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Article 11

Lack of Good Faith in Collective Bargaining

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merits of the unmentioned policy reasons[28] that apparently controlled the instant decision could be put to an exacting test.

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Lack of Good Faith in Collective Bargaining—Petitioners in collective bargaining negotiations insisted upon a broad management function clause without an arbitration clause of real value, and also demanded a no strike clause in the contract. The employees' representatives achieved only the concession of grievance and security clauses which gave the union little voice in the determination of such matters. Petitioners had also, prior to the bargaining sessions, granted a unilateral wage raise to certain employees, and had allegedly made threats and promises to their employees. The National Labor Relations Board found that the strike that followed was not an unfair labor practice strike, because the petitioners had failed to bargain in good faith in failing to concede *anything* substantial, and in granting the wage increases. The petition to set aside the order of the Board was granted respecting the findings and order relating to refusal to bargain in good faith, and to the determination that the strike was an unfair labor practice strike. *White's Uvalde Mines v. NLRB,* 42 LRRA 2001 (5th Cir., April 23, 1958).

The statute pertinent here is §8 (d) of the National Labor Relations Act, as amended by the Taft-Hartley Act:[1]

> "(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of 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: . . . ."

This subsection was inserted in the National Labor Relations Act to give more definiteness to §8 (a)(5)[2] of the original Act, which made it an unfair labor practice for an employer to bargain collectively with

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in successive statutory revisions has made no attempt to alter, if any amelioration is required it is now a matter for Congress, not this Court."

[28] Riordan, *supra* note 26, admits that a holding of part payment as sufficient to bring suit would not prevent the Government from utilizing its drastic remedies. But he feels that such use would produce an unsatisfactory tax administration because 1) it would affect the taxpayers' willingness to perform under our voluntary assessment program; 2) it would be burdensome to the Government; 3) it might cause hardships to those doing business with the taxpayer. But the query remains whether these arguments completely offset the dire circumstances in which many a taxpayer now finds himself.

[1] 29 U.S.C.A. §158 (d).

[2] 29 U.S.C.A. §158 (a) (5).

the representatives of his employees. There was a clearer elaboration upon the components of good faith bargaining.[3]

While the court here found sufficient substantial evidence to support the Board's finding that the peitioners had interfered with, restrained and coerced employees in the exercise of their right to engage in union and concerted activities,[4] and denied the petition to that extent, it treated the pay increase by the employer in a different manner. This latter conduct of the petitioner was summarily disposed of by the court:

> "We think, however, the unilateral increase of pay of five of the sixty members of the bargaining unit, each of which was accounted for as being appropriate to the particular individual in relation to his job, and all of which occurred before the bargaining sessions commenced, did not amount to violations of either Section 8 (a)(1) or 8 (a)(5) of the Act. These were not such general increases as were criticized in NLRB v. Crompton-Highland Mills, 337 U.S. 217, 24 LRRM 2088 and May Department Stores v. NLRB, 5 Cir., 211 F.2d 843, 33 LRRM 2789. . . . These particular increases were simply in line with their custom and practice and could not be said to be either restraint or coercion under 8 (a)(1) or a refusal to bargain in good faith under 8 (a)(5)."[5]

As to the principal issue in the case, that of the employer's continued insistence upon a contract favorable wholly to itself, and especially upon the management function clause, the court relied heavily upon the United State's Supreme Court decision in *NLRB v. American Insurance Co.*[6] That case clearly demonstrated the Supreme Court's reluctance to judge substantive terms of the proposed collective bargaining contracts, or to imply a refusal to bargain from the failure to reach a settlement where the employer will not yield[7] in his demand for a management function clause.[8] The Court held that since such

[3] N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1956); N.L.R.B. v. American Insurance Co., 343 U.S. 395 (1952). See also Annot., 100 L. ed. 1035 (1957).

[4] This was a violation of §8 (a) (1): "It shall be an unfair labor practice for an employer — to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7, . . ." 29 U.S.C.A. §158 (a) (1).

[5] White's Uvalde Mines v. N.L.R.B., 42 L.R.R.M. 2001, 2002 (5th Cir. April 23, 1958).

[6] 343 U.S. 395 (1952).

[7] N.L.R.B. v. American Insurance Co., *supra* note 6; "And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment on the substantive terms of collective bargaining contracts. . . ."

[8] The management function clause in the case of N.L.R.B. v. American Insurance Co., *supra* note 7, at 397, is typical: "The right to select, hire, to promote, demote, discharge, discipline for cause, to maintain discipline and efficiency of employees, and to determine the schedules of work is recognized by both union and company as the proper responsibility and prerogative of management to be held and exercised by the company, and while it is that an employee feeling himself to have been aggrieved by any decision of the company in respect to such matters, or the union on his behalf, shall have a right to have such a decision reviewed by top management officials of the

a clause was a subject proper for collective bargaining,[9] and Congressional intent was *contra* to any governmental determination as to the desirability of terms of labor-management collective agreements,[10] an adamnant demand for a management prerogative clause which resulted in an impasse in negotiations would not *per se* amount to bad faith in bargaining.

The principal case however seems to extend farther the protection given the employer in his bargaining. It affirms strongly the idea that *no* concession need be made,[11] and rejects the Board's theory that bad faith can be based upon the employer's failure to concede *anything* substantial.[12] Thus, the majority find, there is no substantive evidence here to support the Board's finding regarding the violation of good faith in bargaining, because there exists no basis for the contentions urged in support of it. The dissenting Judge Rives however, felt that the unilateral wage increases together with the weight which the court must give the Board's findings under §10 (f) of the Act,[13] would support a denial of the petition in toto. He further felt that *something* was required of the employer to fulfill his duty to bargain in good faith, and here that was lacking.

The court in the *White* case showed its recognition of the difficulty involved in the application of the good faith test:[14]

> "The language of the courts is not, as it cannot be, in construing this difficult statute, entirely clear, ..."

The standard criterion for the courts in the construction of whether

company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the company made by such top management officials shall not be further reviewable by arbitration."

[9] N.L.R.B. v. American Insurance Co., *supra* note 6: "Congress provided expressly that the Board should not pass upon the desirability of the substantial terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining." This is quite important, for the finding that such a clause was not a proper subject for collective bargaining would result in the finding of an unfair labor practice in not bargaining in good faith, if the employer insisted upon such a clause. See N.L.R.B. v. Wooster Division of Borg-Warner, 42 L.R.R.M. 2034 (U.S. Nos. 58 and 78, May 5, 1958).

[10] N.L.R.B. v. American Insurance Co., *supra* note 6; the intent behind Section 8 (a) (5) as described by the Senate Committee: "The Committee wishes to dispel any possible false impressions that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935).

[11] White's Uvlade Mines v. N.L.R.B., *supra* note 5 at 2003.

[12] White's Uvalde Mines v. N.L.R.B., *supra* note 5 at 2003; the court summarizes the Board's contentions in like terms.

[13] §10 (f) of the National Labor Relations Act.

[14] White's Uvalde Mines v. N.L.R.B., *supra* note 5.

conduct amounts to bad faith has been a rather broad one.[15] Hence the approach of the court in the different cases varies with the particular circumstances of each. This of course furnishes no guide as to what will or will not be good faith bargaining in that vast area beyond flat refusal to negotiate in the first instance. The *White* decision shows that the good faith test, although codified by Taft-Hartley into the National Labor Relations Act, still retains the indefiniteness of §8 (a)(5)[16] of the original act. Since, however, it appears that the existence of good faith can only be determined by an objective evaluation of all of the acts and circumstances in each case, in order to ascertain the purpose or subjective intention of the parties,[17] the inadvisability of a more specific rule seems apparent.

The decision in the *White* case,[18] under the application of the good faith test, seems to be a well-considered one, which is in conformity with the statutory recognition of the non-concession privilege and the Congressional intent that the terms of the agreement be left to the parties, and not to governmental supervision. However, in finding no fault with the insistence on a management function clause under §8(d), the court did caution:

> "We do not hold that under no possible circumstances can the mere content of the various proposals and counterproposals of management and union be sufficient evidence of a want of good faith to justify a holding to that effect. We can conceive of one party to such bargaining procedure suggesting proposals of such a nature or type or couched in such objectionable language that they would be calculated to disrupt any serious negotiations. . . ."[19]

ROBERT J. URBAN

Federal Income Taxation—Tax Accounting—Effect of Events Occurring After The Close of The Taxable Year On An Accrual Taxpayer's Deductions—A corporate taxpayer on the accrual basis accrued on its books on July 1, 1945 a capital stock tax which was payable June 30, 1946. At the close of its fiscal year on August 31, 1945 an independent accounting firm audited the taxpayer's books for the purpose of reports to stockholders, reports to creditor banks and as a basis for filing tax returns. This audit was completed on October 30, 1945. On November 8, 1945, the capital stock tax was repealed. The taxpayer, after obtaining extensions, filed its tax returns on Janu-

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[15] See *e.g.*, J. I. Case, Inc. v. N.L.R.B., 253 F. 2d 149 (7th Cir. March 12, 1958): "Particular circumstances in each case must be considered in determining whether statutory obligations of the employer to bargain in good faith has been met."

[16] 29 U.S.C.A. §158 (a) (5).

[17] See Singer Mfg. Co. v. N.L.R.B., 119 F. 2d 131 (7th Cir. 1941), *cert. denied*, 313 U.S. 585.

[18] White's Uvalde Mines v. N.L.R.B., *supra* note 5.

[19] White's Uvalde Mines v. N.L.R.B., *supra* note 5, at 2005.