WORKPLACE EXPOSURE TO TOXIC CHEMICALS: INFORMATION DISCLOSURE VERSUS TRADE SECRET PROTECTION

INTRODUCTION

Americans are exposed to over 59,000 toxic chemicals in their workplaces.[1] Exposure to such substances potentially leads to a wide range of serious health problems. Knowledge of the relationships between chemical exposure and human health effects is inadequate, many of the needed methodologies are in nascent stages.[2] Yet, according to some estimates, twenty percent of cancer is caused by occupational exposure to chemicals.[3] Other chronic health hazards associated with exposure to toxic chemicals include mutagenicity, teratogenicity, and various neurological effects.[4]

Workers and their unions seek to obtain toxic-related information in order to evaluate the health effects of chemicals, assess safety procedures, and monitor exposure conditions. Often, the employee's interest in obtaining information about toxic chemicals conflicts with the employer's desire to limit access to that information. Employers are primarily interested in keeping information regarding products and processes from their competitors. The desire to limit access also stems from the belief that employers and/or the government are best suited to balance the competing interests involved, including the protection of worker health.

Labor's difficulty in obtaining toxic-related information directly from employers has spawned federal, state, and local regulatory attempts to mandate disclosure.[5] These efforts, often referred to as worker's "right-to-know", have been a target of the Reagan Administration's anti-regulatory efforts.[6] An increasing number of state and local regulations that reflect a variety of purposes and strengths have been enacted.[7] However, they are effective in only some parts of the country and are often subject to the limited enforcement abilities of the state and local jurisdictions.

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1. National Institute for Occupational Safety and Health, Registry of Toxic Effects for Chemical Substances (1981-1982).

2. N. Ashford, Crisis in the Workplace 15-17, 114-24 (1976); see also Toxic Substances Strategy Committee (Council On Environmental Quality), Toxic Substances and Public Protection: A Report to the President 10 (1980).

3. K. Bridbord, P. Decoufle, J. Fraumeni, Jr., D. Hoel, R. Hoover, D. Rall, U. Saffiotti, M. Schneiderman & A. Upton, Estimates of the Fraction of Cancer in the United States Related to Occupational Factors (1978), cited in Toxic Substances Strategy Committee, supra note 2, at 120 n.4.

4. See N. Ashford, supra note 2, at 77-79.

5. See text accompanying notes 171-91 infra.

6. See note 171 infra.

7. See note 184 infra.

Although the National Labor Relations Act (NLRA or the Act)[8] is the country's primary mechanism for resolving labor disputes,[9] the extent to which the NLRA mandates employers to disclose toxic-related information is a question only recently addressed by the National Labor Relations Board (NLRB or the Board)[10] and the federal courts.[11] The first court of appeals decision to directly address the issue[12] did not specify what kind of disclosure is required in the face of employer trade secret claims.[13] The court failed to tackle two questions: First, are employers required to substantiate trade secret claims, and, if so, how? Second, if certain information is determined to be a *bona fide* trade secret, what forms of disclosure, if any, will be mandated? The eventual answers to these questions will indicate a great deal about the relative rights of employees under the NLRA as opposed to those under health and safety regulatory schemes. The D.C. Circuit's failure to fully address the trade secret issue may evidence a solicitude to the interests of employers in maintaining a tight rein on information access.[14] This attitude may ultimately constrain not only union access to information,[15] but the scope of bargaining itself.[16]

After briefly describing the theoretical limits that the NLRB and the courts have placed on collective bargaining,[17] this Note will consider whether worker exposure to toxic chemicals falls within the scope of mandatory bargaining and is therefore subject to information disclosure obligations.[18] The Note will then critically examine the recent decisions of the NLRB and the United States Court of Appeals for the District of Columbia which directly address these issues,[19] but fail to resolve the primary issue of whether disclosure is required in the face of a trade secret claim.[20] The circuit court's approach will be found to potentially place undue constraints on both information access and the scope of bargaining.[21] Various alternative approaches to resolving the inherent tension between information disclosure and trade secret protection will also be considered.[22]

Finally, the Note considers the relationship between information disclo-

8. 29 U.S.C. §§ 151-169 (1982).

9. See generally R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 1 (1976).

10. See text accompanying notes 89-101 infra.

11. See text accompanying notes 102-20 infra.

12. Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB, 711 F.2d 348 (D.C. Cir. 1983) [hereinafter *OCAW*].

13. See text accompanying notes 136-40 infra.

14. See text accompanying notes 139-40 infra.

15. See id.

16. See text accompanying notes 141-45 infra.

17. See text accompanying notes 24-52 infra.

18. See text accompanying notes 53-62 infra.

19. See text accompanying notes 89-120 infra.

20. See text accompanying notes 121-46 infra.

21. See text accompanying notes 136-46 infra.

22. See text accompanying notes 148-91 infra.

sure under the NLRA and occupational health and safety regulations. The Note concludes that the NLRB and the courts have a duty to protect employee rights in attempting to achieve health and safety goals.[23]

I
THE SCOPE OF MANDATORY BARGAINING

The NLRA embodies a preference for peaceful resolution of labor disputes through the process of collective bargaining.[24] To this end, the Act establishes procedures for facilitating the bargaining process, but it does not define the substantive parameters of bargaining. The Act simply refers broadly to "wages, hours, and other terms and conditions of employment" as subjects of bargaining,[25] and leaves the substantive resolution to the parties. The Act established the NLRB to serve as a referee when the parties disagree over procedural matters.[26] The judiciary's only role is to ensure that the actions of the NLRB reflect statutory requirements and are in accord with constitutional principles. As in other areas of the law, however, the substantive/procedural dichotomy has frequently proven difficult to apply and has resulted in case-by-case analysis.[27] As a result, the NLRB and the courts have increasingly entered the substantive realm by attempting to define the universe of bargainable subjects.

The attempt to exclude some subjects from the bargaining process was born of a concern that parties might insist on bargaining to an impasse over issues which were either insignificant or perhaps not contemplated by Congress when it enacted the Wagner Act. Thus, the Supreme Court in *NLRB v. Wooster Division of Borg-Warner Corp.*[28] sanctioned the bifurcation of labor relations issues into mandatory and permissive subjects of bargaining. The phrase "wages, hours, and other terms and conditions of employment" was construed as a term of limitation defining mandatory subjects; all other areas were held to be permissive subjects of bargaining.[29] With respect to the latter category, the Board could not compel bargaining, nor could the parties utilize economic pressure in order to obtain their objectives.[30]

Having created this bifurcated universe, the NLRB and the courts have met considerable difficulty in determining its parameters. In general, unions have been precluded from pressing issues directly connected to an employer's "right" to make business decisions.[31] This latter area has caused considerable

23. See text accompanying notes 192-96 infra.
24. See 29 U.S.C. § 151 (1982).
25. 29 U.S.C. § 158(d) (1982).
26. 29 U.S.C. § 153 (1982).
27. For example, in determining whether to apply federal or state law in diversity cases in federal courts see Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) and its progeny.
28. 356 U.S. 342 (1958).
29. Id. at 349.
30. See id.
31. See, e.g., First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674-88 (1981); see

analytic difficulty, as the Board has been forced to categorize such issues as subcontracting,[32] pension benefits,[33] and work-site closings.[34]

Attempting to develop a coherent rule of decision for addressing those issues that labor may not push to an impasse, the Supreme Court has developed the "managerial prerogative" doctrine. This doctrine had its genesis in a concurring opinion by Justice Stewart in *Fibreboard Paper Prods. Corp. v. NLRB*.[35] At issue was whether management's decision to subcontract certain bargaining unit work was a mandatory bargaining subject. Writing for a five-member majority, Chief Justice Warren held that "to require the employer to bargain about the [subcontracting] would not significantly abridge his freedom to manage the business."[36] Therefore, "[t]o hold . . . that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."[37]

In contrast to the majority's expansive view of bargainable subjects, Justice Stewart in his concurring opinion began with the *Borg-Warner* restrictive construction of "wages, hours, and other terms and conditions of employment."[38] While agreeing that the particular subcontracting decision at issue was a bargainable subject, Justice Stewart stated that "[n]othing the Court holds today should be understood as imposing a duty to bargain collectively regarding [those] managerial decisions . . . which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security . . . ."[39] Justice Stewart stated that such decisions "lie at the core of entrepreneurial control."[40]

In 1981, Justice Stewart's approach was adopted by the Court. In *First National Maintenance Corp. v. NLRB*,[41] the Court held that an employer's decision to terminate a part of its business did not, despite the obvious effect on employment, fall within the parameters of § 8(d) of the NLRA which defines bargaining responsibilities.[42] Justice Blackmun's majority opinion, however, embellished upon Justice Stewart's *Fibreboard* categorization of management decisions into mandatory bargaining subjects and managerial prerogatives. Justice Blackmun offered a third category for those decisions in-

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also Harper, Leveling the Road from *Borg-Warner* to *First National Maintenance*: The Scope of Mandatory Bargaining, 68 Va. L. Rev. 1447, 1462-71 (1982).

32. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).
33. Allied Chem. Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).
34. *First Nat'l Maintenance Corp.*, 452 U.S. at 666.
35. 379 U.S. at 217-26 (Stewart, J., concurring).
36. Id. at 213.
37. Id. at 211.
38. Id. at 220.
39. Id. at 223.
40. Id.
41. 452 U.S. 666.
42. Id. at 686.

volving "matter[s] of central and pressing concern to the union and its member employees"[43] that are "not in . . . [themselves] primarily about conditions of employment."[44]

Justice Blackmun also provided a test to be used to push issues from the fence of this third category: "[b]argaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."[45] Thus, after the Board has determined that the union has a powerful interest in bargaining over a subject, and that management has a significant interest in keeping the subject off the bargaining table, the Board must balance the interests involved. However, it is not at all clear that the interests of the employer are to be balanced against those of the union. Rather, the employers' interests are to be balanced against those of "labor-management relations."[46]

The Court's *Borg-Warner* decision thrust the NLRB into the substantive area of determining whether a given issue was a proper subject of mandatory bargaining. In attempting to provide further guidance to the Board, the Court has developed a balancing test that is arguably skewed in favor of management interests.[47] As the Board, either explicitly or implicitly, attempts to apply the test, non-traditional bargaining issues are unlikely to be found mandatory subjects. This will be particularly true if the Board adopts a view of government regulation which diminishes unions' roles in these non-traditional areas.[48]

Despite this resistance to expanding the category of mandatory subjects, both the NLRB and the courts have indicated that matters affecting the health and safety of union members are appropriate mandatory bargaining subjects. In *NLRB v. Gulf Power Co.*,[49] the Fifth Circuit enforced a Board order and held that § 8(d) "is to include safety rules and practices which are undoubtedly conditions of employment. . . ."[50] Both the court and the Board specifically rejected, "the company's contention that in all matters pertaining to safety it was immune to bargaining since safety was a prerogative of management."[51] Similarly, Justice Stewart's *Fibreboard* concurrence refers to safety practices as "conditions of employment."[52]

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43. Id. at 677.

44. Id. (quoting concurring opinion by Justice Stewart in *Fibreboard*, 379 U.S. at 223).

45. Id. at 679.

46. See id. at 689 (Brennan, J., dissenting); see also Atleson, Management Prerogatives, Plant Closings, and the NLRA, 11 N.Y.U. Rev. L. & Soc. Change 83, 107 (1983).

47. See Atleson, supra note 46.

48. See Rabin, "Response to Atleson," 11 N.Y.U. Rev. L. & Soc. Change 109, 111-12 (1983).

49. 384 F.2d 822, 825 (5th Cir. 1967).

50. Id.

51. Id.

52. 379 U.S. at 222.

II
DISCLOSURE OF TOXIC-RELATED INFORMATION: THE OCAW CASES

From the earliest days of the NLRA, it has been recognized that "communication of facts peculiarly within the knowledge of either party . . . is of the essence of the bargaining process."[53] The NLRA imposes a duty on employers "to provide relevant information needed by a union for the proper performance of its duties as the employees' bargaining representative."[54] Information access allows a union to evaluate, and perhaps verify, claims made by an employer in the context of negotiations.[55] The duty to disclose also "unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement."[56] Failure to disclose information necessary for negotiations may violate sections 8(a)(5) and 8(a)(1) of the NLRA,[57] because it can restrain effective bargaining.

In general, information must be disclosed if it pertains to a mandatory bargaining subject.[58] Thus, decisions limiting bargaining subjects may impact upon the scope of the duty to disclose. Conversely, decisions about the duty to disclose may at least suggest what boundaries the NLRB and the courts are likely to place on the universe of bargainable subjects. Further, limitations on information disclosure may constrain the ability of unions to effectively negotiate and administer contracts.

Union and employee access to specific chemical identity information is crucial for a wide-range of reasons. The availability of such information promotes meaningful bargaining and contract enforcement. Without it, unions may be unable to determine what importance to attach to a given toxic-related concern. For example, workers at a plant regularly use chemical *X*. If the union doesn't know what *X* is, it can't assess whether the hazards posed by the chemical warrant bargaining demands.

With regard to contract enforcement, toxic-related information will enable unions to assess whether the information supplied by employers adequately reflects known dangers. Similarly, this knowledge is essential if unions are to monitor both employer safety procedures and actual exposure levels. Additionally, unions may be more effective than employers in communicating hazards to workers and in training workers to deal with the hazards.

Unavailability of chemical identity information will greatly hamper a union's own research on the effects of exposure to toxic chemicals. Identity

53. S.L. Allen Co., 1 N.L.R.B. 714, 728 (1936), enforced, 2 L.R.R.M. 780 (3rd Cir. 1938).

54. Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1973).

55. See NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims . . . . If . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some proof of its accuracy." Id. at 152-53.

56. NLRB v. Acme Indus. Co., 385 U.S. 432, 436 (1967).

57. 29 U.S.C. §§ 158(a)(1), (5) (1982).

58. See text accompanying notes 112-15 infra.

information is necessary for unions to combine exposure data and health effects in epidemiological investigations. Epidemiological studies provide the most conclusive links between substances and hazards. Yet, such studies demand large population sizes in order to discern trends.[59] Such population sizes are not likely to be found if only a particular company's trade formulation is considered. Informal investigations of hazards associated with exposure, such as that which uncovered a connection between the pesticide DBCP and worker sterility,[60] require identity information if they are to involve more than a single work-site.

Thus, decisions concerning union access to chemical identity data raise the issue of whether unions must rely on the efforts of employers and/or government agencies to protect the health of union members. The NLRA's recognition of unions as representatives of employee interests, at the very least, suggests that a decision to preclude union involvement in these matters should not be made lightly. Although the principle of employee self-help, which underpins the NLRA, stands in potential tension with the principle of government protection manifested in the Occupational Health and Safety Act (OSH Act),[61] the two models can be considered supplementary rather than mutually exclusive.[62]

A series of recent cases considered the disclosure of toxic-related information pursuant to the disclosure requirements of the NLRA. Yet, these cases, which are discussed below, leave unanswered many crucial questions, including the relationship between disclosure under the NLRA and that pursuant to health and safety regulations.

A. The History of the Cases

1. Union Requests

In 1977 the Oil, Chemical, and Atomic Workers Union (OCAW) launched an intensive effort to obtain data regarding the chemicals to which its members were exposed.[63] Spurred by its own discovery of sterility among workers engaged in the production of pesticides,[64] OCAW prepared a form

59. See generally A.M. Lilienfeld, Foundations of Epidemiology (1976); J. Mausner & A.K. Bahn, Epidemiology (1976).

60. See text accompanying note 64 infra.

61. 29 U.S.C. §§ 651-678 (1982).

62. See text accompanying notes 192-96 infra.

63. Colgate-Palmolive Co., 261 N.L.R.B. 90, 97 (1979).

64. In that situation, researchers were able to connect the pesticide dibromochloropropane (DBCP) with sterility only after workers noted common symptoms among themselves. See J. O'Reilly, Unions' Rights to Company Information 288 (1980); see also Comment, Unions' Right to Information About Occupational Health Hazards Under the National Labor Relations Act, 5 Ind. Rel. L.J. 247, 255 (1983) [hereinafter Occupational Health Hazards]. Referring to this incident, the Secretary of Labor stated: "Experience has shown that direct worker involvement has often played a major role in discovering occupational health problems." 45 Fed. Reg. 35,220 (1980) (Preamble to OSHA rule providing for "Access to Employee Exposure and Medical Records" [hereinafter Records Access Rule]).

letter for its locals to submit to employers.[65] One hundred ten locals utilized the letter and requested the following information:[66]

(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 monitoring 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) a list of plant work areas where temperatures exceed proposed National Institute for Occupational Safety and Health heat standards and a description of the company's control program to prevent heat disease.[67]

Over half of the companies furnished at least some of the information requested.[68] OCAW filed charges under § 8(a)(5) of the NLRA against two of the companies that rejected its requests: Colgate-Palmolive Company (Colgate) and Minnesota Mining and Manufacturing Company (3M).[69] A third case arose from the same effort. Based on consultations with the OCAW, the International Chemical Workers Union (ICW) also sought a list of "all raw materials and chemicals" to which its workers were exposed.[70] Although the ICW sought only the generic and trade or code names of the chemicals, the Borden Chemical Company (Borden) rejected the request. The ICW responded by filing a § 8(a)(5) action.[71] In each of the cases, the union requests indicated that they would accept the data in "any . . . written form convenient for the company" and in any "format under which the company may

65. See J. O'Reilly, supra note 64, at 228; Occupational Health Hazards, supra note 64, at 255.
66. *Colgate-Palmolive*, 261 N.L.R.B. at 91 n.6.
67. *Minnesota Mining*, 261 N.L.R.B. 27 (1982).
68. *Colgate-Palmolive*, 261 N.L.R.B. at 91 n.6.
69. *Minnesota Mining*, 261 N.L.R.B. 27; *Colgate Palmolive*, 261 N.L.R.B. 90.
70. Borden Chem. Co., 261 N.L.R.B. 64, 70 (1979).
71. Id. at 64.

choose to answer [the] request."[72]

In the *3M* case, for example, the union's request stated that information was sought "in order that [the union might] propose steps to be instituted to protect the health and lives of the bargaining unit personnel."[73] Workers at the plant involved produced DBCP, the pesticide responsible for the incidence of sterility which helped prompt the OCAW initiative. Workers at this facility were also exposed to epichlorohydrin, a known carcinogen, mutagen, sterilizing agent.[74] Borden and Colgate workers were exposed to such carcinogens as formaldehyde and chloroform, respectively.[75]

Often 3M workers were unaware of the nature of the chemicals they handled. Chemicals were regularly found in drums identified only with code numbers.[76] Testimony at the unfair labor practice hearing also indicated that cautionary labels affixed by 3M would sometimes understate the hazards noted by manufacturers. For example, one label indicated that inhalation of a substance could "cause temporary headaches," while the warning supplied by the vendor stated that inhalation could be "fatal."[77] With regard to use of the known carcinogen epichlorohydrin, 3M's toxicology manager testified that he did not view the problem as severe enough to warrant informing employees or to instruct them in appropriate handling of the chemical.[78]

2. *Employer Responses*

All three employers refused to comply with union requests for chemical information. 3M argued that: (i) much of the data would not help the union, (ii) its regular safety meetings with the union provided enough information, (iii) the company's own industrial hygienists were adequately protecting the health of union members, and (iv) compliance with the request would disclose trade secret information.[79] Colgate also objected to disclosure, claiming that its trade secrets would be implicated.[80] Colgate additionally argued that compliance would be burdensome and that the request was not directed at particular safety or health problems.[81] Borden's refusal also emphasized that release

72. *Minnesota Mining*, 261 N.L.R.B. at 39.

73. Id. For many years, 3M and Local 6-418 had bargained extensively over health and safety issues. Id. at 39-40.

74. Id. at 40.

75. *Borden*, 261 N.L.R.B. at 68; *Colgate-Palmolive*, 261 N.L.R.B. at 92.

76. *Minnesota Mining*, 261 N.L.R.B. at 40.

77. Id.

78. Id.

79. *Minnesota Mining*, 261 N.L.R.B. at 39-42. A comprehensive and often utilized definition of trade secrets may be found in the Restatement of Torts § 757, comment (b) (1939). It reads in part: "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." See also Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (trade secret status of chemical formulas).

80. *Colgate-Palmolive*, 261 N.L.R.B. at 99-101.

81. Id.

of this information might disclose trade secrets.[82] The company was unwilling to take this risk. It contended there was no need for disclosure because the company was taking every appropriate measure to handle known potential health dangers.[83]

The protection of trade secret information was the most serious issue raised. Even though specific chemical formulations are generally not patentable, they are still frequently considered proprietary data.[84] Because chemicals may be sold under trade names, the actual chemical composition or generic name of the substance may remain unknown to purchasers of the product and employees involved in its production or use. Additionally, chemicals may be used in a manufacturing process, but the nature of the process and the chemicals involved may be kept secret, even from those involved with the chemicals on a day-to-day basis. As a result, a very high proportion of the chemical mixtures have ingredients unknown to the users.[85]

In the *Borden* case, for example, the company was extremely concerned with protecting a certain paint color used by the Coors Brewing Co. to achieve "just the right shade and tone for cans of Coors beer."[86] This dye, manufactured in the same factory in which the unfair labor practice charge arose, consisted of a number of known ingredients plus one secret ingredient.[87] Borden was concerned that disclosure of specific chemical identities to its employees would result in its competitors' awareness of the secret formulation, and ultimately lead to increased competition.[88]

B. The NLRB Decisions

The NLRB issued simultaneous decisions in the three cases; however, the *3M* decision was the primary announcement.[89] In that case, the NLRB asserted its long-established principle that "health and safety are terms and conditions of employment regarding which an employer is obligated to bargain upon request and information concerning these matters is therefore relevant."[90] Evaluating the union's interest in the requested information, the Board concluded:

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82. *Borden*, 261 N.L.R.B. at 73.

83. Id. at 72.

84. See *Kewanee Oil*, 416 U.S. at 470; see generally R. Milgrim, Trade Secrets ch. 2 (1967 & Supp. 1983).

85. In a 1972-74 survey of 4636 workplaces, the National Institute of Occupational Safety & Health (NIOSH) found that 70% of the chemical mixtures in these workplaces had compositions unknown to the users. With regard to those mixtures known to contain OSHA-regulated chemicals such as benzene, 32.5% were claimed to be trade secrets. National Institute of Occupational Safety & Health (U.S. Dept. of Health, Educ. & Welfare), The Right To Know 7 (1977).

86. J. O'Reilly, supra note 64, at 215.

87. Id.

88. Id.

89. *Minnesota Mining*, 261 N.L.R.B. 27; *Borden*, 261 N.L.R.B. 64; *Colgate-Palmolive*, 261 N.L.R.B. 90.

90. *Minnesota Mining*, 261 N.L.R.B. at 29.

> 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. Information of the type sought by Local 6-418 appears reasonably necessary to enable that Union to discuss and negotiate in a meaningful fashion on behalf of those it represents, for Local 6-418 can hardly be expected to bargain effectively regarding health safety matters if it, unlike [3M], knows neither those substances to which the unit employees are exposed nor previously identified health problems resulting therefrom.[91]

In recognition of the relevance of the union's request, the Board determined that 3M "breached its collective-bargaining obligations when it refused to provide to the Union a listing of those substances requested which would admittedly not compromise any proprietary advantage, and thereby violated Section 8(a)(5) and (1) of the Act."[92] The Board issued an order compelling 3M "to turn over to the Union a listing of those substances used and produced at the Chemolite Plant as to which [3M] asserts no trade secret defense."[93]

The Board was reluctant, however, to extend its decision to cover those chemical identities that the company asserted were trade secrets.[94] While expressly noting that 3M had not substantiated its claim that certain identities constituted trade secrets,[95] the Board refrained from conducting "the full balancing of countervailing rights."[96] The Board claimed that its failure to conduct such a balancing did not "avoid resolution of the conflict before us,"[97] based on the fact that 3M had not previously acknowledged the relevance of any of the information.[98] The Board's decisions in the *Borden* and *Colgate-Palmolive* cases paralleled the *3M* decision in relevant aspects.[99]

Board member Jenkins disagreed with the majority on this point, arguing that the Board was obligated to resolve the trade secret issue. "Having found relevance, . . . we have already balanced the Union's right to this information

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91. Id.

92. Id. at 31.

93. Id. at 32.

94. Id. The administrative law judges reached this issue in each of the three cases. In the *3M* and *Borden* cases, the companies were ordered to release the requested information in its entirety. *Minnesota Mining*, 261 N.L.R.B. at 42-43; *Borden*, 261 N.L.R.B. at 87. In the *Colgate-Palmolive* case, the company was not found to have violated the Act by failing to disclose information alleged to include trade secrets. 261 N.L.R.B. at 103.

95. *Minnesota Mining*, 261 N.L.R.B. at 31.

96. Nonetheless, on appeal the General Counsel argued that the Board had "concluded that 3M's asserted trade secrets were at least as weighty as the union's asserted need for the names of trade secret substances." See Reply Brief for Petitioners at 4, *OCAW*, 711 F.2d 348 (D.C. Cir. 1983).

97. *Minnesota Mining*, 261 N.L.R.B. at 32 n.26.

98. Id.

99. *Borden*, 261 N.L.R.B. 64; *Colgate-Palmolive*, 261 N.L.R.B. 90.

against [3M's] claimed confidentiality."[100] Jenkins then suggested an approach which would resolve the trade secret issue.

> [I]t must be emphasized that confidentiality is not a defense to an obligation to furnish relevant information. Once it is determined that [3M] must furnish the requested information, I would leave it to the parties to determine between themselves the conditions under which the Union's right of access to such information may be accommodated to [3M's] proper concern not to have business information of a confidential character revealed to its competitors.[101]

C. The D.C. Circuit Decision

Virtually all of the parties involved in the three cases before the Board sought either review or enforcement of the decisions.[102] The unions effectively won the race to court and the cases were consolidated in the D.C. Circuit.[103] On June 30, 1983 the circuit court announced a decision enforcing the Board's orders in each of the cases.[104]

The unions had appealed on the ground, *inter alia*, that the Board's orders, by merely determining relevance and not resolving the trade secret issue, violated § 10 (c) of the NLRA.[105] Section 10 (c), they argued, "allows the Board no discretion to abstain from deciding whether challenged conduct violates the Act."[106] Rather, it requires the Board "to decide in every case whether an employer's challenged conduct constituted the unfair labor practice charged and to issue an order requiring the employer to cease and desist from such conduct in the event a violation is found."[107] The employers reiterated the arguments they made previously before the Board.[108]

The circuit court began its analysis by broadly identifying the interests at stake.[109] The court acknowledged that the unions' interests were those discussed in *Truitt* and its progeny:[110] "obtaining information that will enable [the union] to negotiate effectively and perform properly its other duties as

100. *Minnesota Mining*, 261 N.L.R.B. at 34 (Member Jenkins, concurring in part and dissenting in part).

101. Id.

102. All three union locals involved petitioned for review of the Board's orders. Two of the employers also petitioned for review. The third employer, 3M, resisted enforcement; in that case the NLRB petitioned for enforcement. *OCAW*, 711 F.2d at 351-52.

103. Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB, 694 F.2d 1289 (D.C. Cir. 1982).

104. *OCAW*, 711 F.2d at 364.

105. 29 U.S.C. § 160(c) (1982).

106. Brief on Behalf of Union Petitioners at 17-18, *OCAW*, 711 F.2d 348 (D.C. Cir. 1983)[hereinafter OCAW Brief]. See also UAW v. NLRB, 427 F.2d 1330, 1332 (6th Cir. 1970); Int'l Woodworkers of Am., Local 3-10 v. NLRB, 380 F.2d 628 (D.C. Cir. 1967).

107. OCAW Brief, supra note 106, at 14.

108. See *OCAW*, 711 F.2d at 351-52; see also text accompanying notes 79-88 supra.

109. *OCAW*, 711 F.2d at 358-60.

110. Id; see also text accompanying notes 53-57 supra.

bargaining representative."[111] The court went on to note the "dichotomy . . . between data bearing directly on mandatory bargaining subjects and other kinds of information."[112] Information of the former sort has been found to be "presumptively relevant,"[113] while information of the latter variety is not required to be disclosed unless the union "affirmatively demonstrate[s] relevance to bargainable issues."[114]

Despite finding the presumptive relevance theory applicable—"[e]mployee health and safety indisputably are mandatory subjects of collective bargaining"[115]—the circuit court noted that the Board did "not purport to rely on [it]."[116] The circuit court also chose to eschew the presumption in favor of a direct examination of the issues.

> In cases like those now before us, where the employees admittedly are exposed to a variety of potential hazards and have expressed growing and legitimate concerns over their health and safety, where the unions explained the rationales underlying their requests in considerable detail, and where the pertinent collective bargaining agreements obligate both management and the unions to take specified actions to safeguard employees' health and safety, the relevance of a wide range of information concerning the various elements of the working environment and employees' health experiences cannot be gainsaid. Under these circumstances, at least, the goals of occupational health and safety are inadequately served if employers do not fully share with unions available information on working conditions and employees' medical histories. Requiring the release of exposure and medical data in such cases will facilitate the identification of workplace hazards, promote meaningful bargaining calculated to remove or reduce those hazards, and enable unions effectively to police the performance of employers' contractual obligations, as well as to carry out their own responsibilities under the respective collective bargaining agreements.[117]

Despite this finding of relevance, the court insisted that "particular circumstances sometimes warrant a refusal to disclose or the imposition of conditions upon the production of requested information."[118] The D.C. Circuit, like the NLRB, rested this proposition firmly on the back of the Supreme

111. *OCAW*, 711 F.2d at 358 (quoting Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB, 598 F.2d 267, 271 (D.C. Cir. 1979)).

112. 711 F.2d at 359 (quoting Press Democratic Publishing Co. v. NLRB, 629 F.2d 1320, 1324 (9th Cir. 1980)).

113. Id. See also Whitlin Machine Works, 108 N.L.R.B. 1537, 1541, enforced, 217 F.2d 593 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955).

114. *OCAW*, 711 F.2d at 359 (quoting Press Democrat Publishing Co., 629 F.2d at 1324).

115. 711 F.2d at 360.

116. Id. at 361.

117. Id.

118. Id. at 360.

Court's decision in *Detroit Edison Co. v. NLRB*.[119] The D.C. Circuit read *Detroit Edison* as "clearly reject[ing] 'the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate.' "[120]

D. Analysis

The D.C. Circuit decision is flawed in two respects. First, it misreads and misapplies *Detroit Edison*. Second, it fails to adequately reconcile the potential conflict between disclosure requirements and trade secret protection. In *Detroit Edison*, while the Supreme Court did not clearly reject the proposition that the union's interest in access to information must predominate, it refused to apply the proposition to the facts of that case.[121] The distinction is not entirely semantic.

Detroit Edison may be read to limit the form of disclosure, but not necessarily the underlying obligation to disclose. Moreover, the confidentiality interests at stake in *Detroit Edison* included those of employees, not those of the employer alone. Thus, to find in *Detroit Edison* a balancing test applicable to a wide-range of circumstances, as both the NLRB and the D.C. Circuit did, may be an inappropriate extension of a decision more properly confined to the facts of that case.

Detroit Edison involved a union's attempt to obtain information related to employee aptitude tests[122] in order to process a grievance. The employer asserted three bases to support its claim that the materials were confidential: 1) protection of "the future integrity of the tests"; 2) preservation of the privacy of job applicants who were assured "that their scores would be held confidential"; and 3) honoring of the commitments of the company's industrial psychologists who "deemed themselves ethically bound not to disclose" the test questions or the actual scores to representatives of management or the union.[123]

The Board had ordered disclosure of the information sought by the union.[124] The question before the Supreme Court was whether this was the appropriate remedy. The Court held that the Board, and the Sixth Circuit which enforced the Board's order,[125] had "abused its discretion in ordering the Company to turn over the test battery and answer sheets directly to the Union."[126] This determination turned on the fact that the Board's remedy did

119. 440 U.S. 301 (1979).

120. *OCAW*, 711 F.2d at 360 (quoting *Detroit Edison*, 440 U.S. at 318).

121. 440 U.S. at 318.

122. The information included "the actual test questions, the actual employee answer sheets, and the scores linked with the names of the employees who received them." Id. at 303.

123. Id. at 306-08.

124. Detroit Edison Co. v. NLRB, 18 N.L.R.B. 1024 (1975), aff'd, 560 F.2d 722 (6th Cir. 1977), rev'd, 404 U.S. 301 (1979).

125. Id.

126. 440 U.S. at 316-17.

"not adequately protect the security of the tests,"[127] rather than on the underlying question of whether the union should have been granted some form of access to the materials. The union was not a party in the proceedings and the Court's concern focused on the lack of available sanctions should the union disclose material obtained by virtue of the NLRB order.[128] The Board failed to identify a "justification for a remedy granting such scant protection to the Company's undisputed and important interests in test secrecy . . . ."[129]

Crucial to the Court's decision is the fact that the interests asserted by the company were not only the company's own proprietary interests, as in the OCAW cases, but the confidentiality interests of job applicants and the ethical and professional responsibilities of the industrial psychologists. The Court explicitly noted that there was no "evidence that the Company had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities."[130] Thus, the Court in *Detroit Edison* was primarily concerned with the inadequacy of the remedy given the privacy interests at stake. Under such circumstances, "the order requiring the Company unconditionally to disclose the employee scores to the Union was erroneous."[131]

In the OCAW cases, no such privacy interests were at stake. Although the unions had requested employee medical records that might indicate worker exposure to toxic chemicals,[132] they had not, as the D.C. Circuit noted, "sought access to individually identified medical records."[133] Further, "the Board's orders in these cases permit the deletion of any information that could reasonably be used to identify specific employees."[134] The *Detroit Edison* opinion itself does not mandate the reading given to it by the Board and the D.C. Circuit in the OCAW cases: where unions' *Truitt*-based informational interests[135] conflict with employer confidentiality concerns, the Board is required to balance the competing interests.

The D.C. Circuit, having found an employer confidentiality interest implicated — protecting trade secrets — and a principle which arguably allows curtailment of *Truitt*-based disclosure obligations — *Detroit Edison* — halted its analysis there. Two inquiries fundamental to the application of *Detroit*

127. Id. at 315. The Court noted that available evidence suggested that the information might be abused. "Indeed, the Company presented evidence that disclosure of individual scores had in the past resulted in the harassment of some lower scoring examinees who had, as a result, left the Company." Id. at 319. Cf. La. Chem. Assn. v. Bingham, 550 F. Supp. 1136, 1142 (W.D. La. 1982) (reading *Detroit Edison* narrowly due to evidence that the information might be misused).

128. 440 U.S. at 315-16.

129. Id. at 316.

130. Id. at 320.

131. Id. at 321.

132. *OCAW*, 711 F.2d at 352-53.

133. Id. at 363.

134. Id.

135. See *Truitt Mfg. Co.*, 351 U.S. at 152-53 (stating that proof of the accuracy of an argument is essential to good faith bargaining).

Edison to trade secrets were neglected by the Court and the Board. First, is the information which is claimed to be trade secrets legally entitled to such status? Second, if legitimate trade secrets are at stake, are there ways of protecting the information which fall short of curtailing the obligation to disclose?

Rather than resolving these issues, both bodies skirted them. The court endorsed the Board's order for the employers to bargain in good faith "over the conditions under which the proprietary information *might* be disclosed."[136] Thus, while insisting that the union and employer interests must be balanced, the court did not conduct the balancing itself, but left it to the parties in the first instance.[137] Ultimately however, if the parties are unable to reach agreement, the "cases may . . . come before the Board again for a balancing of the parties' interests."[138]

The D.C. Circuit claimed to "express no view concerning how the balance between the parties' interests should be struck in the event that no satisfactory conditions [which protect confidentiality] can be developed."[139] Yet, the court seemed prepared to limit access, noting that "if no such conditions can be created, the Board might be forced to sanction the companies' refusal to disclose trade secret information."[140]

Regardless of whether the parties do ultimately return for a balancing of their interests, and regardless of the outcome of any such balancing, the D.C. Circuit appears to have created a limitation on the *Truitt* obligation to disclose relevant information. The court agreed with the NLRB that the employers had no unconditional obligation to disclose information claimed to be trade secrets. The distinction between mandating disclosure but requiring conditions to protect confidentiality, and, making disclosure conditional in the first place, is possibly subtle, yet not insignificant. The latter approach skews the bargaining relationship between the parties. Since information access is so critical to negotiation and enforcement of contracts involving worker exposure to toxics, any constraint on the duty to disclose restricts the union's efficacy in this area.

The fact that the D.C. Circuit approach has the effect of skewing bargaining relationships. This can be seen by considering the parameters of mandatory bargaining. Any ultimate balancing which gives greater weight to employers' concerns in protecting proprietary information than to unions' interest in information access will implicitly place all issues touching upon trade secrets in the category of management prerogatives.[141] This can be seen in the extent to which the so-called *Detroit Edison* balancing test mirrors the *First National Maintenance* test.[142] The *First National Maintenance* decision ex-

136. *OCAW*, 711 F.2d at 362 (emphasis in original).
137. Id.
138. Id. at 363.
139. Id. at 362 n.37.
140. Id. at 362.
141. See text accompanying notes 35-46 supra.
142. See text accompanying notes 41-46 supra.

amined three categories of potential bargaining subjects: mandatory subjects, management prerogatives, and a middle ground of "management decisions that have a substantial impact on the continued availability of employment."[143] Similarly, the D.C. Circuit's *OCAW* decision notes three categories of information potentially available under NLRA disclosure obligations: information which is disclosed because it pertains to a mandatory bargaining subject; information which need not be disclosed; and information which has a substantial impact on a mandatory subject, yet involves proprietary matters.[144]

In both *First National Maintenance* and *OCAW*, the third category is at the core of the analysis and generates the balancing tests. Further, in both cases, the structure of the balancing is skewed in favor of employers. The *First National Maintenance* test balances the interests of employers, not against those of unions, but against "labor-management relations."[145] Similarly, to the extent that the *Truitt* disclosure obligation is directed at facilitating effective bargaining,[146] the *OCAW* balancing test again places successful labor-management relations on one side of the scales and employer interests on the other.

III
ALTERNATIVE METHODS OF RESOLVING THE TRADE SECRET PROBLEM

The approach taken by both the NLRB and the D.C. Circuit in the *OCAW* cases represents just one of a variety of alternatives for addressing the problem posed by trade secrets. Indeed, to the extent that both bodies refused to inquire into the legitimacy of the trade secret claims or into the existence of remedies which would protect the proprietary nature of the information, the chosen response was a non-approach. The alternative approaches to be discussed in this section include: Board member Jenkins's opinion concurring in part and dissenting in part in all three cases;[147] the approach adopted in cases arising under the Freedom of Information Act (FOIA);[148] the approach taken in regulations issued or proposed pursuant to the OSH Act;[149] and the approach adopted by at least one municipality under its worker "right-to-know" ordinance.[150] These approaches demonstrate one common characteristic: the recognition that traditional trade secret conceptions are not well suited to

143. 452 U.S. at 676.
144. See *OCAW*, 711 F.2d at 360.
145. See note 46 supra.
146. See text accompanying notes 53-55 supra.
147. *Minnesota Mining*, 261 N.L.R.B. 77; *Colgate-Palmolive*, 261 N.L.R.B. 90; *Borden*, 261 N.L.R.B. 64.
148. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982)).
149. 29 U.S.C. §§ 651-678.
150. Cincinnati, Ohio Code ch. 1247 (1982).

resolving the conflict between protection of proprietary information and protection of health.

A. The Jenkins Approach

For NLRB member Jenkins, the Board resolved the access issue when it found that the information sought was relevant to the union's legitimate interests. "Having found relevance . . ., it seems we have already balanced the Union's right to this information against [the company's] claimed confidentiality."[151] Jenkins then noted that he would not require unconditional disclosure, but that "confidentiality is not a defense to an obligation to furnish relevant information."[152] He, like the majority, would have left it to the parties to determine appropriate disclosure conditions. This approach, Jenkins stated, "satisfies the concerns expressed by the Supreme Court in *Detroit Edison* . . . ."[153]

The slight difference between Jenkins's approach and that of the majority would have a significant practical effect. Under the majority's approach, endorsed by the D.C. Circuit, if the parties are unable to agree on a method of disclosure, the "cases may . . . come before the Board again for a balancing of the parties' interests."[154] In such a case, "the Board might be forced to sanction the companies' refusal to disclose trade secret information."[155] In this event, the burden would be on the unions as the parties seeking disclosure to go to the Board and make a case for disclosure. The unions would have the burden of showing that the employers had rejected measures that would have protected the trade secrets. Even if the union were successful, considerable delay could be expected in potentially health-threatening situations.

Jenkins's approach would shift the burden to the employer. While the union would still bear the burden of initiating an action, the employers would have the burden of demonstrating that the unions had not cooperated in devising disclosure methods protective of trade secrets. Additionally, a Board order could specify a time limit for developing a disclosure mechanism. If such time elapsed without disclosure, the employer could be found in violation of the order. The ultimate question is which approach best facilitates collective bargaining. Since the Jenkins approach requires substantiation of trade secret claims, it is more protective of the information access deemed crucial to effective bargaining.

B. The FOIA Approach

Trade secret information is routinely required to be submitted to federal

151. *Minnesota Mining*, 261 N.L.R.B. at 34 (Member Jenkins, concurring in part and dissenting in part).
152. Id.
153. Id.
154. *OCAW*, 711 F.2d at 363.
155. Id. at 362.

agencies.[156] However, the Supreme Court has held that trade secrets may not be disclosed by a federal agency unless the agency has been given specific authority to disclose such information.[157] Some statutes, such as the Toxic Substances Control Act (TSCA),[158] allow for disclosure in the interests of health protection.[159] The Freedom of Information Act (FOIA) provides for public disclosure of information in the hands of federal agencies and officials upon request.[160] Among the information exempted from the provisions of FOIA are: "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[161] This exemption has recently provided the D.C. Circuit with the opportunity to develop a definition for trade secrets in the context of data from health and safety studies submitted to the Food & Drug Administration (FDA).

Public Citizen Health Research Group v. FDA[162] involved the disclosure of records produced during clinical studies of the safety and efficacy of intraocular lenses. Manufacturers sought, and the FDA utilized, a broad definition of trade secrets that protected much information from public disclosure.[163] Public interest groups, on the other hand, sought a much narrower definition that would immunize significantly less data.[164] Noting that the broad definition, essentially that embodied in the Restatement of Torts,[165] "would classify virtually all undisclosed health and safety testing data as trade secrets,"[166] the court adopted the narrower definition. It defined "trade secrets, solely for the purpose of FOIA Exemption 4, as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[167]

The court ruling explicitly noted that the public interest is not served by restricting information related to health and safety.[168] "[T]he *Restatement* definition, tailored as it is to protecting businesses from breaches of contract and confidence by departing employees and others under fiduciary obligations, is ill-suited for the public law context in which FOIA determinations must be

156. See R. Milgrim, supra note 84, at ch. 6; McGarity & Shapiro, The Trade Secret Status of Health and Safety Information: Reforming Agency Disclosure Policies, 93 Harv. L. Rev. 837 (1980).

157. Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

158. 15 U.S.C. §§ 2601-2609 (1982).

159. 15 U.S.C. § 2613(b) (1982).

160. See J. O'Reilly, supra note 64, at 217-18 n.12.

161. 5 U.S.C. § 552(c)(4) (1982).

162. 704 F.2d 1280 (D.C. Cir. 1983).

163. Id. at 1283.

164. Id.

165. Id. at 1286; see *Kewanee Oil Co.*, 416 U.S. at 474; see generally R. Milgrim, note 84 supra.

166. 704 F.2d at 1286 (quoting McGarity & Shapiro, supra note 156, at 862).

167. 704 F.2d at 1288.

168. Id. at 1289 n.125. See also Pennzoil Co. v. Federal Power Comm., 534 F.2d 627, 632 (5th Cir. 1976). (With regard to the disclosure of trade secret information by the FPC, the court held that "[w]hat is required is a balancing of the public and private interests.")

made."[169] Thus, in opting for a restrictive definition of trade secrets, the court emphasized that the health and safety context poses "important considerations which the common law was not designed to handle."[170]

While it is true that the generic chemical identities sought in the OCAW cases could have been classified as trade secrets under the narrower definition adopted in *Public Citizen*, chemical identities were not the subject of the *Public Citizen* case. That case is significant because the court explicitly sought to limit trade secret protection where it conflicted with the disclosure of health and safety information.

C. The OSHA Regulatory Approach

On November 25, 1983, the Occupational Safety and Health Administration (OSHA) promulgated a rule concerning "Hazard Communication."[171] The rule provides workers in certain manufacturing industries, *inter alia*, with access to the generic names of the chemicals to which they are exposed.[172] In defining trade secrets, the rule makes use of a modified version of the Restatement of Torts definition.[173] The approach to handling trade secret information, however, is multi-faceted and attempts to strike a delicate balance between the health interest threatened by limited trade secret disclosure and the economic interest promoted by trade secret protection.[174]

The rule permits employers to withhold hazardous chemical identities from the information provided to employees, if: 1) the claim that the withheld information is a trade secret *can be substantiated*; 2) data regarding the properties and effects of the chemical is disclosed to employees; 3) the fact that the information is being withheld as a trade secret is disclosed to employees; and 4) the chemical identity is made available to health professionals under specified circumstances.[175] Such circumstances include health emergencies and similar instances when the health professional makes a written request certifying the need for the identity information and describing the provisions to be used to maintain confidentiality.[176] The confidentiality agreement may provide for legal remedies including liquidated damages in the case of a breach.[177] A health professional denied the information may turn to OSHA

169. 704 F.2d at 1289.

170. Id. n.25 (quoting McGarity & Shapiro, supra note 156, at 863).

171. 48 Fed. Reg. 53,280 (1983) (to be codified at 29 C.F.R. § 1910.1200). A significantly broader right-to-know regulation was proposed in the waning days of the Carter administration. 46 Fed. Reg. 4412 (1981). In one of its first acts, the Reagan Administration withdrew that proposal. 46 Fed. Reg. 12,020 (1981). In 1982 the administration proposed a rule substantially similar to that promulgated. 47 Fed. Reg. 12,092 (1982).

172. 48 Fed. Reg. at 53,340 (1983).

173. Id. at 53,296, 53,342.

174. Id. at 53,312.

175. Id. at 53,344 (emphasis added).

176. Id. at 53,344-45.

177. Id. at 53,345.

for review.[178] This review would involve determining whether: 1) the claim of trade secret status can be supported; 2) the health need for the information can be substantiated; and 3) adequate means of protecting confidentiality can be demonstrated.[179]

Although adopting a relatively broad definition of trade secrets, the OSHA approach demonstrates the agency's view that careful examination of trade secret claims and possible alternatives are required in the health context. "OSHA has . . . taken the position that its mandate requires it to balance and accommodate the interests in occupational safety and health with the protection of trade secrets, but that any unavoidable conflict should be decided in favor of the health interest."[180] OSHA based that position on three factors, all but the second of which seem to apply in the NLRA context as well: 1) federal preemption of state trade secret protection;[181] 2) the OSH Act itself, which does not expressly limit the agency's actions in the trade secret area; and 3) a judicially mandated balancing approach favorable to the health and safety interest.[182] OSHA's view was recently found valid in a case assessing disclosure of trade secrets under OSHA's Access to Employee Exposure and Medical Records Rule.[183]

D. The Approach of the Cincinnati "Right-to-Know" Ordinance

A number of states and municipalities[184] have enacted "right-to-know" provisions which, *inter alia*, require disclosure of the same types of information sought in the *OCAW* cases. The continued viability of these enactments is open to some question given the recent promulgation of the OSHA regula-

178. Id.

179. Id.

180. Id. at 53,322.

181. The Supreme Court, however, has recently stated that the Federal Insecticide Fungicide and Rodenticide Act (FIFRA), 61 Stat. 163 (1947)(codified as amended 7 U.S.C. § 136 (1982), does not preempt state trade secret law for the purpose of the Taking Clause of the fifth amendment. Ruckelshaus v. Monsanto, __ U.S. __ (1984).

182. 48 Fed. Reg at 53,322. Similarly, if the information disclosure obligations of the NLRA are found to require release of trade secrets, it would be within the discretion of the Board to order such disclosure.

183. *La. Chem. Assn.*, 550 F. Supp. at 1136. The Records Access Rule, 29 C.F.R. § 1910.20 (1983), requires employers to provide employees and their designated representative (generally unions) with any records kept by the employer relating to medical and exposure histories of employees exposed to toxic substances.

184. At least twelve states and six local governments have enacted right-to-know regulations. Approximately thirteen more states and three other local governments have introduced legislation in recent years. Preamble to OSHA Hazard Communication Rule. 48 Fed. Reg. at 53,284. Among the states that have passed worker right-to-know laws are: California, Cal. Lab. Code §§ 6360-6399.9 (West Supp. 1984); Connecticut, Conn. Gen. Stat. Ann. §§ 31-40c (West Supp. 1984); Maine, Me. Rev. Stat. Ann. tit. 26, §§ 1709-1725 (West Supp. 1984); Michigan, Mich. Comp. Laws Ann., § 408.1011 (West Supp. 1984); New York, N.Y. Lab. Law §§ 875-883 (McKinney Supp. 1983); West Virginia, W. Va. Code § 21-3-18 (1981); Wisconsin, Wis. Stat. Ann. § 101.58-.599 (West Supp. 1984). The municipalities passing similar legislation include: Cincinnati, Cincinnati Code, ch. 1247 (1982) and Philadelphia, Philadelphia Code, §§ 3-101, 3-102, 3-201, 3-301, 3-302, chs.5-500, 5-1600, 5-4100 (1982).

tion.[185] However, many of the provisions have significantly broader applications than either the OSHA standard[186] or access to information under the NLRA.[187] The Cincinnati ordinance is one of the more wide-ranging, and its trade secret provisions are heavily weighted in favor of access to information.

First, the definition of trade secret takes into account the extent to which modern technology has rendered traditional conceptions obsolete.[188] An employer seeking to withhold the chemical name of a toxic or hazardous chemical substance must make an affirmative showing that the substance is a catalyst or other intermediate unknown to competitors, or that it "cannot be practically and lawfully discovered by analytical techniques, laboratory procedures or other means available to any potential competitor."[189] Even after such a showing is made, the ordinance allows an employer to withhold the chemical name only if: 1) the employer can establish that the chemical has not been found to demonstrate one of a variety of particularly toxic properties; 2) a generic classification is provided that would be sufficient for a health professional to render recommendations for adequate exposure safeguards; and 3) the withheld information is provided on a confidential basis to a treating physician.[190] All disclosures of trade secret information may be predicated upon acceptance of a confidentiality agreement, which may provide for liquidated damages.[191]

Approaches such as Cincinnati's indicate that traditional concepts of trade secrets are not appropriate in the context of employee health. Yet, they also suggest that adequate resolution of this problem is complex. Given the necessity of considering new and potentially complex concepts of trade secrets, the NLRB may not be the proper forum for resolving the issues. Legislative responses may be required.

185. The preamble to the Hazard Communication Rule states that the OSHA standard "preempts state laws which deal with hazard communication requirements for employees in the manufacturing sector. . . ." 48 Fed. Reg. at 53,284 (1983). Additionally, some of the state and local right-to-know enactments contain provisions stating the requirements will no longer remain in effect if OSHA promulgates a substantially similar regulation.

186. For example, unlike most state legislation, the OSHA standard is limited to the manufacturing sector and does not provide for public access to the identity and hazard information.

187. Unlike disclosure under the NLRA, federal regulation and state statutes are not effectively limited to the less than one quarter of the workforce which is unionized.

188. Information which is well-known or readily ascertainable cannot be considered trade secrets. See R. Milgrim, supra note 84, at § 2.07. Increasingly, analytical techniques, such as gas chromotography and mass spectometry, are reducing the cost and effort associated with uncovering a chemical formulation. See 48 Fed. Reg. at 53,314.

189. Cincinnati, Ohio Code § 1247-31(A)(1) (1982).

190. Id. § 1247-31(A)(2), (3), (7).

191. Id. § 1247-31(D).

IV
RELATION BETWEEN ACCESS TO TOXIC-RELATED INFORMATION UNDER THE NLRA AND ACCESS PURSUANT TO HEALTH AND SAFETY REGULATIONS

The foregoing discussion indicates that workers may have greater access to information relating to toxic chemicals under various health and safety regulatory schemes than they do under the information disclosure obligations of the NLRA. This statement applies with particular force to access to information claimed to be trade secrets. This perspective, however, begs the question. What will be the effect on the roles of the NLRA and of unions, if increasingly there is movement away from the self-help concept implicit in the collective-bargaining model to the paternalism implicit in government regulation? As long as the NLRA provides for rights at least equal to those available under health and safety statutes, unions can maintain an important role in the area. However, if less information is available under the NLRA, as the OCAW cases suggest, then unions may lack the ability to aid employees effectively in protecting their health and safety. As one commentator has suggested: "[w]hile unions were once the only guardians of these interests, their role is now becoming duplicative, if not superfluous."[192]

The federal regulatory presence in the field of health and safety was not intended to exclude the NLRB from health and safety matters. Not long after the enactment of the OSH Act, a "Memorandum of Understanding" between OSHA and the NLRB announced that common objectives could be best accomplished through continued NLRB efforts in the health and safety area.[193] As the Secretary of Labor stated in promulgating the Records Access Rule: "any safety or health problem which OSHA could address would also be an appropriate subject for collective bargaining . . . . OSHA['s] rulemaking authority [was] intended not only to fill gaps in existing labor-management relations and the collective bargaining process, but to place a solid foundation under that process."[194] In upholding OSHA's authority to promulgate such a regulation, a federal district court noted: "[t]he objectives and jurisdictions of both agencies must be made to compliment [sic] and mutually accommodate one another."[195]

The complementary nature of employee rights under the OSH Act and under the NLRA is readily apparent. The OSH Act enables extensive chemical control regulations, inspections, information gathering, and so on. All of

192. Rabin, supra note 48, at 111.

193. 40 Fed. Reg. 26,083 (1975) (Memorandum of Understanding Between Occupational Safety and Health Administration—Department of Labor, and National Labor Relations Board).

194. 45 Fed. Reg. 35,248 (1980).

195. *La. Chem. Assn.*, 550 F. Supp. at 1144. See also S. Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942); Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975); Memorandum of Understanding, supra note 193.

these would be difficult, if not impossible, for individual unions to achieve through negotiation. As a result of the federal regulatory scheme, extensive government research has been undertaken and expertise developed on a scale that unions could never afford. Additionally, the OSH Act covers the large majority of American workers who are not union members.

The NLRA, for its part, establishes and protects the role of unions as employee representatives. The unions negotiate and administer the contracts that control workplace conditions. The NLRA protects the rights of employees to take concerted action in support of health and safety goals.[196] Moreover, as noted above, communicating information and training workers about toxic chemicals is a task particularly suited to unions. Perhaps most significantly, none of the workplace health and safety regulations would have been possible without the political power of unions. It would be ironic indeed if the success of American labor in establishing workplace health and safety regulations resulted in a diminished role for unions. However, this may occur if the NLRB fails to accord unions an important role in worker health and safety.

CONCLUSION

Neither the NLRB nor the federal courts have adequately responded to the difficult problems posed by union attempts to obtain information which is arguably classified as trade secrets. This failure may ultimately constrain the ability of unions to address problems of increasing concern to their members. Various health and safety regulatory efforts, on the other hand, demonstrate a recognition that traditional trade secret concepts may not be appropriate in the health and safety context. To the extent these schemes provide greater information access to employees, the role of unions may be diminished, and ultimately the protection of workers may be lessened.

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196. See NLRB v. Tamara Foods, 692 F.2d 1171 (8th Cir. 1982), cert. denied, 103 S. Ct. 2089 (1983). This case involved a group of employees who were discharged for clocking out before the end of their shift to protest unhealthy working conditions. Ruling that the walk-out was a protected activity under § 7 of the NLRA, 29 U.S.C. § 157 (1982), the Eighth Circuit noted that "the rights guaranteed to these employees by the Act are superior to the provisions of the OSH Act." Id. at 1182.