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Duty of Union to Bargain in Good Faith

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RECENT DECISIONS

Duty of Union to Bargain in Good Faith—The Court of Appeals of Columbia, faced with a factual situation which found a union engaging in harassing tactics involving refusal to work overtime, extended rest periods, slowdowns, and unannounced walkouts while bargaining with an employer, concluded that nothing in the LMRA outlawed such union conduct. The Court also found that such conduct did not constitute a failure to bargain in good faith.[1]

Since the specific activities in which the union was engaging were not prescribed in the LMRA, the Court said that it had no jurisdiction. In answer to the contention that Sec. 8(b)(3)[2] and 8(d)[3] applied in this situation the Court rejoined that:

> "There is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants. . . . As the Board intimated, the Union might have called a strike; no inference of failure to bargain in good faith could have been drawn from a total withholding of services during negotiations, in order to put economic pressure on the employer to yield to the Union's demands. As a simple matter of fact, it is equally clear that no such inference can be drawn from a partial withholding of services at that time for that purpose."[4]

A vigorous dissent, directed at the majority's attitude on good faith bargaining was written by Judge Danaher.

> "The Board here has not asserted that the 'tactics' constitute a violation of federal law. It has said that such conduct taken into account with all other factors 'on the entire record' justified a finding of failure to bargain in good faith. Surely it is within the competence and one of the functions of the Board to inquire into and to decide problems arising from Section 8(d)[5] of the act."

It appears that the dissenter's viewpoint was correct in the instant case. It seems from a study of legislative history and the wording of Sec. 8(d) that the duty of the union to bargain is equivalent to that of the employer.[6] Although there are not many

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[1] Textile Workers Union, CIO v. N.L.R.B., 227 F.2d 409 (D.C. Cir. 1955). This decision again become current by virtue of the U.S. Supreme Court's denial of certiorari in N.L.R.B. v. Textile Workers Union of America, CIO, 77 S. Ct. 90 (1956).

[2] Labor-Management Relations Act, 1947, 61 Stat. L. 141 (1947), 29 U.S.C. §158(b)(3) (1952).

[3] Labor-Management Relations Act, 1947, 61 Stat. L. 142 (1947), 29 U.S.C. §158(d) (1952).

[4] 227 F.2d at 410.

[5] *Id.* at 412.

[6] See *The Duty of a Labor Union to Bargain Collectively in Good Faith—An Unresolved Problem*, 25 FORD L. REV. 319, at 324 (1956).

cases spelling out the union's responsibility to bargain, the basic philosophy enunciated in discussion of the duty of employers seems applicable.

The Seventh Circuit stressed as a yardstick for good faith collective bargaining a totality of conduct test which requires that all facts be closely scrutinized.[7] The *Truitt* case[8] restated this point. In this case the Court held that the employer was required to produce information about its financial status when inability to pay increased wages was an issue. Here the Court stated:

> "We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met."[9]

Applying a totality of conduct test to Textile Workers[10] it appears that the action taken by the union in engaging in deliberate acts of harassment is not in harmony with any ordinary concept of good faith bargaining. Although pretending to bargain, as a practical matter the union has actually withdrawn itself from the bargaining table because it is no longer properly using persuasive reasoning but is attempting to force the issue through various physical pressures. Surely these are not the tactics which are employed by a good faith bargainer. True there may be the appearance that the union is presenting logical argument, but because of its harassing acts it would seem as a realistic matter that the presentation of the union would make no impression on the employer.

This thinking is supported by the view of Edward Peters, Conciliator of California State Conciliation as outlined in his recent publication.[11] In the chapter discussing the element of good faith collective bargaining he proposes:

> "Standards of fair play cannot be based on conflicting social outlooks and philosophies. The one basic criterion of good faith, recognized and accepted by the parties, is contained in the iron rule: Preserve the sanctity of your lines of communication."[12]

There is no realistic communication when one party at the

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[7] Singer Mfg. Co. v. N.L.R.B., 119 F. 2d 131 (7th Cir. 1941), *cert. denied*, 313 U.S. 595 (1941).
[8] N.L.R.B. v. Truit Mfg. Co., 224 F.2d 869, *reversed* 76 S. Ct. 753 (1956).
[9] 76 S.Ct. at 756 (4th Cir. 1955).
[10] See note 1 *supra.*
[11] See Edward Peters, *Strategy and Tactics in Labor Negotiations* (1955).
[12] *Id.* at 222.

bargaining table treats the other unfairly. The same thought has been expressed in a similar manner by Robert D. Leiter in the Labor Law Journal[13] where he observed:

> "The N.L.R.B. has held that if a union is engaged in an activity which is not consistent with the act, it does not meet the test of bargaining in good faith; such bargaining requires reasoned decisions and balanced relations. It noted that good faith at the bargaining table is generally a relative matter and that the lack of good faith in one party may remove the possibility of negotiation and preclude the existence of a situation in which the other parties good faith can be tested."

The majority of course, see no distinction between the facts here involved and those that exist when a strike is in progress. The distinction, however, appears to be this. Since many strikes are valid, economic expediency requires that the parties bargain in an effort to resolve differences. Under the circumstances here involved, economic expediency does not control and since the union has moved itself outside the periphery of good faith bargaining, the employer can take the position that he will not continue to bargain until the union stops its harassing tactics or goes out on a true strike. No valid strike was employed by the union in the *Textile Workers* case.[14] It is submitted, that recognizing the aforementioned difference between harassing tactics and a valid strike, such union conduct should have been enjoined as bad faith collective bargaining.

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Real Estate Broker: Entitlement to Commission After Buyer Defaults Purchase Contract—Defendants gave plaintiff a standard broker's listing on their property for $15,900. Three days later, plaintiff secured an unconditional offer of $15,000 from prospective buyers, which the defendant-sellers accepted, agreeing to close the transaction in three months. When the parties met for the closing, buyers were informed of a judgment docketed against one of the defendants in the amount of $700. Plaintiff's attorney suggested an escrow arrangement to cover this amount. The purchasers refused to close under such circumstances and promptly departed. Plaintiff, unable to induce the parties to close subsequently, demanded its commission from the defendants, who refused. Plaintiff brought action on its listing agreement in the Civil Court of Milwaukee County. From a judgment for the defendant, plaintiff appealed to the Circuit Court. From an order of the Circuit Court

[13] See Leiter, *The Meaning of Collective Bargaining* 6 LAB. L. J. 835 (Dec. 1955).
[14] See note 1 *supra*.