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The obligation to bargain collectively in good faith is imposed on both the employer and the representative of his employees by the National Labor Relations Act.[1] Generally, some form of ask-

1. Section 8(a)(5) of the National Labor Relations Act, 49 Stat. 453 (1935), 29 U.S.C. § 158(a)(5) (1958) and § 8(3) of the NLRA, as amended by the Labor Management Relations Act (Taft-Hartley) § 101(b)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(3) (1958), require the employer and the labor organization respectively to bargain collectively. To bargain collectively is defined by § 8(d) of the NLRA, as amended by the Labor Management Relations Act § 101(d), 61 Stat. 140 (1947), 29 U.S.C. § 158(d) (1958), as the duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

and-bid bargaining is used to satisfy this statutory obligation.[2] Since 1947, however, the General Electric Company has developed and used a bargaining technique known as Boulwareism,[3] which, on its face, seems capable of achieving the same results as the ask-and-bid method, but in a more efficient manner. Nevertheless, the National Labor Relations Board recently found Boulwareism to be in violation of the duty to bargain in good faith.[4]

Although the facts leading to the Board decision relate specifically to the 1960 contract negotiations between GE and the International Union of Electrical, Radio, and Machine Workers (IUE), they are typical of the Boulware techniques. Since initiating its plan to improve industrial relations, GE has continually employed a communications program designed to promote the company's image as a protector of employee interests.[5] When formal contract negotiations began in 1960, IUE was permitted to present its contract demands and supporting arguments. GE discussed and criticized the union's position, but did not indicate, either in its communication program or at the bargaining table, the particulars of its own position, nor did it provide certain information requested by the union. Following this initial discussion period, GE made a firm and final offer based on extensive year-round research into all relevant considerations, including a consideration of the union's demands.[6] Since this offer was stated to be the only one warranted by the facts, GE declared that it would not compromise its position,[7] but professed a

2. In ask-and-bid bargaining, the parties unveil their respective positions at the outset of negotiations. Thereafter, the parties engage in an economic tug-of-war, hoping to force concessions and to reach an agreement.

3. The term "Boulwareism" refers to General Electric's entire approach to labor relations. Its basic premise is that scientific methods, rather than bargaining skill, should be used for attaining settlements. See generally Northrup, *The Case for Boulwarism,* Harv. Bus. Rev., Sept.-Oct. 1963, p. 86. Note, *"Boulwarism": Legality and Effect,* 76 HARV. L. REV. 807 (1963).

4. General Elec. Co., 57 L.R.R.M. 1491 (N.L.R.B. Dec. 16, 1964) [hereinafter cited as principal case].

5. The communications relevant to the principal case publicized GE's philosophy of collective bargaining, questioned the motives of James Carey, the union president and chief negotiator in 1960, and ultimately urged the employees to indicate their approval of the GE offer to the union representatives.

6. The offer included a 3% general wage increase effective when an agreement was signed and another 4% increase effective April 2, 1962. Brief for Respondent, p. 69, principal case. An almost identical offer was made by GE's competitor, Westinghouse, and accepted by the IUE. See IUE News, Oct. 24, 1960, p. 1, col. 2; Oct. 10, 1960, p. 3, col. 1.

7. According to the Boulware theory, a holding back of material for later concessions would be inconsistent with GE's policy of voluntarily accommodating the interests of its employees. While this approach appears to be take-it-or-leave-it bargaining, see Selekman, *Cynicism and Managerial Morality,* Harv. Bus. Rev., Sept.-Oct. 1958, pp. 61, 64. GE's technique does not seem to differ materially in effect from those situations in which parties take extreme initial positions, planning to retreat later in what appear to be concessions or compromises. See generally Blum, *Collective Bargaining: Ritual or Reality?* Harv. Bus. Rev., Nov.-Dec. 1961, p. 63.

willingness to alter its bargaining offer if IUE could show a sufficient change of circumstances or new facts to warrant an alteration in the offer.[8] The union called an unsuccessful strike,[9] which failed in part because of GE's solicitations to the local unions and to the individual employees, and ultimately GE's offer was accepted. IUE then filed a complaint with the Board alleging that GE's bargaining constituted an unfair labor practice.[10] The Trial Examiner found that the totality of GE's conduct, which included a number of challenged practices,[11] indicated that GE was not bargaining in good faith. Particularly, the Trial Examiner disapproved GE's final-offer bargaining table conduct. GE filed exceptions, but a majority of the Board adopted the Trial Examiner's Report.[12]

Good faith collective bargaining has always been a difficult concept to define. Although the congressional discussions preceding the enactment of the National Labor Relations Act reveal disagreement as to the meaning of the statutory requirement,[13] the early decisions of the NLRB and the courts clearly indicated that a mere meeting and discussion was insufficient to satisfy the statutory obligation and that, in addition, an effort must be made actually to reach an agree-

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8. In past contract negotiations between GE and the IUE, changes in GE's original offer always have occurred. For example, in 1953 GE modified its offer after General Motors acceded to union demands for a wage increase. See Northrup, *supra* note 3, at 91. In 1960, twenty-three changes were alleged to have been made. Brief for Respondent, pp. 69-72, principal case. However, the Board mentions only five such changes. Principal case, at 1494. See note 38 *infra*.

9. At that time, there were apparently three major demands which prevented agreement: (1) the discontinuance of a cost of living escalator clause spaced at intervals between wage increases at more than one year; (2) a union shop; and (3) supplemental unemployment benefits. Brief for Respondent, p. 63 and Brief for General Counsel, p. 229, principal case.

10. Similar charges were made in 1954 and 1958 but were dismissed by the General Counsel. NLRB Cases Nos. 2-CA-3811 (1954) and 2-CA-8190 (1958).

11. The charges specifically cited were: (1) GE's failure to furnish certain requested information to the Union during negotiations; (2) GE's attempts to deal separately with locals on matters properly the subject of national negotiations with the IUE, and its solicitations of locals to abandon or refrain from supporting the strike; (3) GE's pre-negotiation presentation of a personal accident insurance proposal on a take-it-or-leave-it basis; and (4) its overall approach to, and conduct of, bargaining. Principal case at 1499.

12. Member Jenkins concurred, disagreeing with the condemnation of GE's approach to collective bargaining. Member Leedom agreed with the concurring opinion on this issue but dissented from the majority opinion.

13. Senator Walsh declared, "When the employees have . . . selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into . . . ." 79 CONG. REC. 7660 (1935). On the other hand, Senator Wagner thought the bill required a party to match unacceptable proposals with counterproposals and to make every reasonable effort to reach an agreement. *Hearings on H.R. 6288 Before the House Committee on Labor*, 74th Cong., 1st Sess. 16 (1935). See generally Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1403-09 (1958); Smith, *The Evolution of the "Duty To Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1084 (1941).

ment.[14] By 1947, however, Congress had become dissatisfied with the tendency of these tribunals to control the bargaining table conduct of the parties by examining the reasonableness of an employer's proposal.[15] Consequently, section 8(d) of the NLRA was added by the Taft-Hartley amendments to provide that the obligation to bargain collectively requires neither agreement to a specific proposal nor the making of a concession.[16] A second amendment expressly obliged labor unions to bargain collectively.[17] Congressional debates disclose that one motive for this latter addition was to outlaw by statute the unions' practice of making a single take-it-or-leave-it offer.[18] Thus, legislative history seems to indicate that Congress had two principal objectives in imposing the duty to bargain collectively on both the employer and the union: (1) the assurance of a joint effort aimed at reaching agreement, including the prevention of a closed-minded or take-it-or-leave-it attitude, and (2) the prevention of compelling concessions or agreement.

However, since Congress did not specify what conduct of the parties at the bargaining table would satisfy the obligation to bargain in good faith nor what inferences should be drawn from conduct and statements away from the bargaining table, the courts have had to devise some enforceable standard. The basic test developed seems to be whether a party's total conduct indicates a sincere desire to reach agreement.[19] If that desire cannot be found, then it is presumed that the party has, in effect, rejected the whole basis of collective bargaining. The inference of bad faith may be drawn from a party's bargaining tactics or from his bargaining position,[20] but this determination often is a difficult one. Although external behavior without specific declarations may or may not indicate a party's state of mind, it is clear nonetheless that good faith theoretically requires more than the offer of a proposal on a take-it-or-leave-it

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14. See, *e.g.*, Highland Park Mfg. Co., 12 N.L.R.B. 1238 (1939), *enforced*, 110 F.2d 632 (4th Cir. 1940); Globe Cotton Mills, 6 N.L.R.B. 461 (1938); Atlas Mills, Inc., 3 N.L.R.B. 10 (1937).

15. See H.R. REP. No. 245, 80th Cong., 1st Sess. 19-21 (1947).

16. Labor Management Relations Act § 101(d), 61 Stat. 140 (1947), 29 U.S.C. § 158(d) (1958). See generally H.R. REP. No. 245, *supra* note 15, at 19-21; H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 34 (1947); S. REP. No. 105, 80th Cong., 1st Sess. Pt. I at 24 (1947).

17. Labor Management Relations Act § 101(b)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(3) (1958).

18. See 93 CONG. REC. 4135 (1947) (remarks of Senator Ellender); *id.* at 4363 (remarks of Senator Pepper). See generally Note, 71 HARV. L. REV. 502 (1958).

19. See, *e.g.*, NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943); Duro Fittings Co., 121 N.L.R.B. 377 (1958). See generally Cox, *supra* note 13, at 1416-21.

20. See Duvin, *The Duty To Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 256-65 (1964).

basis.[21] However, it is also established law that at some point in traditional ask-and-bid bargaining negotiations can be forced to an impasse.[22] Indications of bad faith have included the outright rejection of a union's proposals,[23] intentional stalling of agreement by postponement,[24] or sending a representative to the negotiations who is unauthorized to bind the employer.[25] And bad faith has been found when a party refused to produce reasonable proof to substantiate a claim of economic inability to raise wages,[26] where a party insisted upon patently unreasonable terms,[27] and where a party forced negotiations to an impasse upon a proposal concerning a nonmandatory subject of bargaining.[28] On the other hand, bargaining table threats of economic harassment were held not to be inconsistent with good faith bargaining by the United States Supreme Court in *NLRB v. Insurance Agents Int'l Union*.[29]

In certain cases, the Board and the courts have disregarded the good faith criterion and have found a per se refusal to bargain,[30] especially in matters involving conduct required by the NLRA itself. Thus, it is unfair labor practice per se to refuse to bargain on mandatory subjects,[31] to change employment benefits unilaterally while negotiating with the union prior to an impasse,[32] to refuse to execute a written contract incorporating any agreement already reached,[33]

21. See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 485 (1960); NLRB v. Griswold Mfg. Co., 106 F.2d 713 (3d Cir. 1939).

22. See NLRB v. National Paper Co., 216 F.2d 859, 863 (5th Cir. 1954); Texas Foundries, Inc. v. NLRB, 211 F.2d 791, 793 (5th Cir. 1954); Philip Carey Mfg. Co., 140 N.L.R.B. 1103, 1104 (1963); Bethlehem Steel Co., 133 N.L.R.B. 1347, 1369 (1961). *Cf.* NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952).

23. *E.g.*, NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953), *enforcing as modified* 100 N.L.R.B. 1323 (1952); E. I. Du Pont de Nemours & Co., 115 N.L.R.B. 84 (1956).

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

25. *E.g.*, NLRB v. Hibbard, 273 F.2d 565 (7th Cir. 1960); Wheatland Elec. Co-op. v. NLRB, 208 F.2d 878 (10th Cir. 1953).

26. See NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

27. *E.g.*, NLRB v. Southwestern Porcelain Steel Corp., 317 F.2d 527 (10th Cir. 1963) (employer presented only two counterproposals, would not agree to put into writing provisions he was already observing, and demanded unilateral control of all conditions of employment in a management prerogatives clause); Majure v. NLRB, 198 F.2d 735 (5th Cir. 1952) (employer insisted on a management prerogatives clause, reserving to himself unilateral control of all conditions of employment).

28. See NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

29. 361 U.S. 477 (1960).

30. The Supreme Court's decision in NLRB v. Katz, 369 U.S. 736 (1962), gave full recognition to the per se doctrine.

31. *Ibid.* Mandatory subjects are those concerning "wages, hours and other terms and conditions of employment," using the terminology which appears in § 8(d) of the NLRA. See also NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958); Fleming, *The Obligation To Bargain in Good Faith*, 16 Sw. L.J. 43, 45-53 (1962).

32. *E.g.*, May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945); NLRB v. Shannon, 208 F.2d 545, 548 (9th Cir. 1953).

33. *E.g.*, H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941); NLRB v. Wate, Inc., 310

and to refuse to comply with reasonable requests to furnish information.[34] Since these items are generally procedural in nature, the per se determination has been justified on the basis that compliance will facilitate the reaching of an effective bargaining agreement.[35]

Applying these somewhat ambiguous standards to the principal case, it appears that GE's refusal to furnish certain requested information alone might have been the basis for finding a per se refusal to bargain. Clearly, however, the NLRB grounded its holding on the breach by GE of some type of good faith test,[36] specifically condemning GE's firm offer because it was similar to take-it-or-leave-it bargaining.[37] But, since GE expressly stated an intention to accept, and indeed did accept, some changes,[38] Boulwareism does not seem to involve an absolute take-it-or-leave-it proposition. Furthermore, there was substantial evidence to indicate that the offer itself was reasonable in all respects and that the company did desire to reach an agreement with the union.[39] Thus, GE seems to have met the general test for bargaining in good faith. Moreover, conduct indicating a purpose to insist on the acceptance of an offer without substantial alteration has been held not to constitute a violation of the duty to bargain if a sound business purpose underlies the employer's position,[40] and arguably such a business purpose existed in the principal case. However, in cases upholding such steadfast bargaining the absence of other conduct indicating bad faith has been critical to the court's approval, and in cases where conduct indicating a possible lack of good faith *has* existed, intransigence has been an important factor in the court's finding of a departure from the good faith

F.2d 700 (6th Cir 1962), *enforcing* 132 N.L.R.B. 1338 (1961); Standard Oil Co., 137 N.L.R.B. 690 (1962).

34. See NLRB v. Fitzgerald Mills Corp., 313 F.2d 260 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963); Cincinnati Steel Castings Co., 86 N.L.R.B. 592 (1949).

35. See generally Duvin, *supra* note 20, at 268-69.

36. See principal case, *passim*.

37. *Id.* at 1499.

38. The five changes recognized by the Board were: first, an option of a 3% increase in wages in 1962, coupled with a fourth week of vacation for employees of twenty-five years service plus an eighth paid holiday for all employees, replacing the 4% wage increase contained in the original offer; second, the effective date of the 1960 wage increase was moved up to Monday of the week an agreement was signed; and the other three changes concerned the Company's employees' insurance and pension plans. Principal case at 1494.

39. GE met with the Union forty-five times between July 19 and October 22, which was the date of the end of the strike. It conferred on all required subjects of bargaining, did not take unilateral action or insist to a point of impasse on any non-mandatory bargaining provisions. Its offer was not patently unreasonable, and the General Counsel conceded GE's desire to reach an agreement with the union. Brief for Respondent, p. 5, principal case.

40. See, *e.g.*, NLRB v. National Paper Co., 216 F.2d 859 (5th Cir. 1954), *denying enforcement of* 102 N.L.R.B. 1569 (1953); Texas Foundries Inc. v. NLRB, 211 F.2d 791 (5th Cir. 1954), *denying enforcement of* 101 N.L.R.B. 1642 (1952); McCulloch Corp., 132 N.L.R.B. 201 (1961).

standard.[41] It would seem, then, that the result in the principal case could have been justified on the Board's determination that there was evidence of other conduct which indicated a lack of good faith.[42]

One consequence of accepting this analysis would be that GE or another company could eliminate the condemned conduct from its bargaining procedure, and the remaining characteristics of Boulwareism would then be available as a good faith technique. However, the majority opinion of the Board seems to transcend even the flexible standard of the traditional good faith requirement and to condemn Boulwareism totally.

The Board first condemned Boulwareism because of its tendency to disparage the union. The National Labor Relations Act gives employees the right to choose their own bargaining representative,[43] and the employer is required to recognize a certified union.[44] GE apparently attempted to bypass IUE and to bargain directly with local unions when IUE was, in fact, the proper bargaining representative.[45] Furthermore, one of the declared purposes of the NLRA was to restore equality of bargaining power between employers and employees,[46] and this required employees to focus concerted power through their chosen union organization and to use that organization as a vital and necessary instrument to force concessions from the employer. However, Boulwareism was calculated to suggest to employees that the union can procure no benefits for them that the company has not chosen to grant voluntarily. Although a history of tough bargaining alone might produce a similar impression, GE's technique of freezing its position through policy declarations means that even if it desires to compromise in a given situation, it cannot do so without risking loss of face.[47] Thus, Boulwareism seems to relegate the employees' proper *bargaining* representative to a mere advisory position.

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41. See, *e.g.*, NLRB v. Herman Sausage Co., 275 F.2d 229 (5th Cir. 1960); NLRB v. Denton, 217 F.2d 567 (5th Cir. 1954); Bethlehem Steel Corp., 133 N.L.R.B. 1347, 1369-70 (1961) (dictum).

42. See evidence outlined note 11 *supra*. The Board's reliance upon GE's communication program as evidence of bad faith should be carefully limited. Section 8(c) of the NLRA provides that communication cannot be evidence of an unfair labor practice unless it contains a "threat of reprisal or force or promise of benefit." 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958). Cases involving the interrelationship of §§ 8(a)(5) and 8(c) have upheld employer communications similar to those employed in the principal case. See, *e.g.*, Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); Titan Metal Mfg. Co., 135 N.L.R.B. 196 (1962).

43. NLRA § 7, 49 Stat. 452 (1935), 29 U.S.C. § 157 (1958).

44. See NLRA § 9(a), 49 Stat. 453 (1935), 29 U.S.C. § 159(a) and NLRA § 8(a)(5), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(5) (1958).

45. See principal case, at 1497.

46. NLRA § 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

47. At one point in the negotiations, GE admitted that "everything we think we should do is in the proposal and we told our employees that, and we would look ridiculous if we changed now." Principal case at 1500.

The Board also indicated that General Electric's technique violated the whole spirit of collective bargaining.[48] In incorporating the terms "meet" and "confer" into the collective bargaining process through section 8(d), Congress arguably contemplated an atmosphere of reasoned negotiation that would result in mutual agreement,[49] whereas GE's approach requires that, if the company has done its research properly, there will be no need to change its offer, barring unforeseen circumstances.[50] Although the substantive content of an agreement reached through Boulware techniques may be indistinguishable from one reached through a more or less intensive period of give-and-take discussion, there is no guarantee that this will be the result. If this difference is important, then it may also explain in part the Board's desire to force the resumption of traditional ask-and-bid bargaining.

Although Boulwareism does seem to conflict with the traditional notions of collective bargaining under the statute, the Board should be criticized for failing clearly to indicate the reasons, apart from tradition, why it should not be recognized as an effective means of satisfying the obligation to bargain collectively. Since section 8(d) expressly does not compel concessions, it seems unwise to discourage reasonable firm and final offers which are based on a full consideration of all relevant facts from both the business and employee viewpoints. Furthermore, when the employees themselves favor the company offer,[51] it seems purposeless to require traditional ask-and-bid bargaining on the theory that employee interests will thereby receive greater protection. It is true that permitting a Boulware type offer might necessitate a determination of the reasonableness of the terms of the offer, an examination which Congress expressly tried to eliminate by providing that concessions need not be made by either party.[52] Nevertheless, it would seem that the Board and the courts are presently considering the reasonableness of the terms of an offer in cases where negotiations have been forced to the point of impasse and particularly where the parties have otherwise acted in good faith.[53] As a means of trying to encourage industrial stability through the recognition of bargaining maturity, perhaps a test more consonant with all relevant considerations would require one party to give the other a reasonable length of time to examine a contemplated offer in whole or in part, to express its views, and to suggest methods

48. *Ibid.*

49. See generally Duvin, *supra* note 20, at 265.

50. See principal case at 1500.

51. In the principal case, the Schenectady local, the largest in the IUE, although striking for a short period, returned to work before the end of the 1960 walkout. Decertification petitions were filed by union employees in Bucyrus, Ohio, and Burlington, Vermont, and threatened elsewhere. See Northrup, *supra* note 3, at 92.

52. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 34-35 (1947).

53. See, *e.g.*, cases cited note 22 *supra.*

of compromise before the offeror is permitted to declare a final Boulware type offer.

Since there was sufficient evidence in the principal case to enable the NLRB to conclude that the company's conduct did not coincide with traditional definitions of good faith bargaining between an employer and a union, it would seem that the Board has prematurely, and perhaps unfairly, condemned Boulwareism itself. Boulwareism, as an abstract bargaining concept, appears to have a potential for increasing the chances of early agreement and thus decreasing industrial strife. For this reason alone, it merits a more thorough consideration. If that part of GE's conduct which indicated a lack of good faith were eliminated and the disparagement of union power were reduced, it would appear that the other Boulware techniques, such as the reasonable firm and final offer and the major portion of the communications campaign, could lawfully be retained. The principal case will be examined by another court,[54] and perhaps by the Supreme Court, and a more specific indication of which characteristics of the Boulware technique violate the National Labor Relations Act is required. The Board's seemingly innate adverse reaction should be insufficient to support the total condemnation of Boulwareism as an unfair labor practice.

54. When the Board issued its order against General Electric, the company filed a petition for review with the Court of Appeals for the Seventh Circuit, and the union filed a similar petition with the Court of Appeals for the District of Columbia. When it was discovered that these review petitions had been filed at approximately the same time, the NLRB broke the impasse by seeking enforcement of its order with the Court of Appeals for the Second Circuit, the territory in which the alleged unfair labor practices occurred. The other two courts have apparently agreed to surrender their jurisdiction to the Second Circuit. CCH LAB. L. REPORTS, p. 1 (Feb. 18, 1965).