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COMMENT

THE INCREASING CONTROL OF COLLECTIVE BARGAINING BY THE NLRB UNDER THE GOOD FAITH DUTY

The modes of bargaining in any context [including collective bargaining] are infinitely varied and defy enclosure by metes and bounds, chains and links, or other aids to the precise establishment of boundaries. They embrace bravado, false humility, bluster and entreaty, exaggeration and deprecation. The process itself places a premium on the appearance of strength (naturally, the actual existence of it is to be preferred) and on the concealment of weakness. . . . Even unreasonableness, intransigence and plain obduracy (or facsimilies thereof intended to convince the other party to the bargaining that if reason is to prevail that other must provide enough for two) have a part to play.

A bargain itself is the balance struck by the parties out of their respective skills and strengths.¹

Collective bargaining is like all other bargaining, except that the duty to bargain is imposed by law. The Wagner Act² was originally enacted to facilitate the organization of unions and to establish collective bargaining relationships between unions and employers.³ Section 8(a)(5) of the Labor Management Relations Act requires an employer "to bargain collectively with the representatives of his employees."⁴ The duty to bargain collectively is imposed on the unions by section 8(b)(3) of the Act.⁵ Collective bargaining is described by section 8(d):

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and *confer in good faith* with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .⁶

¹ Benetar, *The Boundaries of the Duty to Bargain in Good Faith Under the N.L.R.B.*, 15 BAYLOR L. REV. 127 (1963).

² 49 Stat. 449 (1935). See Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941) for the history of §8(5) of the Wagner Act.

³ Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950).

⁴ This section, numbered §8(5) in the Wagner Act, 49 Stat. 453 (1935), was renumbered §8(a)(5) by the Taft-Hartley Act (Labor Relations Management Act) without other change, 61 Stat. 140 (1947), 29 U.S.C. §158(a)(5) (1964).

⁵ 61 Stat. 141 (1947) 29 U.S.C. §158(b)(3) (1964). See Note, *Union Refusal to Bargain: Section 8(b)(3) of the National Labor Relations Act*, 71 HARV. L. REV. 502 (1958).

⁶ 61 Stat. 142 (1947), 29 U.S.C. §158(d) (1964).

Traditionally, the National Labor Relations Board and the courts have applied a subjective state-of-mind test to determine good faith. Recently, the NLRB has added to the subjective test an objective test which prescribes proper bargaining conduct. To complete the circle, the Board has begun judging the reasonableness of the substantive positions of the negotiating parties. This final step may result in the seating of the NLRB at the negotiating table.

I. THE TRADITIONAL SUBJECTIVE TEST OF GOOD FAITH

The NLRB was mandated by Congress to enforce the Labor Management Relations Act, thereby giving it some degree of control over collective bargaining. The traditional test used to determine good faith was a subjective test which determined the states of mind of the parties involved.⁷ In *NLRB v. Montgomery Ward & Co.*,⁸ the parties held seven conferences but the company rejected every proposal the union made and refused to make any counterproposals. The range of disagreement covered matters which normally would be settled in a routine fashion (such as the union's request for a recognition clause), along with more substantial questions of wages and union security. The company also attempted to stall the negotiations. Based on that evidence, the NLRB found that the company had failed to bargain in good faith. The Ninth Circuit enforced the resulting order, saying that the duty to bargain in good faith is an "obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. . . ." The parties must demonstrate an "open mind and a sincere desire to reach an agreement" along with "a sincere effort . . . to reach a common ground."⁹

This sincere desire to reach an agreement does not, however, require that the parties "engage in fruitless marathon discussions at the expense of frank statement and support of his position,"¹⁰ nor does the obligation to bargain "compel either party to agree to a proposal or require the making of a concession."¹¹ Thus, the definition of good faith bargaining as a sincere effort to reach an agreement, requires for completion the addition of the antinomy proposed by Professor Cox:

The employer (or union) must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach common ground, but it need make no concessions and may reject any terms it deems unacceptable.¹²

Rather than puzzle over that definition, it seems sufficient for a true understanding of the duty to bargain in good faith to define bad faith

⁷ Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1414 (1959).

⁸ 133 F.2d 676 (9th Cir. 1943).

⁹ *Id.* at 686, quoting in part from *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st Cir.), *cert denied*, 313 U.S. 595 (1941).

¹⁰ *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

¹¹ LMRA §8(d), 61 Stat. 142 (1947), 29 U.S.C. §158(d) (1966).

¹² Cox, *supra* note 7, at 1419.

rather than good faith. Bad faith is a "desire not to reach agreement" with the other party.¹³ The basic question in all cases is whether the party acted like someone with a mind closed against agreement.¹⁴

In determining whether a party has bargained in good faith, all of the conduct of the parties is examined as evidence of his subjective state of mind.¹⁵ This conduct must be viewed against the background of the industry and the history of the relationship between the employer and his employees.¹⁶ Many kinds of conduct have been found convincing to establish bad faith with the weight of any one item usually dependent on the circumstances of the particular case.

A party's state of mind may be revealed by his statements or declarations which evidence bad faith.¹⁷ A party's outright refusal to bargain with the other party to a collective bargaining relationship certainly shows bad faith; however, this is usually characterized as a failure to bargain which does not depend on a finding of good or bad faith.¹⁸

More frequently, the finding of bad faith results from an inference based on the conduct of the party. Thus, while an employer may lawfully demand an election and certification prior to bargaining where the employer has a good faith doubt as to the union's majority status,¹⁹ the employer may not use this demand in order to gain time to undermine the union.²⁰ An employer's failure to reply to a request to bargain made by a certified union has been found to be evidence of bad faith.²¹

¹³ NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

¹⁴ Cox, *supra* note 7, at 1419.

¹⁵ NLRB v. Wonder State Mfg. Co., 344 F.2d 210 (8th Cir. 1965); Sakrate, Inc. 332 R.2d 902 (9th Cir. 1964), *enforcing*, 140 N.L.R.B. 765, *cert. denied*, 379 U.S. 961 (1965), NLRB v. Cascade Employers Ass'n., Inc., 296 F.2d 42 (9th Cir. 1961).

¹⁶ M. H. Birge & Sons Co., 1 N.L.R.B. 731 (1936).

¹⁷ NLRB v. Denton, 217 F.2d 567 (5th Cir. 1954); Continental Oil Co. v. NLRB, 113 F.2d 473 (10th Cir. 1940); Braswell Motor Freight Lines, Inc., 154 N.L.R.B. 101 (1965); Maurice Embroidery Works, Inc. 111 N.L.R.B. 1143 (1955). Where company misrepresented to union that they should not confer because the plant was to stay closed, when actually the plant was to be reopened, Oates Bros., Inc., 135 N.L.R.B. 1295 (1962). Where employer made coercive statements, Reed & Prince Mfg. Co., 96 N.L.R.B. 850 (1951). *But see*, Frohman Mfg. Co., 107 N.L.R.B. 1308 (1954), where employer said he would not bargain but obviously meant that he would not agree to the union's demands.

¹⁸ NLRB v. Croh & Sons, 329 F.2d 265 (10th Cir. 1964); Triple AAA Water Co., 148 N.L.R.B. 1018 (1964).

¹⁹ Dazzo Products, Inc., 149 N.L.R.B. 182 (1964); Gilbert Co., 110 N.L.R.B. 2067 (1954).

²⁰ NLRB Daylight Grocery Co., 345 F.2d 239 (5th Cir. 1965), *enforcing*, 147 N.L.R.B. 733 (1964); Fleming & Sons, Inc., 147 N.L.R.B. 1271 (1964); Bilinski Sausage Mfg. Co., 132 N.L.R.B. 229 (1961).

²¹ NLRB v. Chain Service Restaurant, Lunchette & Soda Fountain Employees, 302 F.2d 167 (2d Cir. 1962); Pinella Paving Co., 132 N.L.R.B. 1023 (1961); Earl Saverin, Inc., 90 N.L.R.B. 86 (1950); Atlanta Journal Co., *d.b.a.* Radio Station WSB, 82 N.L.R.B. 832 (1949). *But see*, NLRB v. Rural Electric Co., 296 F.2d 523 (10th Cir. 1961) where request to bargain was evasively answered, but by person with no experience in labor relations.

Furthermore, the obligation to bargain is not fully satisfied by merely inviting the union to submit written proposals where the union has requested a personal conference.²²

Even a willingness to meet does not preclude a finding of bad faith.²³ Mere surface meeting and conferring does not satisfy the obligation to bargain in good faith since there must be a bona fide attempt to come to terms.²⁴ Nor does extensive and continuous bargaining over a long period of time conclusively establish good faith.²⁵ A bad faith finding may be based on the showing of dilatory tactics: such as, delaying the course of negotiations once begun;²⁶ sending a negotiator without any authority;²⁷ or revoking the authority of a negotiator after an agreement had finally been reached.²⁸ Further evidence which might tend to show a lack of good faith includes a sudden shift of position when agreement is near,²⁹ or the interjection of new issues after agreement has apparently been reached.³⁰ Any showing of interference, coercion or restraint during the course of bargaining also indicates bad faith.³¹

The questions which have caused the greatest difficulty in determining subjective good faith are those which are based on the substantive propositions advanced by the parties at the bargaining table. The problem is that it is difficult to determine bad faith without judging the reasonableness of the proposals themselves. Thus, where the negotiation centers around stereotyped clauses which any party would normally find acceptable as a matter of course, a failure to agree can manifest an intent not to agree.³² Furthermore, a bad faith finding may be based

²² NLRB v. U.S. Cold Storage Corp., 203 F.2d 924 (5th Cir. 1953).

²³ Majure *d.b.a.* Majure Transport Co., 95 N.L.R.B. 311 (1951).

²⁴ NLRB v. Wonder State Mfg. Co., 344 F.2d 210 (8th Cir. 1965); NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953); NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943); Generac Corp., 149 N.L.R.B. 980 (1964); The Little Rock Downtowner, Inc., 145 N.L.R.B. 1286 (1964), *modified*, 341 F.2d 1020 (8th Cir. 1965).

²⁵ Woodruff, *d.b.a.* Atlanta Broadcasting Co., 90 N.L.R.B. 808 (1950).

²⁶ NLRB v. W. R. Hall Distrib., 341 F.2d 359 (10th Cir. 1965); NLRB v. Satilla Rural Elec. Membership Corp., 322 F.2d 251 (5th Cir. 1963); Perry Publications, 151 N.L.R.B. 1030 (1965).

²⁷ NLRB v. A. E. Nelleton Co., 241 F.2d 130 (2d Cir. 1957). *But see*, Lloyd A. Fry Roofing Co. v. NLRB, 216 F.2d 273 (9th Cir. 1954), where negotiator did not have authority to make binding commitment, but there was no violation.

²⁸ Gitlin Bag Co., 196 F.2d 158 (4th Cir. 1952), *enforcing*, 95 N.L.R.B. 1159 (1951).

²⁹ Marley Co., 150 N.L.R.B. 919 (1965); Stanislaus Implement & Hardware Co., 101 N.L.R.B. 394 (1952); Franklin Hosiery Mills, Inc., 83 N.L.R.B. 276 (1949). *But see*, Stoner Rubber Co., 123 N.L.R.B. 1440 (1959), where employer legally shifted position on two separate wage proposals because each proposal was made in a different context.

³⁰ NLRB v. Altex Mfg. Co., 307 F.2d 872 (4th Cir. 1962); Arkansas Louisiana Gas Co., 154 N.L.R.B. 878 (1965); Franklin Hosiery Mills, 83 N.L.R.B. 276 (1949).

³¹ NLRB v. Lettie Lee, Inc., 140 F.2d 243 (9th Cir. 1944); NLRB v. Dixie Motor Coach Corp., 128 F.2d 201 (5th Cir. 1942).

³² Reed & Prince Mfg. Co., 96 N.L.R.B. 850, *enforced*, 205 F.2d 131 (1st Cir. 1953), cert. denied, 346 U.S. 887 (1953); Crow-Burlingame Co., 94 N.L.R.B.

upon a failure to agree on trivial matters such as the union's use of a plant bulletin board.³³ As Judge Magruder said:

[I]f an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests . . . this is at least some evidence of bad faith . . . [T]he employer is obliged to make some reasonable effort in *some* direction to compose his differences with the union, if §8(a)(5) is to be read as imposing any substantial obligation at all.³⁴

Good faith should be manifested by a willingness to make *some* offer or counterproposal on *some* subject on which the parties might come to agreement.³⁵

The conduct of the parties outside the bargaining room may also show bad faith. The duty to bargain does not, however, exclude one party from using economic pressure to force the other party to agree to its bargaining demands. In the *Insurance Agents'* case,³⁶ the Supreme Court held that the NLRB could not base a finding of bad faith bargaining on the fact that the union had organized various on the job slow-down tactics in order to put economic pressure on the employer to submit to the bargaining demands of the union. Even though this conduct was not protected union activity, it could not be used to show a failure to bargain in good faith. The Court indicated that in its view collective bargaining was to be largely free from the imposition of the rule of law:

The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party inclined to agree on one's terms—exist side by side.³⁷

991 (1951); *Montgomery Ward & Co.*, 37 N.L.R.B. 100 (1941), *enforced*, 133 F.2d 676 (9th Cir. 1943).

³³ *Montgomery Ward & Co.*, 90 N.L.R.B. 1244 (1950).

³⁴ *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134-35 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953).

³⁵ See *California Girl*, 129 N.L.R.B. 209 (1960), which required a "potentiality for yielding." *But see*, *Harcourt & Co.*, 98 N.L.R.B. 892 (1952); *Collins Baking Co.*, 90 N.L.R.B. 895 (1950), where failure to make a counterproposal was not sufficient to show bad faith.

³⁶ *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

³⁷ *Id.* at 489.

In *Crestline Co.*,³⁸ the employer unilaterally discontinued contributions for its employees' insurance plan and suspended all holiday pay while bargaining for a new contract after the previous one had expired. The employer attempted to explain the unilateral action as merely the exercise of economic pressure to force the union to agree to its terms. The NLRB distinguished *Insurance Agents'* and found the unilateral changes to be violative of the Act because they amounted to a deliberate refusal to bargain on mandatory subjects of bargaining. An employer may, however, use a lockout to exercise economic pressure for acceptance of its terms after an impasse has been reached in negotiations.³⁹ But a lockout may be illegal when it is combined with other illegal conduct as part of a plan to undermine a union.⁴⁰

Some conduct amounts to a *per se* violation of the Act. The refusal to sign a written agreement has always been regarded as such a strong indication of bad faith as to be a *per se* violation because such a refusal to sign is a negation of the idea of *collective* bargaining; *i.e.*, it amounts to a denial of joint participation in the culminating act of bargaining—the promulgation of the written agreement.⁴¹ The employer's denial of a union request for certain information also has been held to be a *per se* violation of the Act. Thus a failure to disclose such things as individual earnings,⁴² job rates and classifications,⁴³ merit wage increases,⁴⁴ pension data,⁴⁵ time-study information,⁴⁶ the operation of incentive pay systems,⁴⁷ and piece rates⁴⁸ violates the Act, because without such information, the union would be unable to bargain on matters which constitute mandatory subjects of negotiation. Failure to disclose such information amounts to a refusal to bargain.⁴⁹

It is also a *per se* violation for the employer (or union)⁵⁰ to unilaterally make changes in wages, hours or conditions of employment

³⁸ 133 N.L.R.B. 256 (1961). Parties may bargain to impasse on mandatory subjects of bargaining: NLRB v. Borg-Warner, 356 U.S. 342 (1958); Fibreboard v. NLRB, 379 U.S. 203 (1964); Allen Bradley Co. v. NLRB, 286 F.2d 442 (7th Cir. 1961).

³⁹ American Ship Bldg. v. NLRB, 380 U.S. 300 (1965).

⁴⁰ American Stores Packing Co., 158 N.L.R.B. No. 46, 3 CCH LAB. L. REP. 20, 384 (1966) which is a supplemental decision following the order of 351 F.2d 308 (10th Cir. 1965) to examine the case in light of the *American Ship Bldg.* case.

⁴¹ NLRB v. Highland Park Mfg. Co., 110 F.2d 632 (4th Cir. 1940). The requirement that parties sign a written agreement was included in the duty to bargain in §8(d) of the Act. 61 Stat. 142 (1947), 29 U.S.C. §158(d) (1966). See also, Cox, *supra* note 7, at 1423.

⁴² NLRB v. F. W. Woolworth Co., 352 U.S. 938 (1956) (Per Curiam).

⁴³ Taylor Forge & Pipe Works v. NLRB, 223 F.2d 58 (1st Cir. 1955).

⁴⁴ NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir.).

⁴⁵ Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952).

⁴⁶ NLRB v. Otis Elevator Co., 208 F.2d 176 (2d Cir. 1953).

⁴⁷ Dixie Mfg. Co., 79 N.L.R.B. 645 (1948), *enforced*, 180 F.2d 173 (6th Cir. 1950).

⁴⁸ Vanette Hosiery Mills, 80 N.L.R.B. 1116 (1948).

⁴⁹ Cox, *supra* note 7, at 1428.

⁵⁰ The Supreme Court, in NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 496-97 N.28 (1960), left open the question of a union's attempt to unilaterally change working conditions.

while negotiations are going on without first consulting the other party. In *NLRB v. Katz*,⁵¹ the employer, during the course of negotiation, gave automatic wage increases which were greater than the increases offered by the company at the bargaining table. The Supreme Court held that the Board could find a failure of the duty to bargain without a finding of over-all subjective bad faith because the institution of these changes amounted to refusals to bargain over questions which were mandatory subjects of bargaining.⁵²

In summary, all of these violations—the refusal to sign a written agreement, the denial of requested information regarding certain mandatory subjects of bargaining and the institution of unilateral changes in mandatory subjects of bargaining—are *per se* violations because they constitute refusals to bargain rather than failures to bargain in good faith. Designating these situations as constituting bad faith seems to be a confusion.⁵³

II. THE EMERGENCE OF THE OBJECTIVE MODEL OF BARGAINING

The confusion between refusal to bargain and bad faith bargaining formed the springboard which the NLRB used to add an objective standard of good faith to the traditional subjective test. By the use of this objective standard, the Board has undertaken to regulate the manner in which bargaining is conducted regardless of the party's state of mind.⁵⁴

In *Truitt Mfg. Co.*,⁵⁵ the Board extended the *per se* violation approach, used in refusal to bargain situations, to situations where an employer refused to give financial data after denying a union wage demand on the grounds of inability to pay even though the refusal did not in itself constitute a refusal to bargain on wages. The employer offered a two-and-a-half cents-an-hour wage increase which was rejected by the union because it claimed that the company could afford a ten-cents-an-hour increase. Truitt then rejected a union request to have a certified public accountant examine the company books on the grounds that such information was confidential and not a matter for discussion with the union. The NLRB found that this refusal to disclose amounted to an unfair labor practice because:

. . . it is *settled law*, that when an employer seeks to justify the refusal of a wage increase upon an economic basis . . . good-faith bargaining under the Act requires that upon request

⁵¹ 369 U.S. 736 (1962). See also, *NLRB v. National Shoes, Inc.*, 208 F.2d 688 (2d Cir. 1953); *Stanislaus Implement & Hardware Co.*, 101 N.L.R.B. 394 (1952), *enforced*, 226 F.2d 377 (9th Cir. 1955).

⁵² This conclusion may be rebutted by showing that there was a need for immediate action or that the negotiations had reached an impasse.

⁵³ *Cox, The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1428 (1959).

⁵⁴ *Id.* at 1430.

⁵⁵ *Truitt Mfg. Co.*, 110 N.L.R.B. 856 (1954), *enforcement denied*, 224 F.2d 869 (4th Cir. 1955), *rev'd*, 351 U.S. 149 (1956).

the employer attempt to substantiate its economic position by reasonable proof.⁵⁶ (Emphasis added.)

The Supreme Court eventually upheld the NLRB decision. Professor Cox analyzed the Court's decision and concluded that Justice Black had "evaded every issue."⁵⁷ The *Truitt* case is unsatisfactory under the subjective state-of-mind test because there had been no factual finding of subjective bad faith. Rather, the Board and the Supreme Court relied for its finding on a settled rule of law, *i.e.*, an objective standard. Furthermore, the withholding of financial data necessary to prove inability to pay could have been prompted by many considerations other than bad faith,⁵⁸ so that it would seem impossible to base a finding of bad faith on the refusal alone. Thus, an objective standard was promulgated to govern the disclosure of requested financial data when the company has denied a wage proposal because of financial inability to pay.⁵⁹ It is a standard of conduct imposed on all parties to collective bargaining regardless of the states of mind of the parties. While it is not unreasonable to maintain that it is unfair or undesirable for an employer to base his denial of a wage demand on information peculiarly within his own knowledge, the imposition of an objective standard proscribing such conduct does place a restriction on the essentially free nature of collective bargaining.

The Board has also attempted to establish a similar objective standard where a party uses economic pressure during negotiations to force the other party to accede to its terms.⁶⁰ As was discussed above, this attempt has been rejected by the Supreme Court in the *Insurance Agents'* case.⁶¹

The NLRB seems not to have changed its basic approach since *Insurance Agents'*, but rather it has continued to extend its control of the bargaining methods of parties negotiating labor contracts. In *General Electric Co.*,⁶² the company eschewed all traditional bargaining

⁵⁶ *Id.* at 856.

⁵⁷ Cox, *supra* note 53, at 1432.

⁵⁸ For example, the company may have feared that disclosure might impair the company's credit or give a competitor some advantage.

⁵⁹ See also, International Telephone & Teleg. Corp., 159 N.L.R.B. No. 145, 5 CCH LAB. L. REP. §20, 642 (1966), which required the employer to document a plea that its competitive position would be adversely affected by a wage increase. *But see*, American Sanitary Wipers Co., 157 N.L.R.B. No. 97, 5 CCH LAB. L. REP. §20, 295 where employer admitted he could pay higher wages but where he would not give a wage increase because he could get all the labor he needed at the existing scale, *held*, no violation.

⁶⁰ Textile Workers (the *Personal Products* case), 108 N.L.R.B. 743 (1954), *enforced in part, set aside in part*, 227 F.2d 409 (D.C. Cir. 1957), *cert. denied*, 352 U.S. 864 (1956); United Mine Workers (The *Boone County* case), 117 N.L.R.B. 1095 (1957); and Insurance Agents' Int'l. Union, 119 N.L.R.B. 768 (1957).

⁶¹ NLRB v. Insurance Agent's Int'l. Union, 361 U.S. 477 (1960). See *supra* notes 36-37, and accompanying text.

⁶² 150 N.L.R.B. 192 (1964). The Supreme Court remanded the case to the Second Circuit on the issue of a successful party's right to intervene in Court of

techniques and adopted a bargaining system known as "Boulwareism." The purpose of this new bargaining system was to avoid management cave-ins at the bargaining table under strike threats by the union. The company attempted to avoid such cave-ins and to strengthen its bargaining position by convincing the public and its employees that the company would voluntarily offer the best possible contract at the outset of negotiations without requiring the union to extract each benefit from a recalcitrant management. In order to instill the attitude that G.E. would "do right by its employees," the company employed marketing methods which had been found successful in the sale of the company's consumer products. To establish the best possible contract, G.E. made an extensive economic survey in order to determine what the company could afford to offer, as well as a study to find which economic benefits and psychological satisfactions were most important to its employees.

When negotiations began the union presented its proposals for the new contract. The company listened to the union offer without responding to it. G.E. then geared the union proposal in with all of the other information which had been gathered. Based on this wealth of data, the company made its offer to the union. The company stated that this proposal was the best it would give and that, unless the union could present new information which would show that the company offer was not based on accurate information, the company would not accept any modifications. To further strengthen its bargaining position, G.E. announced that it would not give in even if the union went out on strike.

As an integral part of its overall bargaining system, G.E. used advertising techniques in a communications program designed to "sell" the employees on the merits of the company's offer and to denigrate the union's offer, bargaining approach and leadership. Circulars, company newspapers, an intensive personal contact program between supervisors and employees and other media were used to fully publicize every aspect of the company offer including the company position that it would not modify its offer without good reason.

After a 21 day strike failed, the union settled essentially upon the terms of G.E.'s offer, though the agreement contained some modifications of the original company offer. The union then filed charges with the NLRB claiming that the Boulware bargaining system was illegal.

The rationale underlying Boulwareism seems to be that because the company had gathered such complete information covering every facet of the bargaining relationship and had based its offer on that data, the proposal made by the company was fully documented as the best possible offer. Furthermore, G.E.'s offer and the information on which

Appeals review proceedings. *Sub. nom.* International Union v. NLRB, 382 U.S. 366, 15 L. Ed.2d 420, 86 Sup. Ct. 528 (1966) (Per Curiam).

it was based formed good reason for denying the union's original offer⁶³ as well as any subsequent union proposal unless that proposal would be based on information which was more accurate than the information used by the company.⁶⁴ Although one side had presented most of the revelant information on which negotiations were conducted, the bargaining itself was a rational process of persuasion because every proposal and counterproposal was based on accurate data of the labor-management relationship.⁶⁵

The NLRB, however, viewed Boulwareism as a whole and concluded that it constituted a failure to bargain in good faith.⁶⁶ This conclusion was made without any finding of a subjective bad faith, but in light of a conceded intent on the part of the company to reach agreement with the union. The Board reasoned that the company had attempted to bypass and undermine the union as bargaining agent by advancing and publicizing its "fair and firm" offer. This combination of G.E.'s fixed position at the bargaining table coupled with the communication campaign placed the company "in a position where it could not give unfettered consideration to the merits of any proposal the Union might offer."⁶⁷ The position of the union thereby was demeaned to that of an advisor, rather than a full joint participant in the bargaining process. Thus, the company was precluded by its bargaining system from taking any of the union proposals seriously. After characterizing the bargaining conduct as bespeaking a "take-it-or-leave-it" attitude, the Board concluded that:

a party who enters into bargaining negotiations with a "take-it-or-leave-it" attitude, violates its duty to bargain although it goes

⁶³ This would satisfy the requirement that reasons must be given for proposals offered and refused. See *NLRB v. Yutana Barge Lines, Inc.*, 315 F.2d 524, 530 (9th Cir. 1963); *Grinnell Co.*, 153 N.L.R.B. 1334 (1965); *Roy Hanson*, 137 N.L.R.B. 251 (1962).

⁶⁴ Furthermore, G.E. still was open to change its offer but only if its proposal was refuted by better information supplied by the union. See, *United Clay Mines Corp.*, 102 N.L.R.B. 1368 (1953), *enforcement denied*, 249 F.2d 120 (6th Cir. 1955).

⁶⁵ Professor Cox enunciated four purposes for the original §8(5) of the Wagner Act. The first purpose was to reduce the number of strikes which had been caused by the outright refusal of employers to deal with unions. The second purpose was to create aggregations of economic power for the employee to countervail the existing power of employers to establish conditions of employment. Cox further described two purposes which were not written into the Wagner Act but which framed the development of collective bargaining which was hoped for at the time of the passage of the Wagner Act. The first was the development of true joint participation in the establishment of wages, hours and conditions of employment. The second goal was that the parties would come to look upon collective bargaining as a rational process of persuasion whereby prejudices would be forgotten and where each party would attempt to find the actual joint needs of both parties. Hopefully such an attitude by both parties would lead to such general agreement over the wide gamut of issues that compromise would become the only reasonable course for the few disputed issues. Cox, *supra* note 53, at 1407.

⁶⁶ *General Electric Co.*, 150 N.L.R.B. 192, 197 (1964).

⁶⁷ *Id.* at 195-196.

through the forms of bargaining, does not insist on any illegal or nonmandatory bargaining proposals, and wants to sign an agreement.⁶⁸

Because of the combination of take-it-or-leave-it bargaining and the public statement by the company that it would not change its position, the case may be so unusual as to be restricted to its facts. Therefore, the *General Electric* case may not, of itself, establish give-and-take bargaining as an objective element of the NLRB's bargaining structure. However, subsequent cases seem to indicate that parties to collective bargaining must use give-and-take bargaining.

In *Proctor & Gamble Mfg. Co.*,⁶⁹ which distinguishes the *General Electric* case, the employer insisted to impasse that the labor contract should contain a management rights clause which would give the company exclusive control over job classifications and subcontracting and that the arbitration clause should limit arbitration to the express terms of the contract. As a part of its bargaining program, the company initiated a communication program to give full information on the status of negotiations, to explain the company's position, to refute inflammatory union charges, and to criticize the bargaining strategy and tactics of the union leadership. In distinguishing the situation from the *General Electric* case, the NLRB stated that while communicating in non-coercive terms with employees during collective bargaining negotiations was not a *per se* violation of section 8(a)(5), a non-coercive communication campaign could be utilized as an effective instrument to bypass the union. As an example, the Board cited *General Electric*, as a situation in which the company illegally used a non-coercive communications program to bypass the union by communicating its refusal to engage the union in meaningful give-and-take bargaining with respect to its "fair and firm" nonnegotiable contract proposal. The NLRB found that the communication program of *Proctor & Gamble* was not illegal because there had been give-and-take bargaining with extension discussions, proposals, counterproposals and concessions.

It seems clear from a comparison of *Proctor & Gamble* and *General Electric*, that the one basis of the finding of bad faith in *General Electric* was the failure of the company to practice give-and-take bargaining. The only thing wrong with G.E.'s communication program was that it had publicized and thereby reinforced the "take-it-or-leave-it" attitude of the company before there had been any real bargaining between the parties.

Recent cases in which negotiations have reached an impasse without any finding of bad faith further establish give-and-take bargaining as a necessary element of any bargaining system. In *Intercontinental Engi-*

⁶⁸ *Id.* at 194.

⁶⁹ 160 N.L.R.B. No. 36, 5 CCH LAB. L. REP. §20, 672 (1966).

neering & Mfg. Co.,⁷⁰ an impasse was reached over union security and wages. The Trial Examiner, who was affirmed by the Board, found that there had been no violation of the duty to bargain in good faith

. . . where there has been an open exchange of ideas, proposals, and counterproposals, and an indication of willingness to compromise [the parties] cannot be found to have violated Section 8(a)(5) of the Act simply because on some issues, even though they may be crucial, one or the other of the parties has been unwilling to recede from its position so as to yield to the contention or demands of the other.⁷¹

However, in *East Texas Steel Casting Co.*,⁷² the parties exchanged several proposals and counterproposals, but the company remained adamant on all major economic questions. The Board concluded that the company was not using proper give-and-take bargaining procedure because its change of position was only minimal.

Therefore, give-and-take bargaining required by the *General Electric* case does not preclude a party from holding a firm position on some issues from the beginning of negotiations, nor does the case prevent a party, who has used give-and-take bargaining during negotiations, from eventually coming to a firm proposal covering every issue. As long as there has been the open exchange of ideas and as long as proposals and counterproposals have been made during negotiations, there will not be a finding of bad faith even though there has been hard bargaining on some of the issues from the beginning of negotiations.

By issuing its firm all-encompassing proposal before any real negotiations began, by publicizing it as the final offer, and by attempting to establish in the minds of its employees that the company was the true protector of the employees, G.E. was effectively saying that the union was not necessary. This amounted to a denial that agreement to a labor contract was essentially a collective process between the union and management. The Board characterized G.E.'s conduct as an attempt to disparage the union and concluded:

It is inconsistent with this obligation [to deal with the employees' representative] for an employer to mount a campaign, as Respondent did, both before and during negotiations, for the purpose of disparaging and discrediting the statutory representative in the eyes of the employee constituents . . . and to create

⁷⁰ 151 N.L.R.B. 1441 (1965). See also *Rangaire Corp.*, 157 N.L.R.B. No. 62, 5 CCH LAB. L. REP. §20, 274 (1966); *Grinnell Co., Inc.*, 153 N.L.R.B. 1334 (1965).

⁷¹ *Id.* at 1446.

⁷² 154 N.L.R.B. 1080 (1965). See also *Capitol Aviation, Inc.*, 152 N.L.R.B. 745 (1965), *enforcement denied*, 355 F.2d 875 (7th Cir. 1966); *Weinacher Brothers, Inc.*, 153 N.L.R.B. 459 (1965). *But see*, Jack Lipsitz, *d.b.a.* American Sanitary Wipers Co., 157 N.L.R.B. No. 97, 5 CCH LAB. L. REP. §20, 295 (1966), where the employer never deviated from his original position on any economic issue but the Board held that this would not *per se* establish bad faith bargaining.

the impression that the employer rather than the union is the true protector of the employees' interests.⁷³ This duty not to disparage is based on the duty of an employer to recognize the statutory representative and to bargain collectively with that representative rather than with the individual employees.⁷⁴

III. THE JUDGEMENT OF THE REASONABLENESS OF COLLECTIVE BARGAINING PROPOSALS

The duty not to disparage the union has taken a strange twist since the *General Electric* case. In *H. K. Porter Co., Inc.*,⁷⁵ the employer refused to concede to a checkoff clause on the ground that he did not want to aid in the union's business of collecting dues. The Trial Examiner followed the language from the *General Electric* case:

it is inconsistent with the bargaining obligation which the Act imposes upon an employer for the latter to conduct negotiations with the statutory representative in such a manner as to disparage or discredit the statutory representative in the eyes of its employee constituents.⁷⁶

The Trial Examiner then reasoned that since the Act requires an employer to give some aid and comfort to the union by dealing with it as representative, the employer could not deny checkoff on the ground that he did not want to give aid to the union. Thus, the NLRB examined the reasons the employer gave for his position and found them to be unsatisfactory. Because of this, the employer was found to have violated his duty to bargain in good faith.

In another case dealing with hard bargaining on checkoff, *Roanoke Iron & Bridge Works, Inc.*,⁷⁷ the Board again found that the employer's denial of a checkoff was unreasonable and that, as a result, the employer had bargained in bad faith. In 1951, the Steelworkers were certified. In the ensuing negotiations the company successfully refused checkoff. By the time the first contract expired, the union had withered so that no new contract was ever negotiated. The Steelworkers were again certified in 1964, and again the company refused checkoff. The company, as a part of its bargaining program, distributed literature which cited the 1951 refusal of checkoff and the falling away of union members "when they found out they did not need a union."

The Trial Examiner, who was affirmed by the Board, found that

⁷³ *General Electric Co.*, 150 N.L.R.B. 192, 195 (1964).

⁷⁴ *Id.* at 194. ". . . the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 484-485 (1960).

⁷⁵ 153 N.L.R.B. 1370 (1965), *enforced* 363 F.2d 272, *cert. denied*, ———U.S. ———, 87 Sup. Ct. 40 (1966).

⁷⁶ *Id.* at 1373.

⁷⁷ 160 N.L.R.B. No. 17, 5 CCH LAB. L. REP. §20, 652 (1966). See also, *Farmers Coop. Gin Ass'n.*, 161 N.L.R.B. No. 86, 5 CCH LAB. L. REP. §20, 876 (1967). The Board is especially suspicious of any employer who refuses checkoff but who does make other payroll deductions for government bonds, charities, etc.

the company had refused checkoff in the belief that without checkoff the union would again leave the scene. He reasoned that:

Where an employer takes a position in bargaining, not to advance his own economic interest or to safeguard the rights or interests of his employees, but for the purpose of damaging or destroying the union with which he is bargaining, then he is not bargaining in good faith. This is not to say that the employer must grant a union's demands which do not appear harmful to the employer, but only to say that the employer's motives and objectives must be legitimate, and the principle on which he stands must be permissible under the statute (e.g., an unwillingness to prefer the union over other creditors of his employees), not as here, the impermissible object of harm to the other party.⁷⁸

As the dissent in *Roanoke* points out, there had been no showing of an intent not to agree; the parties had negotiated the checkoff issue; each party had made proposals and counterproposals; and the parties had been able to reach agreement on every other issue. The only basis for the bad faith finding was the Board's judgment of the reasonableness of the employer's position on the checkoff issue. The test used to determine whether the position was reasonable was whether the object of the position was to harm the other party.

The Board did not, however, make acceptance of checkoff an element of the objective standard. Thus in *Truitt* the Board did not judge the reasonableness of refusing to open the company books to the union, but just proscribed such a refusal after the denial of a wage demand because of financial inability.⁷⁹ In *Roanoke*, however, the Board looked into the reason for denying checkoff to see if the denial was based on an intent to harm the other party.

There appear to be three grounds by which checkoff can be denied: First, that checkoff would be too costly. This ground would seem questionable where the payroll is figured by computer. Second, that checkoff would work against the interest of the employees. For example, an employer might deny checkoff where his employees would be denied membership in a professional association because of union membership. The third ground, which predictably will be used most often, is an unwillingness on the part of an employer to favor the union over other creditors of his employees.

One problem with *Roanoke* is whether the "object of harm to the other party" test will be extended to judge the substantive positions of bargaining parties on issues other than checkoff. For example, if a union staked its future existence on getting wages doubled, would a company denial be judged to be for the object of harming the union?

⁷⁸ *Ibid.*

⁷⁹ *Truitt Mfg. Co.*, 110 N.L.R.B. 856 (1954). See *supra* notes 55-59, and accompanying text.

If the test were applied to union bargaining positions, would a union be found to be in bad faith for pushing for higher wages after the company showed that it would have to go out of business if it granted any increase? The reasoning in *Roanoke* does not seem to limit application of the object of harm test to the question of checkoff.

Another problem is what "harm" really means. In *Roanoke* "harm" was limited to where the employer foresaw the withering of the union. In *H. K. Porter* there was only a showing of strong anti-union feeling. The real question emanating from these cases is how the NLRB will distinguish the object of a party's position to harm the other party from an attempt to bargain for the strongest possible bargaining position, vis-a-vis the other party.

Potentially, this test could be expanded to allow the Board to judge every position taken by bargaining parties. This would place the NLRB directly at the bargaining table in a position to impose by rule of law whatever contract provisions it finds desirable.

IV. CONCLUSION

If good collective bargaining requires that the parties be basically free to come to their own agreement, it is questionable whether such continued expansion of NLRB control of collective bargaining is desirable. The effect of using an objective standard to judge bargaining procedures is to preclude the development of any new techniques. Today the traditional bargaining practices are under attack as inadequate to meet the demands of present society.⁸⁰ Perhaps a more flexible approach by the NLRB would allow the parties to develop more efficient bargaining techniques.

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⁸⁰ See e.g., Blum, *Collective Bargaining: Ritual or Reality?*, 39 HARV. BUS. REV. 63 (1961); Cox, *The Uses and Abuses of Union Power*, 35 NOTRE DAME LAW. 624 (1966); Wallich, *Can We Stop Inflationary Wage Increases?*, 40 HARV. BUS. REV. 6 (1962).