually agreed that since the matter was in litigation they would not discuss it in negotiations, although neither party was waiving any rights that it might have. More specifically, Levine testified that, when the discussion of the Union's proposal to greatly expand the health and safety language came up in negotiations, there was general discussion about the Union's need for a list of chemicals and the response of Whitcomb was "Look, the matter is in litigation, and you know that our position hasn't changed." It is undisputed that at the time of the hearing the Respondent had supplied no list of chemicals in response to the Union's request other than the list of eight chemicals supplied to Levine by Gilley on October 2.

There was also little discussion between the parties relative to the request for the results of the employees physical examinations. It is clear from the record that the Respondent did not supply the Union with the results of the physicals and did not change its position from that initially taken by Gilley on June 10.

The Respondent presents a number of arguments in its defense. The Respondent devoted a substantial part of its brief to the argument that, while employee safety and health is a proper and mandatory subject of bargaining, the basic dispute between the parties more appropriately falls within the purview of the Occupational Health and Safety Administration (OSHA) which has set forth standards regulating employee access to safety and health information held by employers. The Board, the argument goes, should not assert its jurisdiction in this matter. The Respondent then proceeds to argue that even if the Board asserts its jurisdiction here it should find that there has been no bad-faith bargaining because the information sought by the Union would not be considered relevant to the Union's bargaining functions and obligations. Even assuming such information was relevant, the argument continues that the Respondent was entitled not to disclose the requested information because of the confidential nature of the information. Moreover, even if relevant and not privileged from disclosure the Union waived its right to the information by engaging in collective-bargaining negotiations and agreeing to a bargaining agreement containing a "zipper clause" under which the parties signatory agreed that "no other matters, whether covered by this agreement or not, shall be subject to further collective bargaining during the continuance of this agreement."[5] Finally, the Respondent advances the claim that a number of factors mitigate against the finding of a violation here in refusing to provide the requested information. Among such factors are: the shown safety of the Respondent's plants, the Respondent's practice of providing the Union with information upon request when specific problems arise, the Respondent's supplying the Union with the names of the eight toxic chemicals appearing on the EPA list; and the absence of a real need by the Union for the requested information since the union health and safety committee serves the same function that the requested information would serve for the Union; i.e., monitoring the safety of the Respondent's facilities. The Respondent also cites as a mitigating factor: the extreme cost of producing the information.

B. *Discussion and Conclusion With Respect to the Chemical Information*

1. Board assertion of jurisdiction

The Respondent argues that Congress charged OSHA with the duty "to assure so far as possible every working man and woman in the nation safe and healthful working conditions." Occupational Safety and Health Act, 29 U.S.C. § 651 (1970). And in keeping with this duty, OSHA has formulated regulations making certain employee exposure data and medical records available, to employees and their representatives. According to the Respondent, the formulation of the regulations constituted an attempt, to the extent possible, to strike a delicate balance on the myriad of complex issues involved in the area of access by employee representatives to safety and health information held by the employers. Since the Union's request for information here falls within the purview of OSHA's regulations, expertise, and jurisdiction the Board should decline jurisdiction here, and for the Board to become heavily embroiled in an issue that OSHA has already determined is for the Board to go outside of "its legitimate area of concern." In support of this argument the Respondent cites the fact that the General Counsel of the Board has recognized the primary jurisdiction of OSHA in cases involving discrimination against employees engaged in health and safety activity even though such discrimination might also be proscribed under the National Labor Relations Act where related to the broad right of employees to engage in concerted activities. See *Memorandum of Understanding Between OSHA and NLRB*, 40 F.R. 26083 (1975).

The Respondent's argument briefly related above has considerable appeal. But the General Counsel's understanding with OSHA has application only to discrimination cases, and does not apply to refusal-to-bargain cases where the Board itself has significant expertise. Moreover, the Board has already answered the Respondent's argument in this area in *Gulf Power Company*, 156 NLRB 622, 626 (1966), enfd. 384 F.2d 822 (5th Cir. 1967), where it said:

> We find without merit the Respondent's contention that statutory provisions requiring that it exercise a high degree of care in its operations render all matters pertaining to safety a prerogative of management and therefore immune from bargaining.

[5] Resp. Exh. 1, art. 33, sec. 2.

> Such laws, like the minimum wage and a variety of governmental regulations, merely establish certain minimum requirements in their respective fields as conditions of doing business and are not intended to preempt their fields of regulation to such an extent as to exclude therefrom the concept of collective bargaining.

Gulf Power issued prior to the advent of OSHA regulations cited by the Respondent. However, it has not been reversed on the point noted above, and, on the contrary, it was cited by the administrative law judge in a case in which the Administrative Law Judge held with recent Board approval that an employer violated Section 8(a)(5) by refusing to allow plant access to a union's industrial hygienist. *Winona Industries Inc.*, 257 NLRB 695 (1981). In reaching this conclusion, the Administrative Law Judge observed that although OSHA reports might be available the evidence reflected that the union's industrial hygienist followed procedures which would reveal data supplementing and expanding that obtained by OSHA investigators.

Likewise, in the instant case, there was no showing that the information with respect to all the chemicals used, processed, or contained in the Respondent's products was available to the Union through OSHA reports, or that the Union would have access to all such information under OSHA regulations. Without this information it is unlikely that the Union could insure identification, location, examination, and treatment of unit employees exposed to chemicals subsequently determined to be hazardous. Moreover, the Union's reluctance to accept at face value the Respondent's assertion of plant safety and compliance with OSHA regulations, notwithstanding the Respondent's safety record, is understandable where, as here, one of the Respondent's representatives, Gilley, in his testimony alluded to OSHA regulations and employee complaints thereunder as an "endless little game, wasting a lot of time."

Considering the foregoing and the authority cited above, I reject the Respondent's argument that the Board should not assert its jurisdiction in this case, and conclude that the Board has not yet abdicated its authority to OSHA to determine employer obligations under Section 8(a)(5) of the Act to bargain in good faith.[6]

2. The relevance of the requested information

It is well established that an employer is obligated to provide a union which represents its employees information requested by that union which is relevant and necessary for the proper performance of the union's duties as a collective-bargaining representative. *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956). The obligation to supply requested information extends not only to information which is useful and relevant for the purposes of contractual negotiations, but also to information necessary to inform administration of a collective-bargaining agreement. *Safeway Stores, Inc.*, 252 NLRB 1323 (1980); *Westinghouse Electric Corporation*, 239 NLRB 106 (1978). The only premise for deciding whether the obligation to produce exists is its relevance and reasonable necessity for the labor organization's proper performance of its role as a collective-bargaining representative. *Detroit Edison Company*, 218 NLRB 1024, 1033 (1975), reversed and remanded on other grounds 440 U.S. 301 (1979). Relevancy is to be determined by a liberal standard. *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 437 (1967). And, as the court said in *Curtiss-Wright Corporation, Wright Aeronautical Division* v. *N.L.R.B.*, 347 F.2d 61, 69 (3d Cir. 1965), "Reasonable necessity for a union to have relevant data is apparent; necessity is not a separate and unique guideline, but is directly related to the relevance of the requested data." Furthermore, in determining relevance, the Board has observed in *Northwest Publications, Inc.*, 211 NLRB 464, 466 (1974), "All possible ways in which the information may become important can not be foreseen in advance of negotiations." And in *N.L.R.B.* v. *Acme Industrial, supra*, the Supreme Court in requiring an employer to provide information requested by a union in connection with processing a grievance indicated at 437 that it was necessary to establish only "the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities."

"[*W*]*age and related information* pertaining to employees in the bargaining unit is *presumptively* relevant, for, as such data concerns the core of the employer-employee relationship, a union is not required to show the precise relevance of it, unless effective employer rebuttal comes forth . . . ." *Curtiss-Wright Corporation* v. *N.L.R.B.*, *supra* at 69. Because plant safety rules and safe work practices have consistently been considered to be a mandatory subject of bargaining,[7] a request for information related to work place health and safety problems must be likewise considered presumptively relevant to a collective-bargaining representative's fulfillment of its statutory functions. Aside from wages, it is difficult to perceive of any subject being of greater concern to employees or having a greater impact upon their conditions of employment than the subject of safety. Indeed, there is frequently direct correlation between wages and safety.

In the instant case, the fact that safety has been a matter of interest and concern to the Union is demonstrated by the inclusion of the health and safety provision, article 18, in the current and preceding collective-bargaining agreements.[8] In that provision it is specifically stated:

> It is agreed that health and safety of the employees is a matter of interest to both the Company and the Union. The Company shall use reasonable care to see that no employees shall be required to work under conditions which constitute a hazard or which are injurious to health and shall continue to

[6] This is not to say that the accommodation between the Act and OSHA should not be sought. Preservation of the objectives of each dictates such accommodation. But Board deference to OSHA is not required in all cases. See, e.g., *Brown & Root, Inc.*, 246 NLRB 33 (1979); *Kelly-Springfield Tire Company*, ALJD-586-81. As indicated, I find no necessity for deferral to OSHA under the circumstances of this case.

[7] See *Gulf Power Company, supra.*

[8] See Resp. Exhs. 1 and 9

> supply without cost to the employees such safety and health equipment as may be reasonably needed for the safety and health of employees while at work. Employees will not be required to perform any job which cannot be done with reasonable safety.

Thus, the parties here by agreement have emphasized their collective concern over safe working conditions for unit employees. Accordingly, even if safety information was not presumptively relevant the parties have by agreement and in their past practice clearly made it relevant.[9]

While the Union had failed to clearly articulate its reasons for wanting the list of chemical substances in the working environment prior to October 1, it is clear and undisputed that on that date Union President Perry had related the request for the information to the Union's general concern over prior incidents when several employees had experienced nausea after exposure to certain fumes. And on the following day, October 2, Levine, at Gilley's request, expressly stated the necessity of the Union's acquisition of the requested information relating it to a concern over record keeping of employee exposure to chemicals or materials which might later be determined as harmful or hazardous. Moreover, regardless of whether the information requested would have an immediate impact upon the working conditions of unit employees, Levine's expressed reason for requesting the information has obvious validity. Experience in recent years has revealed that certain substances once thought harmless have turned out to be in fact hazardous. Having a list on file of chemicals to which unit employees have been exposed quite clearly has a potential usefulness in determining the necessity of periodic examination and treatment if any of such chemicals are subsequently found to be hazardous. As I have already related, the fact that the requested information might not have an immediate impact upon working conditions does not affect the obligation to produce. As the Board said in *Western Massachusetts Electric Company*, 234 NLRB 118, 119 (1978):

> Thus, it is well settled that a labor organization's entitlement to information is not to be limited merely to that which would be pertinent to a particular existing controversy but rather extends to all information that is necessary for the labor organization properly and intelligently to perform its duties in the general course of bargaining. Indeed, a more restrictive view of a union's right to information would often require it to play blindman's bluff with respect to potential grievances, a result repeatedly rejected by this Board and the courts.

Finally, the information requested on chemicals could clearly affect the Union's ability to administer the health and safety provision of the collective-bargaining agreement. Without such information and the knowledge of what employees are dealing with or are exposed to, there is no way it could effectively ensure the Respondent's compliance with its commitment in the health and safety provision of the collective-bargaining agreement not to require employees "to work under conditions which constitute a hazard or which are injurious to health . . . ." It is true that the Respondent has commendably taken efforts to ensure the safe working conditions of its employees. The fact that it has had substantial success with its efforts in this regard cannot be disputed and is also very commendable. The Respondent's safety programs may serve its purposes well and may well meet the standards required by state and Federal regulations. But as stated by Administrative Law Judge Maurice M. Miller in *Borden Chemical, a Division of Borden, Inc.*, 261 NLRB 64, 77–78 (1982), in a case which closely parallels the instant case and which is presently pending before the Board:

> More particularly, Respondent's broad spectrum of control devices, protective clothing, technical procedural directives, and safe practice rules, calculated to preserve health and promote workplace safety, may indeed provide the Fremont plant workers with "adequate" protection against *known* toxicological risks, while permitting management to maintain *optimum* production. However, shared knowledge, confined merely to familiarity with a plant management's currently maintained protective measures, provides neither Respondent's Fremont workers, nor their collective-bargaining representative, with sufficient data to facilitate continuous "intelligent" contract policing or prospective contract negotiations. 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 work force, never previously recognized within a laboratory, and thus not yet cognizably forestalled. [Emphasis supplied.]
>
> * * * * *
>
> Respondent's determination to withhold a complete materials list, necessarily, precludes Complainant Union from seeking determinations—derived from "independent" consultation or research—regarding the toxic properties of chemicals handled and processed within the firm's Fremont plant. Conceivably, *some* potential hazards—clinically or experimentally traceable to significant or sustained "exposure" involving such chemicals, but never previously suspected, never previously recognized, never reported to Respondent's concerned profes-

[9] The Respondent claims that the Union previously made an extensive request for information including a "list of all substances in use, and possible hazards." Whitcomb testified, without contradiction, that the request was made in the 1978 negotiations, but he added that the Union's request which was contained in a contract proposal was withdrawn with the Union's acknowledgement that they had enough information for their needs. It is sufficient to observe that a prior withdrawal of a request does not affect the relevancy of a subsequent request for the same information nor does such withdrawal thereafter preclude for all time the necessity for the requested information.

sionals, and never previously verified—could, therefore, remain undetected, pending their definitive physiological manifestation within a significant number of Respondent's workers.

Administrative Law Judge Miller in *Borden Chemical, supra*, concluded therefore that a union's request for a complete "materials and chemicals" list was a request for "relevant" information which "would be of use" to the union in seeking to discharge statutory duties and responsibilities. Similar results were reached by two additional administrative law judges in *Colgate-Palmolive Company*, 261 NLRB 90 (1982), and *Minnesota Mining Company*, 261 NLRB 27 (1982). These cases are also pending decisions by the Board. More recently, in *Kelly-Springfield Tire Company*, JD-586-81, Administrative Law Judge Thomas Bracken held that a union's request of an employer for a list of chemicals by generic name was a request for "information vital to the present and future health of the employees it represent[ed]."

Considering all of the foregoing and consistent with the conclusion of the Administrative Law Judges in the *Borden Chemical, Colgate-Palmolive, Minnesota Minning*, and *Kelly-Springfield* cases, I conclude that the Union's request here for a listing of all chemical substances in the employee work environment was a request for "relevant" information necessary to the Union in the fulfillment of its representative functions.[10]

In view of the relevance of the requested chemical information and the reasonable necessity of the Union's possession of it, the Respondent's *good faith* in failing to provide the information, absent an outright inability to provide it, becomes largely irrelevant. The mechanics of providing the information such as the allocation of costs involved, the form of assurances against disclosure by the Union, the format of the information to be supplied, the time and method of supplying, and any other pertinent details of access to the information are subject to the bargaining process.[11] But the Respondent's obligation to provide relevant and necessary information is basic and not subject to bargaining. *Curtiss-Wright Corporation, supra; Winona Industries, Inc., supra; General Electric Company*, 199 NLRB 286 (1972). Cf. *N.L.R.B.* v. *Associated General Contractors of California*, 633 F.2d 766 (9th Cir. 1980). And as the Board said in *The Kroger Company*, 226 NLRB 512, 513 (1976), "[W]here a request for relevant information adequately informs the employer of the data needed, the employer either must supply such information or adequately set forth the reasons why it is unable to comply." See also *Westinghouse Electric Corporation*, 239 NLRB 106 (1978).

While, as urged by the Respondent, the Union's request in the case *sub judice* was a broad one, I am satisfied from the record as a whole that the Respondent comprehended the scope of the information sought by the Union. More particularly, Gilley testified that in the October meeting he had with Levine they had discussed "exactly what was meant by chemical substances in the work plant." It was agreed that the Union was not seeking a listing of chemicals in the cafeteria but rather those "within the working area."

In view of the foregoing I conclude that the Respondent understood what was requested of it, that it had a clear and affirmative duty to provide the Union with the requested chemical information, unless the reasons advanced by the Respondent and considered *infra* justify its failure to comply with this duty.

3. The Respondent's confidentiality defense

It is undisputed that the Respondent manufactured products containing chemical substances which are combined in accordance with formulas which might involve "confidential" information or "proprietary" trade secrets. In the instant case, however, the Union did not request formulas nor did it request ratios of chemicals within products.[12]

The Board has held that a general confidentiality claim "does not privilege" a refusal to provide a union with requested relevant information. See *The Ingalls Shipbuilding Corporation*, 143 NLRB 712, 717 (1963). But in *Detroit Edison Company* v. *N.L.R.B., supra*, the Court indicated that there is no absolute rule that a union's request for relevant information must predominate over other legitimate interests an employer may have in refusing to give the union requested information. Accordingly, there must be a balancing of the interests of each side, the employer's in retaining the information and the union's in obtaining the information.

I am not persuaded that the Respondent here has demonstrated reasonable jeopardy to its confidential materials or proprietary interest. Other than the bare assertion of the Respondent's witnesses that disclosure of a chemical list would jeopardize trade or proprietary secrets, there

[10] In the instant case, I must observe that the Respondent's submission to the Union of a list of eight chemicals determined to be toxic by the Environmental Protection Agency (EPA) was completely inadequate to assuage a legitimate concern by the Union about other chemicals not yet determined to be hazardous. Moreover, and in any event, it is quite clear from the record that employees were required to handle chemicals considered to be dangerous which were not on the EPA toxic list. Thus, Resp. Exh. 12, a portion of a formula card used by the Respondent in making up its products and introduced into evidence to show the precautionary measures taken in instructing employees in handling chemicals used in the formula, demonstrates that at least two chemicals listed in the formula card, phenylmercuric acetate and sodium hydroxide, were chemicals which could be dangerous and could cause burns. Such chemicals clearly were not on the EPA toxic list supplied to the Union on October 2, yet they were nevertheless presented hazards to employees handling them. And even if the Respondent taught its employees handling procedures, the Union without knowing what chemicals were handled could not question or determine whether such handling procedures were adequate for employee protection in its view.

[11] The Respondent sought to introduce evidence at the hearing concerning certain offers it had made to the Union in connection with the requested information. That evidence was excluded, however, because the offers were made in settlement discussion directed by me in a prehearing telephone conference with the parties and also at the hearing. Offers which are part of settlement negotiations are inadmissible. *East Wind Enterprises*, 250 NLRB 685 (1980). See also Fed. R. Evid. Rule 408. Moreover, any offers of compromise made immediately before the hearing are entirely irrelevant to a determination of a preexisting violation of the Act which had remained unremedied for more than a year.

[12] Gilley in his testimony admitted, in any event, that the Respondent's products could be broken down by a chemist and analyzed to determine the components and the ratios of the components within the product. Indeed, as Gilley further admitted, the ingredients of its products are listed on the label of its products.

is precious little in the record herein to establish exactly the degree of danger involved. The Union did not ask for the ingredients of the products and there is no indication of exactly how a list of chemicals, unrelated to any given product, would represent a risk to the disclosure of confidential or proprietary information. The mere assertion of a claim of confidentiality cannot outweigh the right to disclosure of relevant information. *Ingalls Shipbuilding, supra; The Kroger Co.*, 163 NLRB 441 (1967). Clearly an unsubstantiated and unexplained fear of disclosure cannot, on balance, override a union's request for relevant information. Again, as Administrative Law Judge Miller said in the *Borden Chemical* case at 261 NLRB at 85, "This Board cannot presume some 'certain risk of public disclosure' which Respondent has not, yet, persuasively demonstrated."[13] The same may be said here. Accordingly, I conclude that, on the record in this case, the Respondent has not established an overriding proprietary or confidentiality interest in the list of chemical substances sought by the Union sufficient to deprive the Union of its right to obtain and possess such a list.

4. The Respondent's waiver claim

As already related, the Respondent claims that the Union by proceeding through 1981 negotiations on the collective-bargaining agreement and by executing the so called "zipper clause," it thereby waived any right it might have to the information requested. A "waiver" will not be lightly inferred however, and a waiver of a statutory right to requested relevant information must be clear and unmistakable. *Globe-Union, Inc.*, 233 NLRB 1458 (1977). A waiver requires "conscious relinquishment by the Union, clearly intended and expressed." *Perkins Machine Company*, 141 NLRB 98, 102 (1963). And the failure to incorporate a statutory right in a collective-bargaining agreement does not justify the inference of a waiver of that right. *Southwestern Bell Telephone Company*, 247 NLRB 171 (1980). Even the presence of a "zipper clause" in a negotiated agreement does not necessarily dictate a finding of a waiver. In *Rockwell-Standard Corporation Transmission and Axle Division, Forge Division*, 166 NLRB 124 (1967), enfd. 410 F.2d 953 (6th Cir. 1969), the Board adopted the Trial Examiner's finding at 132 that:

> Even when a "waiver" is expressed in a contract in such broad, sweeping terms . . . it must appear "from an evaluation of the . . . negotiations that the [particular] matter [in issue] was 'fully discussed' or 'consciously explored' and the union 'consciously yielded' or clearly and unmistakably waived its interest in the matter."

On the basis of the record here I find no "waiver" by the Union. On the contrary, as Levine credibly testified, there was specific mutual agreement after the subject arose in negotiations that since litigation on the requested information was pending the parties would not discuss the matter. I do not credit Whitcomb's testimony to the extent it contradicts Levine's on this point. Whitcomb was at times vague, evasive, unresponsive, and occasionally argumentative. Moreover, even Whitcomb's testimony reveals that he did not specifically understand the successful negotiations on the new collective-bargaining agreement to constitute a resolution of the dispute over supplying the Union information on chemical substances. Thus, in a discussion with Levine concerning arrangements for executing the new agreement, Whitcomb found it necessary to inquire if that resolved the "whole issue of the material list." Such inquiry would have been unnecessary if the negotiations had been clearly intended to resolve the point. Finally, the execution of the contract did not in itself render moot the issue on the requested information. The need for, and relevancy of, the requested information was not limited to contractual negotiations, but, as already noted, extended to administration of the contract as well as the Union's long-term concern for the health and safety of unit employees. Accordingly, I find the credited evidence here falls far short of establishing any "clearly intended and expressed" relinquishment by the Union of its right to the requested information.

5. The Respondent's cost defense

With respect to its contention that the production of a list of chemical substances in the plant would be burdensome and costly, Board law is that an employer need not furnish even relevant data to a union that would be unduly burdensome to compile. *Westinghouse Electric Corporation*, 129 NLRB 850, 866 (1960). Here I am not satisfied that the Respondent has established an undue burden.

Gooch testified that supplying the Union with the requested information would cost an estimated $2 million. Gooch's testimony is based on discussion and communications with Dr. J. M. Neilsen, an official of a division of the General Electric Company, a concern capable of developing safety data sheets for various chemicals. Gooch presented to Neilsen as a basis for the estimate the theoretical preparation of 10,000 material safety data sheets.[14] Neilsen, in a letter to Gooch dated April 9, 1981, concluded that it would take 4 years to complete the task using a planned staff of six to eight professionals and the project would cost a "guesstimated" $2 million.

Similarly, the Respondent's director of systems development for the proprietary drugs and toiletries division,

[13] Whitcomb testified with apparent seriousness that Levine during 1981 contract negotiations responded affirmatively to a specific accusation by Whitcomb that all Levine wanted the requested information for was to supply it to the general public and the Respondent's competitors. However, on cross-examination Whitcomb conceded, reluctantly, that Levine's response had been sarcastically delivered. Accordingly, I do not accept Whitcomb's testimony as establishing any ulterior motivation by the Union in seeking to secure the requested information, particularly in view of Whitcomb's further admission that Levine also specifically told him that the Union needed to know even the "harmless" chemicals in case at "some unforeseen date in the future, they would become of concern."

[14] A safety data or material hazard sheet was described by Gooch as a document reflecting the chemical composition of a substance, the exposure limits on a daily basis for an individual, the flash point of the substance, and protective measures and equipment to be utilized in handling the substance.

Cynthia Ziegler, testified that during the week prior to the hearing she was asked by Whitcomb to provide an estimate of the cost of the development of a computer system necessary to provide the requested information by the Union for a list of chemical substances as well as an estimated annual cost to run the system. Ziegler estimated that the development of a computer system which could provide for each chemical in use in the plant, regardless of whether it was used in the product manufactured, the generic name, trade name, hazardous warning or instructions related to the chemical, and the material safety data sheet for the chemical would cost $258,000. She further estimated an annual cost of $114,000 in maintaining the computer system from which the information on the chemicals could be obtained.

I find the Respondent's cost defense defective for a number of reasons. First of all, while the Union, in addition to a list of chemicals, also sought "any" hazardous warnings or instructions associated with the chemicals to include material hazard sheets such request cannot be interpreted as requiring the Respondent to establish material hazard sheets. The use of the word "any" in my view is a word of limitation referring to existing warnings, instructions, and hazard sheets. Moreover, if there was any ambiguity or uncertainty on the Respondent's part as to what was required in this regard there is no evidence that it sought clarification from Levine. Second, Dr. Neilsen's "guesstimate" was based on preparation of 10,000 safety data sheets but the record does not establish that the Respondent utilized 10,000 chemical substances. Even if it did, Gooch admitted that the Respondent already had "some" safety data sheets. Thus, I view the "guesstimate" to be a clear and unreliable exaggeration.

Third, and with respect to the testimony of Ziegler, the Union did not request the development of a computerized system. Moreover, there is nothing in Ziegler's testimony nor in the testimony of any of the other witnesses presented by Respondent which would explain the necessity of the development or maintaining of a computerized system for providing the Union with the requested information. It is also clear that Ziegler did not base her estimate on personal knowledge of the availability of information. In this regard, testifying with respect to obtaining raw data, Ziegler testified that as she "understood it" some of the requested material was not available at all, and otherwise exhibited confusion with respect to the availability of information to put into the computer system. The following question and answer are demonstrative:

> Q. (By Mr. Cantrell) So when you are saying "not available" [data] you don't mean it is not anywhere in the plant?
>
> A. I am frankly not sure if all of the data is available in the plant. I know a great deal of it probably is somewhere on either some chemical drums or in some file or something, but I truly don't know the answer to that.

Asked about her estimate with respect to the cost of systemizing the printing plant, Ziegler responded:

> That was our best guess. I was much more comfortable with proprietary drugs and toiletries and how we would go about doing it and the discussions with the data processing people in the printing plant and what information they had readily available to them, we felt that including them, as I understand we would need to do in this estimate, that they would represent an incremental cost of about a quarter.

Thus, while Ziegler may have been well qualified to ascertain the cost of establishing a computer program as a source for information, I am not persuaded that her testimony in itself proves the unavailability of the requested information or provides an accurate estimate of the cost of providing the information. Indeed, Ziegler's testimony shows that the cost of acquiring the chemical information would be less than 6 percent of the $372,000 claimed cost of establishing and maintaining a computer system for the information.

The record is also otherwise contradictory and confusing as to the availability of the information sought by the Union. There was testimony of Gooch that there was no single list of chemical substances used in the plant. The testimony of Whitcomb and Ferrell, however, was vague with respect to the existence of a number of separate lists and the difficulty in compiling therefrom a single list. Whitcomb, at one point in his testimony, indicated the departmental employees might catalog chemicals within their area and a list could be compiled within 8 hours. It is difficult to understand how a presumably efficient and modern plant would not have immediately available to it information regarding the content of its products, raw materials, and substances used in the manufacturing process. Indeed, Ferrell in his testimony related that the Respondent was able to determine whether it was using any of the over 239 chemicals listed by the EPA as toxic and hazardous. Thus, the Respondent determined that it did have some eight chemicals of a toxic nature and it was these eight chemicals which it revealed to the Union on October 2 through Gilley's conversation with Levine. Logic would seem to dictate that if department heads can determine that they do not have certain chemicals they must necessarily have knowledge or stored information regarding chemical substances that they do have in their departments and under their control. In other words, one cannot determine what he does not possess unless he knows what he possesses. Moreover, even Ziegler testified that the Respondent already had approximately 500 chemical substances available from the Respondent's computer system.

Finally, I note with respect to the Respondent's cost defense that it made no attempt to ascertain the cost of providing the information until more than 10 months after the Union's initial request for the information in May 1980.[15] Nor did it seek at any time any contribution

[15] As previously indicated, Ferrell's communication with Neilsen of General Electric was not until April 1981. And Ziegler was not asked about developing a data system for the information until a week prior to the hearing.

from the Union for any alleged costs.[16] Accordingly, I find on this record the Respondent's economic defense to be vague, overstated, and so exaggerated as to be unreliable. I find no merit to it.

C. *Discussion and Conclusion on Information Relative to Results of Employee Physicals*

Initially it must be observed that the results of physical examinations had relevance to the Union's representative functions because such information could allow it to identify deteriorating physical conditions which, when correlated to departments or areas, might be vindictive of an exposure hazard involving chemicals in that area.[17]

It is clear that the results of a physical examination constitutes a medical record. In *United Aircraft Corporation (Pratt and Whitney Division)*, 192 NLRB 382 (1971),[18] the Board considered whether it was a violation of Section 8(a)(5) for the employer there to provide the union with certain medical records. There the Board stated at 390:

> As to the "Functional Capacity Record" which is a record of physical disabilities and informities of employees discovered by a physician in a physical examination, Respondent's position was that such records should not be publicized without the employee's permission unless and until that individual's physical capacities become relevant to some particular problem. In view of the generally recognized confidential nature of a physician's report, we find that Respondent's position with respect to furnishing copies of such reports was [a] reasonable one and did not violate Section 8(a)(5) of the Act.

Applying the above language in *United Aircraft*, and proposed OSHA regulations on the confidentiality of medical records, the Administrative Law Judge in *Colgate-Palmolive Company, supra*, concluded that an employer did not violate Section 8(a)(5) by refusing to provide the union with requested medical records which would identify employees absent their consent. The Respondent cites the reasoning and result in *Colgate-Palmolive* on this point as applicable here. The Union would apparently distinguish *Colgate-Palmolive* on the basis that it specifically did not seek the identity of the employees in the information requested. The Respondent counters that even with deletion of names the results of the physicals would nevertheless contain information by which employees could be identified.

In *Johns-Manville Sales Corporation*, 252 NLRB 368 (1980), the Board, observing its obligation under *Detroit Edison Co., supra*, to balance the union's need for the information requested against any legitimate assertions of confidentiality, found no violation of Section 8(a)(5) in an employer's refusal to supply the requesting union with the names of 34 employees whose medical files the employer had "red-tagged" because of a diagnosis of their partial disability by pneumoconiosis, a lung disease possibly related to employment. In reaching this conclusion, the Board found the union could fulfill its responsibilities to the "red-tagged" employees without the requested information.

It is therefore clear that the Board has significant concern with the confidentiality of employee medical records. While the Union here did not ask for names of the individual employees, the results of the physical examinations necessarily includes other identifying information, such as sex, age, height, weight, observable infirmities, and, usually, identifying scars. The record does not show whether the examination records would reflect the employee work area or department. Although it might be possible to delete the identifying information noted above, it would appear that the resulting information would lose much of its value for the purposes sought by the Union. On the other hand, the Respondent has provided the Union in the past with information[19] reflecting the occurrence of any occupational illnesses occurring within the plant and the nature of the illness. Compilation of this information over a period of time would, I believe, tend to serve the same purpose as the information sought by the Union. Moreover, if indeed critical to its needs, the Union nevertheless could acquire the physical examination results upon securing individual employee consent for such records.[20] Accordingly, I conclude that the potential benefit of the Union in having the physical examination results under the circumstances here does not outweigh the legitimate concern over confidentiality of employee medical records. I therefore conclude that the Respondent did not violate Section 8(a)(5) or (1) of the Act in refusing to provide the Union with the results of the physicals.

Based on the foregoing, and considering the record as a whole, I make the following:

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[16] As the Board said with respect to a union's request for information in *Food Employers Council, Inc., et al.*, 197 NLRB 651 (1972):

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

[17] At the hearing the Union made it clear that its request included results of preemployment physicals which would likewise be relevant to identifying a post-employment health condition which might be attributable to a chemical exposure problem. Since the Union's request was for "all" results of physicals, I do not view the Union's explanation at the hearing regarding the employment physicals to constitute an effort to expand the scope of its original request.

[18] Modified on other grounds *sub nom. Lodges 743 and 1746 International Association of Machinists and Aerospace Workers, AFL-CIO* v. *United Aircraft Corporation*, 534 F.2d 422 (2d Cir. 1975), cert. denied 429 U.S. 825 (1976).

[19] This information consisted of the right hand portion of OSHA Form 200, a reporting form which omitted identifying information.

[20] Although the Respondent raised a cost defense with respect to supplying the Union with the results of the physicals, I find no merit to such defense which consisted solely of Ziegler's testimony regarding establishing of a computer system for such information. Here again the necessity of establishing such a system was not shown and I therefore conclude that the cost was unsupported. Moreover, in this instance, the claim of excessive cost is inconsistent with the Respondent's expressed willingness, without reservations as to cost, to provide the results of the physicals upon employee consent.

CONCLUSIONS OF LAW

1. Respondent Plough, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as amended.

2. International Chemical Workers Union Local No. 194 is a labor organization within the meaning of Section 2(5) of the Act, as amended.

3. All production, plant maintenance, machine shop, warehousing, garage mechanics, shipping, receiving, garage, boiler room, and printing plant service employees of the Company at its plants at 3022 Jackson Avenue, Memphis, Tennessee, 1248 Warford Street, Memphis, Tennessee, 2491 Mathews Street, Memphis, Tennessee, and 1178 Pope Street, Memphis, Tennessee, but excluding printers, bookbinders, typographers, over-the-road truck drivers, cafeteria employees, watchmen, guards, office and clerical employees, professional and technical employees and supervisors as defined in the Labor Relations Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the Union has been the exclusive bargaining representative of the employees of Plough, Inc., within the bargaining unit found appropriate herein, within the meaning of Section 9(a) of the Act.

5. By failing and refusing to provide the Union with a complete list of chemical substances in use in the above unit by their respective generic and trade names along with any hazardous warning and instructions associated with the substances, including material hazard sheets, pursuant to the Union's request, Respondent has failed and refused to bargain collectively with the Union and has thereby engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The unfair labor practices specified affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to provide the Union with the results of all physical examinations taken by employees from May 13, 1975, or in any other manner alleged in the complaint.

THE REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with certain requested information, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice.

Having found that Respondent unlawfully refused to provide the Union with information with respect to all the chemical substances used in the bargaining unit along with any available hazardous warnings or instructions associated with such substances, including material hazard sheets, I shall recommend that the Board require that the Respondent be affirmatively ordered to provide the Union with such information.

In connection with its obligation to produce the information requested by the Union, to the extent costs are involved in such production, it is recommended that the Respondent be required to bargain in good faith with the Union regarding who shall bear such costs. Barring agreement, the Union shall be allowed access to records from which it can reasonably compile the information requested. If any dispute arises in applying these guidelines, it will be treated in the compliance stage of the proceeding. *Food Employer Council, Inc., et al., supra* at 651; *Safeway Stores, Inc.*, 252 NLRB 1323 (1980).

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[21]

The Respondent, Plough, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Chemical Workers Union Local No. 194 as the exclusive bargaining representative of its employees by refusing to furnish the Union a complete list of all chemical substances in use in the bargaining unit by generic and trade names along with any hazardous warnings or instructions associated with said substances, including any material hazard sheets.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Furnish the Union, or its designated representatives, upon request, the chemical substances list described in paragraph 1(a) above.

(b) Post at its Memphis, Tennessee, facilities, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 26, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."