1959

The National Labor Relations Act and Collective Bargaining

Nathan P. Feinsinger
University of Wisconsin

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Dispute Resolution and Arbitration Commons](#), [Labor and Employment Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Nathan P. Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807 (1959).

Available at: <https://repository.law.umich.edu/mlr/vol57/iss6/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MICHIGAN LAW REVIEW

Vol. 57

APRIL 1959

No. 6

THE NATIONAL LABOR RELATIONS ACT AND COLLECTIVE BARGAINING*

Nathan P. Feinsinger †

A DISPUTE arose between the company and the employees, . . . negotiations were had, largely at the instance of the representatives of the employees, . . . the negotiations resulted in a settlement of the dispute. Stated thus nakedly, this would look like collective bargaining at its best. Yet the company filed charges accusing the unions of refusing to bargain collectively, the Board issued a complaint pursuant to the charges, and issued an order directing the unions to cease and desist from refusing to bargain collectively."¹

In these words, Judges Madden and Fahy, respectively the first Chairman and the first General Counsel of the National Labor Relations Board, speaking in 1958 as members of the United States Court of Appeals, indicated their bewilderment at the changes in the meaning of the duty "to bargain collectively" which seemed to them to have occurred since the Board's report on its first year of operations under the National Labor Relations (Wagner) Act² of 1935. That report stated:³

"Section 8, subdivision (5), of the act provides that it shall be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his em-

*An address delivered at an institute on Collective Bargaining and the Law, The University of Michigan Law School, July 31, 1958.—Ed.

†Professor of Law, University of Wisconsin.—Ed.

¹ Madden, J., U.S. Court of Claims, sitting as a member of the District of Columbia Court of Appeals, speaking for the majority (Madden and Fahy) in *International Union, United Mine Workers of America v. NLRB*, (D.C. Cir. 1958) 257 F. (2d) 211 at 214. This case denied enforcement to *Boone County Coal Corp.*, 117 N.L.R.B. 1095 (1957).

² 49 Stat. 453 (1935). For the early developments, see Smith, "The Evolution of the 'Duty To Bargain' Concept in American Law," 39 MICH. L. REV. 1065 (1941). For more recent developments, see Cox, "The Duty To Bargain in Good Faith," 71 HARV. L. REV. 1401 (1958).

³ NLRB, FIRST ANNUAL REPORT 84-86 (1936).

ployees, subject to the provisions of section 9(a).' Section 9(a) of the act provides that:

" 'Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .'

"Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground. . . . The Board has repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining."

In the context of the Board's first report, the reason for the bewilderment of Judges Madden and Fahy is apparent. In the case under consideration, a *union*, existing for the very purpose of bargaining collectively, had been charged with a *refusal* to bargain. In the same case, a party to a labor dispute, seeking to negotiate an agreement settling the dispute, had been charged with a refusal to bargain because it had used economic pressure, not otherwise prohibited by the act, in aid of its bargaining position. Were these events, strange though they might have seemed in 1935, a proper cause for judicial concern in 1958?

I. LEGISLATIVE DEVELOPMENTS

The National Labor Relations (Wagner) Act of 1935 adopted collective bargaining as a national policy for the prevention and settlement of labor disputes. The act was based on the theory ". . . that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."⁴ Acting on that theory, Congress imposed on employers the duty "to bargain collectively."⁵ In the 1947 amendments to the act,⁶ Congress undertook

⁴ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 at 45 (1937).

⁵ Section 8(5) of the original NLRA, note 2 supra, carried forward in §8(a)(5) of the act as amended in 1947, 61 Stat. 141, 29 U.S.C. (1952) §158(a)(5).

⁶ Labor-Management Relations [Taft-Hartley] Act of 1947, 61 Stat. 136, 29 U.S.C. (1952) §151 et seq. (hereinafter cited LMRA).

to define the duty⁷ and extended it to unions.⁸ What did Congress mean by "collective bargaining?" How closely have the decisions of the National Labor Relations Board and the reviewing courts conformed to that meaning? Do those decisions support the Board's recent statement that "... our duty under the Act is ... to determine whether the obligation of good faith bargaining has been met rather than to establish ideal bargaining conditions?"⁹

In the view of the Supreme Court, Congress had in mind "the philosophy of bargaining as worked out in the labor movement in the United States."¹⁰ According to that philosophy, collective bargaining is viewed as essentially a voluntary process from its inception. By imposing a legal duty to bargain, Congress itself departed, in a sense, from that basic philosophy. The "majority rule,"¹¹ by which statutory bargaining is confined to dealings between an employer and a union representing a majority of his employees, is a further departure. That rule, moreover, conflicts with one of the stated objectives of the act itself, namely, "the stabilization of competitive wage rates and working conditions within and between industries."¹² If a majority of the employees in a part of an industry, for example, vote against union representation, a union which represents other employees in the industry is effectively blocked from pursuing the stated objective. The 1947 amendments go even farther in regulating, to some extent, both the subject matter¹³ and procedure¹⁴ of bargaining, and in

⁷ Section 8(d) provides that "... 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*. . . ." Emphasis added.

⁸ Section 8(b)(3) of the amended act provides that it shall be an unfair labor practice for a labor organization or its agents—"to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)." The latter section—9(a)—is quoted in the text at note 3.

⁹ Pine Industrial Relations Committee, Inc., 118 N.L.R.B. 1055 at 1061 (1957).

¹⁰ Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 at 346 (1944). Quoted with approval in NLRB v. American National Ins. Co., 343 U.S. 395 at 408 (1952).

¹¹ LMRA, §9(a), 61 Stat. 143 (1947), 29 U.S.C. (1952) §159(a).

¹² LMRA, §1, "Findings and Policies," 61 Stat. 137, 29 U.S.C. (1952) §151.

¹³ For example, the employer and the union can no longer negotiate a "closed shop" agreement. LMRA, §8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. (1952) §158(a)(3).

¹⁴ For example, a union must give 60 days notice of its intent to terminate or modify a contract. LMRA, §8(d)(1), 61 Stat. 142 (1947), 29 U.S.C. (1952) §158(d)(1).

limiting the economic weapons which a union may use in seeking to establish collective bargaining or in attaining its customary objectives thereafter.¹⁵

These departures from "the philosophy of bargaining as worked out in the labor movement in the United States" represent a proper exercise of judgment on the part of Congress in weighing the values of "free" collective bargaining against its own notions of "sound" or "ideal" bargaining. Within the limits thus established, the Board was soon called upon to administer the 1935 act in a variety of situations, out of which it evolved the basic test of "good faith" bargaining. Pre-1947 decisions applying this test were presumably approved by Congress as part of the 1947 amendments in undertaking to define the duty to bargain collectively and in adopting "good faith" as the keystone of that definition.¹⁶

II. "GOOD FAITH" BARGAINING

In endorsing collective bargaining as a national policy, Congress sought to eliminate certain sources of industrial unrest, to remedy the inequality of bargaining power between employers and individual employees, to increase mass purchasing power through increased wage levels, and to eliminate competitive advantages based on differentials in wage rates and working conditions within and between industries.¹⁷ These objectives were to be met by encouraging the growth of strong unions and by requiring the employer "to bargain collectively."

The meaning of the duty "to bargain collectively" must be related to these objectives. One source of industrial unrest was employer interference with self-organization of employees and refusal to meet with unions freely chosen by them as their representatives for the purposes of collective bargaining. A definition of the duty to bargain which would require the employer to adopt a "hands off" attitude and simply to meet with the union to listen to its proposals would largely solve this problem. But such a narrow definition would not remove another kind of

¹⁵ For example, the union cannot resort to a secondary boycott in some situations. LMRA, §8(b)(4), 61 Stat. 141 (1947), 29 U.S.C. (1952) §158(b)(4).

¹⁶ LMRA, §8(d), 61 Stat. 142 (1947), 29 U.S.C. (1952) §158(d).

¹⁷ Note 12 supra.

threat to industrial peace, namely, strikes, lockouts and other forms of economic disturbance resulting from disagreements over wages, hours or working conditions. Congress was concerned with that problem also, and recognized that a broader definition of the duty to bargain was required to solve it. Thus, Congress sought to eliminate obstructions to commerce "by encouraging the practice and procedure of collective bargaining," that is, "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions."¹⁸ Obviously, if the employer were to be obliged to follow such practices, a merely passive attitude at the bargaining table would not suffice. To discharge his duty in good faith, he would have to approach the bargaining table with a sincere desire to reach agreement on the issues in dispute and to make a reasonable effort toward that end. A reasonable effort would include a willingness to explain his objections to the union's proposals, to make counterproposals, and in general to act like one who meant to do business rather than merely to go through the motions. Good faith bargaining, by any definition, would require at least that much.¹⁹

There is, of course, some risk of confusing what Congress *hoped* that good faith bargaining would accomplish with what it intended to *require*, by imposing the duty to bargain. If all the stated objectives of the act were to be read into the duty to bargain, it would follow that an employer would be required to make *concessions* in order, for example, to raise the general level of wages or to eliminate differentials in wages or working conditions. From the very outset, however, the Board made it clear that the duty to bargain did not require the making of concessions,²⁰ and this position was expressly approved by Congress in 1947 in adopting section 8(d).²¹ The duty to make counterproposals, as contrasted with concessions, is still considered as an element of good faith bargaining.²²

¹⁸ Ibid.

¹⁹ The employer must "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." *NLRB v. Reed & Prince Mfg. Co.*, (1st Cir. 1953) 205 F. (2d) 131 at 134-135, cert. den. 346 U.S. 887 (1953).

²⁰ See *Matter of The Sands Mfg. Co.*, 1 N.L.R.B. 546 (1936).

²¹ See note 7 *supra*.

²² See discussion in Cox, "The Duty To Bargain in Good Faith," 71 HARV. L. REV. 1401 at 1421 (1958).

III. CHANGES IN THE MEANING OF "GOOD FAITH"

BARGAINING—EVOLUTION OF THE PER SE RULE

Most of the cases coming before the Board on a section 8(5) or 8(a)(5) charge have been, or could have been, decided by applying a simple test of good faith, namely, whether the evidence revealed a lack of sincere desire and reasonable effort to reach an agreement, or, as sometimes stated, a desire to avoid coming to agreement.²³ Early in its history, however, the Board began to find violations of the act in situations where that simple test does not wholly explain the result. Such situations include refusal to sign a written agreement, unilateral changes in wages or other conditions of employment, and refusal to furnish information relating to the statutory subjects of bargaining.

In *H. J. Heinz Co. v. NLRB*,²⁴ decided in 1941, the Supreme Court agreed with the Board that an employer's refusal to sign a writing embodying the results of negotiations constituted a violation of section 8(5). Describing a signed agreement as "the final step in the bargaining process," the court reasoned that failure to recognize the role of the union in that step "impairs the bargaining process" and "tends to frustrate the aim of . . . industrial peace through collective bargaining."²⁵

Collective bargaining implies acceptance of the role of the union as a joint participant in the establishment of employment standards. Participation is not complete if the union is excluded from the "final step" of confirming the agreement reached, in the form of a signed agreement. This reasoning is sufficient to support the *Heinz* decision. Moreover, as the court pointed out, at the time Congress adopted section 8(5), it had before it decisions issued under section 7(a) of the National Industrial Recovery Act of 1933,²⁶ supporting the requirement of a signed agreement, which decisions Congress presumably meant to approve. Any question on that specific point was settled when Congress adopted such a requirement as part of section 8(d).²⁷ The significance of the *Heinz* case is that its language, whether or not necessary to

²³ See *NLRB v. Reed & Prince Mfg. Co.*, (1st Cir. 1953) 205 F. (2d) 131 at 134, cert. den. 346 U.S. 887 (1953).

²⁴ 311 U.S. 514 (1941).

²⁵ *Id.* at 523-526.

²⁶ 48 Stat. 198.

²⁷ Note 7 *supra*.

the decision, laid the foundation for the view that "good faith" bargaining requires more than willingness to reach an agreement; that it also condemns conduct, whether or not supported by pre-Wagner Act practice, which the Board may reasonably find to be in conflict with the basic objective of the act, namely, the promotion of industrial peace.

The broad language of the Supreme Court in the *Heinz* case presented the Board with a dilemma. Congress sought to prevent industrial unrest but did not prohibit it. In evaluating a particular course of conduct, the Board was obliged to heed both propositions. What kinds of conduct were to be prescribed by the Board under the court's formula, other than conduct made illegal by the act or clearly contrary to its expressed policy? Was the Board itself to establish standards of "sound," "fair" or "ideal" bargaining? If so, where was it to find those standards? Would failure to meet those standards constitute a per se violation of section 8(a)(5) or 8(b)(3), or create a prima facie case, subject to rebuttal, or simply constitute evidence of bad faith to be considered in the context of the employer's total conduct? To what extent would such standards be subject to judicial review?

A. *Unilateral Action—R. L. White v. NLRB*²⁸

The representatives chosen by the employees are by law the "exclusive" representatives for the purposes of collective bargaining.²⁹ An employer's unilateral action, prior to an impasse in negotiations, with regard to wages or other subjects of bargaining, without prior notice to or consultation with the union, violates this principle. The practical objection to such action is that it suggests to employees that there is no need for a union, and at the very least weakens the union's bargaining position.

In *White's Uvalde Mines*,³⁰ the Board recently held that an employer had violated the provisions of section 8(a)(1)³¹ and (5) by granting unilateral merit wage increases after certification of a union and before negotiations had commenced, without notice

²⁸ (5th Cir. 1958) 255 F. (2d) 564.

²⁹ LMRA, §9(a), 61 Stat. 143 (1947), 29 U.S.C. (1952) §159(a). See text above at note 3.

³⁰ 117 N.L.R.B. 1128 (1957).

³¹ Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," which include the right to self-organization and to bargain collectively.

to or discussion with the union. Although there were findings of other violations of those provisions as well, the Board found that the unilateral action constituted an independent violation, stating: "Such conduct not only tends to undermine the Union's authority as the employees' exclusive collective-bargaining representative, but also reflects adversely on the Respondent's good faith in the ensuing negotiations."³² The Board stated further: "Moreover, we find that, even if there were some economic justification for the haste, this does not excuse the Respondent's failure to perform its statutory duty owing to its employees' certified representative."³³

Perhaps a *per se* rule in such a situation is justified in the interest of administrative convenience and as affording a certain guide for the parties. After all, it does not take much time to call some official of a union on the phone. The wisdom of going beyond establishing a rebuttable presumption may, however, be questioned. Suppose X, a steel fabricator or auto parts manufacturer who has always settled with the local union on the basis of the "pattern" of wage increases established by the steel producing or auto manufacturing industry and their unions, has reached agreement with the local on all issues but wages. The local has not yet agreed to settle for the pattern but all indications are that it will do so, although the question of retroactivity may present a problem. The labor market is tight, and some of the key employees of X are irked at his delay in granting a wage increase, with retroactivity still uncertain. On the day of the steel or auto wage settlement, X can find no authorized union official to notify of his intent to place the same wage increase into effect, with full retroactivity. Such a case illustrates the difficulty with a *per se* rule in this area, and perhaps in any area of bargaining.

In *R. L. White v. NLRB*³⁴ the Court of Appeals for the Fifth Circuit reversed the Board's holding as to the unilateral merit increases, rejecting the Board's *per se* rule, and upholding the granting of the increases on the ground that they "were simply in line with . . . custom and practice" of the employer. The court's reasoning on the latter point is questionable. Once a union is

³² 117 N.L.R.B. 1128 at 1129 (1957). Emphasis added.

³³ Id. at 1129, n. 6.

³⁴ (5th Cir. 1958) 255 F. (2d) 564.

certified, continuing a past practice of individual bargaining undermines its status as exclusive bargaining representative. The suggestion of the court of appeals that an employer may continue such a practice until negotiations begin, despite prior certification of the union, appears to have no foundation in law.³⁵

The *White* case involves another aspect of unilateral action and its relation to the duty to bargain, which has considerable practical significance. The problem stems from *NLRB v. American National Insurance Co.*,³⁶ holding that the extent to which a contract should fix standards of employment is "a condition of employment to be settled by bargaining."³⁷ In the latter case, the employer refused to agree to any settlement which did not include a "management prerogative" clause reserving unilateral control over promotions, discipline and work schedules. The union was willing to accept the clause provided that grievances questioning the fairness of the employer's actions in the exercise of his reserved rights could be taken to arbitration. The employer rejected the arbitration proposal. During negotiations, the employer made unilateral changes in certain employment conditions included in the proposed clause, without consulting the union. The Board held that both the insistence on the proposed clause and the unilateral action violated section 8(a)(5). The Court of Appeals for the Fifth Circuit agreed that the unilateral action was improper, but held that the employer could properly insist on the proposed clause, approving the Trial Examiner's view that this was simply a case of "hard bargaining" and his assertion that "Economic strength is still the underlying touchstone of success at the bargaining table." The Supreme Court affirmed, holding that the Board had erred (1) in its *per se* approach, (2) in attempting to "sit in judgment upon the substantive terms" of the agreement,³⁸ and (3) in overlooking the fact that under "the philosophy of collective bargaining as worked out in the labor movement in the United States,"³⁹ employers and unions frequently agree to "management prerogative" clauses. Justices Minton, Black and Douglas dissented, agreeing

³⁵ See the cases discussed by Cox, "The Duty To Bargain in Good Faith," 71 HARV. L. REV. 1401 at 1423-1425 (1958).

³⁶ 343 U.S. 395 (1952).

³⁷ *Id.* at 409.

³⁸ *Id.* at 404.

³⁹ *Id.* at 408. See note 10 *supra*.

with the Board that insistence on, as contrasted with a mere proposal for, unilateral control over any statutory subject of bargaining is tantamount to a refusal to bargain on that subject, and a per se violation of the act.

To the extent that the *American National Insurance Co.* holding is based on pre-Wagner Act practice, it is questionable. Previously, the union had no legally enforceable right to insist on anything; its sole resort was to economic force. The National Labor Relations Act, imposing on the employer the legal duty to bargain on "rates of pay, wages, hours of employment, or other conditions of employment" changes the picture. The duty to bargain includes the obligation to recognize the role of the union as a joint participant in the establishment of employment standards. By insisting on a management prerogative clause covering statutory subjects of bargaining the employer seeks to withhold such recognition. The employer may properly propose such a clause, but it is difficult to see how the union may be forced to accept the proposal and thereby surrender a statutory right, as the price of an agreement. There is no real distinction between an employer's refusal to agree to any standard to govern working schedules, for example, and a refusal to consummate an agreement unless the union agrees to the removal of that subject from the bargaining table. Pre-Wagner Act practice is not in point, because under that practice the employer was legally free to take either position. There is no basis for inferring that Congress intended to prevent him from taking one position but not the other.

The court's criticism of the Board's approach as an attempt to pass judgment on the *reasonableness* of the employer's proposal is likewise open to question. As the court viewed it, the Board was attempting to require the employer to make a "concession," in disregard of the express language of section 8(d). This criticism would be valid if the employer had proposed a particular standard for a work schedule, for example, which the Board condemned as unreasonable on the merits. In the case in question, however, the employer had proposed that it have complete discretion on the subject, which means no standard at all. By its holding, the Board was not requiring a "concession," but was simply requiring the employer to recognize the union's right to full joint participation with management in the establishment and promulgation of standards of employment, which the court in the *Heinz* case

had treated as an essential element in the collective bargaining process.

In the *White* case, the employer insisted on a clause which, taken together with other demands, amounted to a complete reservation of control over *all* standards of employment. The employer demanded a "no-strike" clause while refusing to agree to an arbitration clause. In addition, the employer promised wage increases in return for help in destroying the union, and, after a protest strike, made promises and threats designed to break the strike. This led to a Board finding that "at the time the Respondent was meeting with the union it was also seeking to destroy it." The Board concluded that the employer had violated not only section 8(a)(1) but also 8(a)(5). The court of appeals, with Judge Rives dissenting, disagreed as to the section 8(a)(5) violation.

As the Board saw the facts, the employer had simply offered a signed document with no substance. In its view, the proposed contract would leave the employees worse off than without any contract, since in the latter case, the employer could not unilaterally *change* the conditions of employment over which he sought to reserve unilateral control. The court, however, was not impressed with the argument. In its opinion, the Board had simply proceeded on the erroneous theory that the duty to bargain requires the employer to concede something substantial, though section 8(d) expressly provides the contrary, and had ignored the *American National Insurance Co.* decision, under which the extent of union participation in the establishment of standards of employment is itself a "condition of employment" and therefore a proper subject of collective bargaining.

The *White* case is distinguishable from *American National Insurance Co.* in at least one respect. In the former case, the Board found that the employer was attempting to destroy the union. The court apparently agreed, but treated this fact as immaterial to the issue of refusal to bargain because the Board had not linked its section 8(a)(1) and 8(a)(5) findings. At most, however, this technical defeat warranted remand to the Board, as the Supreme Court would probably hold. The more difficult question is whether the Supreme Court would find it possible to distinguish between insistence on a reservation of unilateral control over *some* subjects of bargaining, as in the *American National Insurance Co.* case, and *all* or virtually all such subjects, as in the

White case.^{39a} If the court should adhere to its criterion of "the philosophy of bargaining as worked out in the labor movement in the United States," such a distinction would be questionable. It would not be difficult to find many instances in pre-Wagner Act practice of unions willing to settle, particularly in negotiations for a first contract, for a skeleton agreement, perhaps one containing nothing but a recognition clause. But again, a practice existing when no legal duty to bargain existed seems inapposite under a law imposing a duty to bargain and setting forth certain mandatory subjects of bargaining. The duty to bargain collectively would seem to include the obligation to attempt to negotiate the kind of agreement which would have a stabilizing effect on industrial relations. A skeleton contract does not have that effect. This is the principle on which the Board rejects such contracts as a bar to an employees' petition to change bargaining representatives,⁴⁰ a doctrine which may be presumed to have the approval of Congress. Applying that criterion, *R. L. White v. NLRB*⁴¹ was wrongly decided.

*B. The Duty To Furnish Information—the Truitt Case*⁴²

Does good faith bargaining obligate either party to lend affirmative assistance to the other in the bargaining process? The Board has held, with the approval of the reviewing courts, that "An employer's duty to bargain includes the obligation to furnish the bargaining representative with sufficient information to enable it to bargain intelligently, to understand and discuss the issues raised by the employer in opposition to the union's demands, and to administer a contract."⁴³ The doctrine has been applied to a number of wage matters such as merit increases, job rates, job classifications and the operation of incentive systems.⁴⁴ It appears to apply although the employer is otherwise making

^{39a} Compare *Cummer-Graham Co.*, 122 N.L.R.B. No. 134 (1959).

⁴⁰ "The Board has consistently denied contract-bar effect to an agreement which does not contain substantive terms and conditions of employment and thus does not stabilize the labor-management relationship and encourage industrial peace." NLRB TWENTY-SECOND ANNUAL REPORT 21 (1957).

⁴¹ (5th Cir. 1928) 255 F. (2d) 564.

⁴² *Truitt Mfg. Co.*, 110 N.L.R.B. 856 (1954), enf. den. *NLRB v. Truitt Mfg. Co.*, (4th Cir. 1955) 224 F. (2d) 869, revd. 351 U.S. 149 (1956).

⁴³ See NLRB SEVENTEENTH ANNUAL REPORT 172 (1953).

⁴⁴ See *Cox*, "The Duty To Bargain in Good Faith," 71 HARV. L. REV. 1401 at 1425-1428 (1958).

a good faith effort to reach an agreement and has stated his business reasons for declining the information.

A good deal may be said for the Board's doctrine in terms of sound labor relations. One who plays his cards close to his chest provokes suspicion as to his motive and invites reprisals. To illustrate, a union having received complaints from its constituents that the employer's system of merit increases has been arbitrarily administered asks for information on which to assess the complaints. The employer refuses, on the ground that such information is confidential, but seeks to assure the union that the system is being fairly administered. Thus rebuffed, the union may feel it has no alternative but to demand the abolition of the system. The employer may resist. The impasse may result in an unnecessary strike. The question remains, however, whether it is proper for the Board to find the employer guilty of a refusal to bargain if he should choose to assume this risk.⁴⁵

The general rule requiring the employer to furnish information concerning the subjects of bargaining does not depend on how the matter becomes an issue. The rule is qualified, however, when the information requested relates to the employer's financial ability to grant a proposed wage increase. If he should raise the issue by pleading inability to pay as the basis for denying the increase, he must, according to the Board's *Truitt* doctrine, "substantiate his position by reasonable proof." The rule does not apply, however, according to the Board's recent decision in *Pine Industrial Relations Committee, Inc.*,⁴⁶ if the employer does *not* plead inability to pay as the basis for rejecting a wage proposal.

The Court of Appeals for the Fourth Circuit disagreed with the Board's description of its *Truitt* doctrine as "settled law." The court reasoned that unlike ordinary wage data, the data which the employer would be compelled to supply in a case like *Truitt* would include confidential information, namely, dividends, manufacturing costs, and other "matters altogether in the province of management." The Supreme Court appears to have rejected this reasoning. In sustaining the Board's order, it stated:⁴⁷

⁴⁵ Compare Cox, *id.* at 1428: "In virtually all the cases, except those involving financial data, there could be no negotiation on the subject, in any sense of the term, until the information was supplied to the union."

⁴⁶ 118 N.L.R.B. 1055 (1957), *affd.* Intl. Woodworkers v. NLRB, (D.C. Cir. 1959) 43 L.R.R.M. 2462.

⁴⁷ 351 U.S. 149 at 152-153 (1956).

"Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy."

The majority of the court questioned the Board's *per se* view,⁴⁸ but pointed to no particular facts other than the refusal to furnish the information requested which might have demonstrated bad faith. Justice Frankfurter, dissenting with Justices Clark and Harlan, was of the view that refusal to substantiate a claim of inability to pay constitutes a "weighty item" of evidence of bad faith, but felt that the case should have been remanded to the Board to consider the totality of the employer's conduct, including "the previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations."⁴⁹ The statement by the majority of the Supreme Court that good faith bargaining requires "honest claims" has considerable appeal, if the Board is to concern itself with bargaining morals. Even in that case, the suggested rule would be difficult to administer. Suppose an employer claims he can afford to pay only three cents of the ten cents per hour increase demanded by the union and furnishes financial information in an attempt to support his claim. The Board, on analyzing the information, concludes that he can clearly afford to pay ten cents, or something more than three cents. Would the employer be subject to a section 8(a)(5) charge? Or, suppose a union demands a union shop agreement on the ground that the employer is "anti-union," but refuses to substantiate its claim. Would the union be subject to a section 8(b)(3) charge?

Ability to pay is an elastic principle. Its application in any case involves some degree of subjective judgment. Its application in a particular case may depend on the employer's business predictions and plans which he should not be required, as a matter of law, to justify to the union. To illustrate the point, one need only

⁴⁸ Id. at 153-154: "We do not hold . . . 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. . . . 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."

⁴⁹ Id. at 155.

refer to the recurrent conflict between the Steelworkers and the Basic Steel Industry as to the latter's ability to absorb the cost of a wage increase without a price increase. The same conflict has occurred between the government and the Steel and other industries in periods of economic controls, despite the existence of official wage and price increase criteria. Again, in a case like *Truitt*, the "honest claims" doctrine may actually discourage honest claims and encourage dishonest ones. Faced with the alternative of "opening the books" so that the union or a third party might formulate a judgment as to the employer's financial position, the employer may decide not to advance the claim of inability to pay, taking refuge instead in other claims, or simply taking an adamant position on wages, thus risking a strike. Or, rather than risk a strike, he may decide to grant an increase which he is convinced is not justified by the economic facts of the case, including his profit position, thus being forced indirectly to make a concession on wages which he could not be forced to make directly.

For the reasons suggested, refusal to furnish financial information to support a plea of inability to pay as the basis for denying a wage increase should not be regarded as a per se refusal to bargain in good faith, or even as a "weighty item" of evidence of bad faith. Its relevancy as well as its weight should depend on all the circumstances of the particular case bearing on the employer's state of mind.

Truitt was followed by *Pine Industrial Relations Committee, Inc.*,⁵⁰ in which the union requested members of an employer's association to supply various items of information expressly in order to "formulate constructive proposals for intelligent collective bargaining." The data requested included figures showing annual board foot production and related sales totals expressed in dollars. Each employer refused to supply such information, claiming that it would handicap him competitively. The Trial Examiner found that the requested information was relevant and necessary for the purpose of collective bargaining and should have been supplied. The Board, interpreting the union's position as a request for financial information to support a claim of ability to pay, dismissed the complaint. In the Board's view, the *Truitt* doctrine applies only when the employer has raised the issue of ability to

pay by pleading inability as the basis for refusing a wage increase, whereas here the employers had expressly disclaimed such a plea. Member Murdock dissented, on the ground that the data requested related to "productivity" rather than to ability to pay. In his view, productivity is a most appropriate criterion for wage increases, one repeatedly endorsed by the Administration; therefore, the information should have been supplied.

In all likelihood, the Board will sooner or later be confronted with a case in which the union demands a wage increase of an employer on the ground that the productivity of his employees has increased since the last previous negotiations; therefore, *regardless of the employer's profit position or ability to pay*, the demand should be granted. In such a case, would the Board require the employer to furnish productivity information to the union at its request? If the employer should *deny* that productivity has increased and on that basis refuse to grant a wage demand, presumably the *Truitt* doctrine would apply. But suppose he does not make such a denial, or seek to justify his rejection of the wage demand on that basis. Does *Truitt* control? Is there any basis for distinguishing information relating to productivity and information relating to ability to pay so as to require the employer to provide productivity data in such a case, regardless of how the issue is raised?

Several possible distinctions may be considered. Productivity is a measure of the worth of the services of the work force, whereas ability to pay is not. Productivity is regarded by employers and unions alike as a relevant criterion in most cases, whereas ability or inability to pay is emphasized by the party more likely to benefit by its use as a criterion in a particular case. Productivity information relates to unit labor costs, which can be determined largely by objective standards, without disclosure of "confidential" information, and without necessarily involving management in a debate with the union as to the employer's business policies or prospects. This does not mean that the furnishing of information on unit labor costs will foreclose debate. There will often be disagreement as to what part of the decrease in such costs, if any, is due to improved performance by the employees and what part to management's efforts, how the resulting benefits should be distributed among the employees, stockholders, and the public, and so on. At the very least, however, the parties will have a starting point for intelligent and constructive bargaining on the

vital subject of wage increases, assuming such a consideration to be relevant to the issue of good faith bargaining.

C. *Union Refusal To Bargain—The Boone County Case*⁵¹

The Board's statement in *Pine Industrial Relations Committee, Inc.*, that "... our duty under the Act is to determine whether the obligation of good faith bargaining has been met rather than to establish ideal bargaining conditions"⁵² is questionable in the light of the foregoing discussion of cases involving charges of employer refusal to bargain. It is open to further question in the light of recent cases involving charges of union refusal to bargain.

In 1947, by adopting section 8(b)(3), Congress subjected unions to a duty to bargain, stated and defined in the same terms as the employer's duty to bargain under section 8(a)(5). The legislative history of section 8(b)(3) discloses that Congress was concerned partly with what it believed to be the economic power of some unions to force agreements on employers by a "take it or leave it" attitude. The immediate cause for concern was the wave of post-war strikes by unions in the basic mass-producing industries. Various proposals were considered to curb the economic power of such unions, but in the end the right to strike was confirmed, subject to a few specific restrictions.⁵³

In *Phelps-Dodge Copper Products Corp.*,⁵⁴ the employer was charged with a violation of section 8(a)(5) by refusing to negotiate with the union during a slowdown, which was designed to bring pressure on the employer to accept the union's terms. A slowdown had previously been held to be a form of unprotected "concerted activity" under the act,⁵⁵ meaning that an employer who disciplined employees for such conduct could not be charged with

⁵¹ *Boone County Coal Corp.*, 117 N.L.R.B. 1095 (1957), enf. den. *International Union, United Mine Workers of America v. NLRB*, (D.C. Cir. 1958) 257 F. (2d) 211.

⁵² *Pine Industrial Relations Committee, Inc.*, 118 N.L.R.B. 1055 at 1061 (1957).

⁵³ Section 13 of the amended NLRA provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." Section 501(2) of the LMRA provides: "The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." Section 8(b)(4) of the amended NLRA prohibits certain types of secondary boycotts.

⁵⁴ 101 N.L.R.B. 360 (1952).

⁵⁵ Section 7 of the NLRA protects the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) prohibits employer interference with such activities.

an unfair labor practice. In *Phelps-Dodge* the Board, defining the issue as "one of first impression," found the employer not in violation of section 8(a)(5) because of the absence of "fair dealing" on the part of the union. In its view, the union had "engaged in a harrassing tactic irreconcilable with the Act's requirement of *reasoned discussion* in a background of *balanced bargaining relations* upon which good-faith bargaining must rest."⁵⁶ In the *Personal Products* case⁵⁷ the Board, citing *Phelps-Dodge*, took the next step of holding that similar unprotected "harrassing tactics" for the same purpose not only suspended the employer's duty to bargain, but constituted a violation of the union's affirmative duty to bargain under section 8(a)(3). The policy of collective bargaining, the Board said, is

"... neither furthered nor effectuated when an employer or a union so exercises its bargaining powers as to thwart or impair the bargaining process, which requires for its furtherance cooperation in the give and take of personal conferences, with a willingness to let ultimate decision follow a fair opportunity for presentation of opposing views, arguments, and positions. . . . We think it clear that such unprotected harrassing tactics were an abuse of the Union's bargaining powers—'irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest'—which impaired the process of collective bargaining that Congress intended not only to encourage but to protect."⁵⁸

The Court of Appeals for the District of Columbia refused to enforce the Board's order. In its view, there is no inconsistency "between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants."⁵⁹ If a total strike for that purpose is permissible, so, in the court's view, should be a partial strike. It is immaterial that the tactics used might justify the employer in discharging the participants on the ground that their activity was "unprotected" under section 7 of the act. Engaging in such activity is not equivalent to a refusal to bargain.

⁵⁶ 101 N.L.R.B. 360 at 368 (1952). Emphasis added.

⁵⁷ Textile Workers Union of America, CIO, 108 N.L.R.B. 743 (1954), enforced in part, set aside in part, Textile Workers Union of America, CIO v. NLRB, (D.C. Cir. 1955) 227 F. (2d) 409.

⁵⁸ 108 N.L.R.B. 743 at 745-747 (1954).

⁵⁹ Textile Workers Union v. NLRB, (D.C. Cir. 1955) 227 F. (2d) 409 at 410.

The Board's requirement of "reasoned discussion" as a factor in good faith bargaining is, of course, not new. If, as the Board found, the union failed even to specify the demands which it sought to enforce by its tactics, the case could have been disposed of on the basis of that simple requirement. But the finding was relied on only as the basis for a "moreover" argument. The Board's assertion, however, that good faith bargaining requires a "background of balanced bargaining relations" and "fair dealing," is difficult to reconcile with its more recent disclaimer of any obligation to establish "ideal" bargaining relations.⁶⁰ If "balanced bargaining relations" suggests a duty on the part of an employer or a union to exercise restraint in the use of its superior economic strength to obtain a favorable settlement, the Board has quite clearly added something to the basic philosophy of the collective bargaining process. The Board's reliance on the *Heinz* decision, which condemns a refusal to sign a written agreement on the ground that such conduct "impairs the bargaining process," is questionable, for such conduct reflects an unwillingness to permit the union to participate in the "final step" of confirming agreed standards; moreover, the rule of the *Heinz* case has been expressly approved by Congress. The Board's reliance on the *American National Insurance Co.* decision of the Supreme Court is also questionable, since the Board was reversed for the very reason that it had undertaken, in the court's view, to evaluate the conduct of the parties in the collective bargaining process.

Similar attempts on the part of the Board to require "fair dealing" on the part of the union as a part of the collective bargaining process have likewise been frowned upon by the courts. In the *Boone County Coal Corp.* case,⁶¹ the Board equated a strike in breach of contract with "harrassing tactics," as a violation of the union's duty to bargain. In that case, the contract contained a seniority clause and a provision for arbitration of grievances. The union struck in a dispute over the application of the seniority clause, an arbitrable issue. The Board found that the agreement to arbitrate implied an agreement not to strike over such an issue, from which it would follow that the strike constituted a breach of contract. In the Board's view such a strike,

⁶⁰ Pine Industrial Relations Committee, Inc., 118 N.L.R.B. 1055 (1957).

⁶¹ Boone County Coal Corp., 117 N.L.R.B. 1095 (1957), enf. den. *International Union, United Mine Workers of America v. NLRB*, (D.C. Cir. 1958) 257 F. (2d) 211.

occurring in a "bargaining context," constituted a violation of section 8(b)(3). The Court of Appeals for the District of Columbia disagreed with the finding of an implied no-strike agreement. This would have been sufficient to dispose of the case. A majority of the court, however, felt impelled to query the Board's conception of the collective bargaining process, saying:⁶²

"The foregoing recital shows that a dispute arose between the company and the employees, that negotiations were had, largely at the instance of representatives of the employees, that the negotiations resulted in a settlement of the dispute. Stated thus nakedly, this would look like collective bargaining at its best. . . ."

IV. SUBJECTS OF BARGAINING—THE BORG-WARNER CASE⁶³

The opinions in the recent five-to-four decision of the Supreme Court in *NLRB v. Wooster Division of Borg-Warner Corp.* further illustrate the difficulties to be anticipated in departing from the simple criterion of a sincere effort to reach an agreement resolving a labor dispute as the test of "good faith" bargaining. In that case, despite the fact he was acting in good faith in all other respects, the employer was found to have violated his duty to bargain by insisting on certain proposals as a condition of agreement. One such proposal was a "recognition" clause naming the local union as the bargaining representative, though the international union had been certified. The second was a clause requiring, in part, that all employees in the bargaining unit, whether members of the union or not, vote by secret ballot on the employer's last offer before the union could call a strike. These proposals were part of a "package" settlement otherwise acceptable to the union. The Board found that the employer's insistence on either proposed clause to the point of impasse, by making its acceptance a condition of any agreement, violated section 8(a)(5).

The Supreme Court unanimously agreed that insistence on the first proposal violated section 8(a)(5) of the act since it conflicted directly with the duty to bargain with the representative selected by the employees. The majority also reasoned that the

⁶² Id. at 214.

⁶³ 113 N.L.R.B. 1288 (1955), enforced in part (6th Cir. 1956) 236 F. (2d) 898, revd. in part 356 U.S.C. 342 (1958).

proposal did not relate to any of the "statutory" or "mandatory" subjects of bargaining listed in section 9(a)—"rates of pay, wages, hours of employment, or other conditions of employment"—therefore the employer could not press the proposal to the point of impasse. On this latter reasoning, the majority of the court, in an opinion by Justice Burton, held that insistence on the second proposal was also a violation of section 8(a)(5). Justice Frankfurter, in one opinion, and Justice Harlan, in another, speaking also for Justices Clark and Whittaker, dissented.

The majority opinion interprets the duty to bargain as permitting either party to advance any proposal which is not illegal or contrary to the policies of the act, but as prohibiting the party making the proposal from (1) requiring that the other party bargain thereon, or (2) making its acceptance a condition of an agreement, if the proposal does not relate to one of the "statutory" or "mandatory" subjects of bargaining, i.e., those listed in section 9(a). An employer who insists on a proposal concerning a mere "permissive" or "voluntary" subject of bargaining violates section 8(a)(3), because he thereby refuses to bargain on the "mandatory" or "statutory" subjects even though, in fact, agreement has been reached on all such latter subjects. A proposal by an employer for a vote by all employees in the bargaining unit falls in the former category, because (1) it settles no condition of employment, but calls for a mere advisory opinion of the employees; (2) unlike the customary "no-strike" clause, the proposed clause prohibits strikes after as well as during the life of the contract; (3) the proposed clause attempts to regulate the procedure to be followed in rejecting a last offer or in calling a strike, which is a matter to be decided solely between the union and the employees it represents, and not the concern of the employer; (4) the proposed clause undercuts the status of the union as bargaining representative by enabling the employer to deal directly with his employees.

Justice Frankfurter, remarking on "the rather vague scope of the obligatory provisions of section 8(d)" would make the distinction turn on whether a particular clause was "clearly outside the reasonable range of industrial bargaining." By this test, he would uphold the clause proposed by the employer in this case. He does not suggest an objective test to determine "reasonable range." Presumably, he would leave the question to the Board in the first instance, subject to judicial review.

The dissenting opinion by Justice Harlan emphasizes the following objections to the majority holding:

1. The no-strike clause proposed, no less than the usual no-strike clause, determines when employees may strike. Both types of clauses are therefore "conditions of employment," hence both are statutory subjects of bargaining.

2. By listing the subjects on which one *must* bargain, Congress did not mean to *preclude* bargaining on other subjects. Assuming that the proposed clause was not a statutory subject of bargaining, that relieved the *union* of any obligation to bargain on it. But it does not follow that by insisting on the proposal, the *employer* violated its affirmative duty to bargain. Granted that the superior economic power of the employer might, in practical effect, compel the union to bargain, this is immaterial, since Congress never intended the Board to "exercise its powers to aid a party . . . which was in an economically disadvantageous position."

3. Congress regarded collective bargaining as a flexible and evolving process. New types of proposals are constantly being made. The distinction between proposing and insisting on non-statutory matters, besides being unrealistic, is difficult to observe. Fear of overstepping the line and thereby inviting a charge of refusal to bargain will inhibit the making of such proposals altogether, thereby stultifying the bargaining process.

4. Insistence on some non-statutory proposals "might in the context of a particular industry be so extreme as to constitute some evidence of unwillingness to bargain." But this was not such a proposal, since similar clauses had been negotiated between several unions and companies.

5. The proposed clause does not tend to undercut the union's status as bargaining agent. While Congress rejected a proposed general requirement for a pre-strike vote on the employer's last offer among all employees in a bargaining unit, it adopted such a requirement as to "national emergency" disputes, and directed the Federal Mediation and Conciliation Service to attempt to secure agreement on such a vote, in seeking to settle disputes generally.

The *Borg-Warner* case was decided on May 5, 1958. Meanwhile, the Board, on March 4, 1958, had decided *Economy Stores, Inc.*⁶⁴ During negotiations, the employer proposed a clause

to indemnify it against damage caused by any future violation of the proposed agreement. The union objected, but proceeded to bargain on the demand, suggesting alternative clauses. Following an impasse, the union filed section 8(a)(5) charges. The General Counsel issued a complaint on the theory that the clause demanded did not relate to a statutory subject of bargaining, hence the employer had no right to insist on its proposal to the point of an impasse. The Board dismissed this aspect of the complaint. Members Rodgers and Jenkins found it unnecessary to pass on the issue raised by the General Counsel, reasoning that the union, by negotiating on the employer's proposal, had rendered the issue moot. If this reasoning is accepted, the danger pointed out by Justice Harlan, dissenting in *Borg-Warner*, is increased. Thus, in a *Borg-Warner* situation, one party will be reluctant to *propose* a non-statutory subject for fear of a section 8(a)(5) or 8(b)(3) violation if it should press its proposal too far. In an *Economy Stores* situation the other party will be reluctant even to discuss such a proposal for fear of being held later to have waived its right to object to the proposal as a condition of agreement.

Chairman Leedom and Member Bean pursued a different line of reasoning. In their view, since the Supreme Court decision in *American National Insurance Co.*, any demand advanced in ordinary good faith may be pressed to the point of impasse. As they saw the facts, the employer had made his proposal because of repeated contract violations by sister locals operating in the same community. Statements by the particular local that it had "ways and means of getting things it wanted," could therefore reasonably be interpreted as a threat by this local likewise to dishonor any contract which was not to its liking. The employer thus had a reasonable justification for his demands, which supplied the basis for a finding of good faith.

The suggested test of reasonable justification, which would permit a party to press even a non-statutory demand to the point of impasse, would seem to conform to the basic principle of subjective good faith as the touchstone of the duty to bargain. However, on July 10, 1958, following the decision of the Supreme Court in *Borg-Warner*, the Board issued its decision in *North Carolina Furniture*,⁶⁵ in which it reverted to its original per se

view. In that case, the employer insisted on a clause which would subject the assets of the international union to damages for breach of contract by the local, the certified representative. The employer sought to justify his position on the ground that the local had no assets and the international benefited from the contract by the receipt of dues. The Board did not attempt to appraise the asserted justification and held the employer in violation of section 8(a)(5), on the ground that the proposed clause did not relate to a statutory subject of bargaining.

V. CONCLUSION

The purpose of this paper has been to review the policy-making decisions of the National Labor Relations Board in seeking to effectuate the duty "to bargain collectively" under the National Labor Relations Act, in order to ascertain and appraise their direction.

The Board's task has not been an enviable one. It has been complicated by vague and sometimes contradictory directives by Congress and the courts, by conflicting pressures from labor, management and the general public, by numerous changes in the Board's personnel, and by a drastic shift in congressional policy reflected in the 1947 amendments to the act. Under the circumstances, it is remarkable that the Board has been able to maintain any consistency in its own views.

The basic objective of Congress in adopting the act was to promote industrial peace and to foster stable labor-management relations through the process of collective bargaining. Congress had in mind "the philosophy of collective bargaining as worked out in the labor movement in the United States."⁶⁶ In laying down the statutory framework, however, Congress departed from that philosophy in important respects.⁶⁷ In some instances it adopted rules inconsistent with its basic objective; in others, rules inconsistent in themselves. Thus, while recognizing labor-management cooperation as essential to stable and peaceful relations, Congress limited such cooperation by making it illegal for employers to cooperate with unions by any means which might tend to "encourage" union membership;⁶⁸ at the same

⁶⁶ Note 10 *supra*.

⁶⁷ See p. 809 *supra*.

⁶⁸ LMRA, §8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. (1952) §158(a)(3), makes it an unfair

time, it sanctioned agreements tending to require union membership, in order to remove a prime source of unrest in organized plants.⁶⁹

Aside from such initial difficulties, the task of the Board has been complicated by the process of judicial review which has inevitably resulted in conflicts of decision among the courts of appeals and divisions of opinion within the Supreme Court itself, as to the meaning of the collective bargaining process and the Board's function in relation thereto. The Board's task has been further complicated by the pressures of labor and management in particular cases, with little or no regard to consistency or to long-range objectives. Finally, the Board has been subjected to the vicissitudes of public opinion which seems to demand a "hands off" policy and at the same time that the government "do something" about union power and inflationary wage settlements.⁷⁰

In its early days, the Board conceived of its function in simple terms, namely, to insure the *establishment* of collective bargaining. It likewise defined good faith bargaining in simple terms. "The essential thing," it said, is "the serious intent to adjust differences and to reach an acceptable common ground."⁷¹ Soon, however, the Board began to concern itself with protecting the collective bargaining *process*, and to condemn as a refusal to bargain conduct which in its judgment "impaired" that process. In applying this concept, it condemned certain types of conduct as illegal per se. More recently, this concept has been held to require, according to *Truitt*, "honest claims"; according to *Phelps-Dodge, Personal Products*, and *Boone County Coal Corp.*, "fair dealing" and "reasoned discussion in a background of balanced bargaining relations"; either party failing to meet

labor practice for an employer "by discrimination in regard to . . . any . . . condition of employment to encourage or discourage membership in any labor organization. . . ." See *Radio Officers' Union, AFL v. NLRB*, 347 U.S. 17 (1954).

⁶⁹ LMRA, §8(a)(3), 61 Stat. 140-141 (1947), 29 U.S.C. (1952) §158(a)(3).

⁷⁰ Compare the following: "The committee bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by . . . free collective bargaining. Government decisions should not be substituted for free agreement. . . ." [remarks of Senator Taft, at 2, S. Rep. 105, 80th Cong., 1st sess. (1947)]. "I say to my colleagues that such action [a union's insistence on a considerable wage increase under threat of strike] is not collective bargaining." [remarks of Senator Ellender, 93 CONG. REC. 4135 (1947)].

⁷¹ NLRB FIRST ANNUAL REPORT 84-86 (1936).

those standards is deemed to be guilty of an "abuse of . . . bargaining powers."⁷²

The requirement of "reasoned discussion" is simply the counterpart of the prohibition against a "take it or leave it" attitude. What is troublesome is the broad requirement of "honest claims" and "fair dealing" in a background of "balanced bargaining relations." Does honesty mean subjective honesty, or honesty according to the observance of reasonable standards, and if the latter, by what test of "reasonable?"⁷³ In *Truitt*, the employer's claim of inability to pay was held to be dishonest, because he failed to produce supporting evidence, although there was no finding that the claim did not represent his honest judgment. Again, what is the criterion for determining "fair dealing?" In *Phelps-Dodge, Personal Products*, and *Boone County Coal*, the unions were held to have refused to bargain because their tactics were deemed improper, although Congress had deliberately refrained from condemning such tactics as illegal.

Perhaps the most troublesome is the suggested requirement of discussion in a background of "balanced bargaining relations." In the recent *Buffalo Linen Supply* case,⁷⁴ the Supreme Court applied a similar concept in finding that a lockout by members of an employer's association, as a counter-measure against a strike against one of its members, was a privileged interference with an otherwise protected concerted activity. In the court's view, the Board could properly strike a balance ". . . between the right to strike and the interest of small employers in pursuing multi-employer bargaining as a means of bargaining on an equal basis with a large union. . . ."⁷⁵ The court stated that the "ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate

⁷² Textile Workers Union of America, CIO, 108 N.L.R.B. 743 at 746, enforced in part, set aside in part (D.C. Cir. 1955) 227 F. (2d) 409.

⁷³ Compare Justice Frankfurter's suggestion in the Borg-Warner case, 356 U.S. 342 at 351 (1958), that any collective bargaining proposal may be pressed to an impasse if it is not "so clearly outside the reasonable range of industrial bargaining as to establish a refusal to bargain in good faith." As a long-time student of labor-management relations Justice Frankfurter was apparently concerned with preserving the flexible character of collective bargaining. Presumably he would have the Board develop and apply the test of reasonableness, subject to judicial review.

⁷⁴ NLRB v. Truck Drivers Local No. 449, 353 U.S. 87 (1957).

⁷⁵ Id. at 96.

responsibility, which Congress committed primarily to the . . . Board, subject to limited judicial review.”⁷⁶ In that case, however, the union was not charged with *refusal to bargain* for exercising its superior economic strength against the struck employer. Is there a difference? Justice Harlan, who concurred in *Buffalo Linen Supply Co.*, evidently thought so, judging by his dissent in *Borg-Warner*, involving a charge of employer refusal to bargain. In that dissent, he stated: “If one thing is clear, it is that the Board was not viewed by Congress as an agency which should exercise its powers to aid a party to collective bargaining which was in an economically disadvantageous position.”⁷⁷ The Board’s reference to “balanced bargaining relations” in the context of a refusal to bargain charge, if meant to contradict this principle, is surely cause for concern. If a strong union is guilty of a refusal to bargain because it has “abused its bargaining powers” in striking a weak employer for an “excessive” wage increase, for example, then a strong employer must be found likewise guilty, for the same reason, in saying “no” to a weak union which has requested a “reasonable” wage increase. Either result would clearly violate the fundamental principle that “the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.”⁷⁸

The temptation to aid the weak against the strong is understandable. But in the complex field of labor-management disputes, such questions as the tactics which may be used or the extent to which a party may exercise its superior economic strength to secure an advantage in the bargaining process, involve delicate policy judgments. There is support in the language of the Supreme Court opinions to justify the Board’s exercising such a judgment in seeking to “protect” the collective bargaining process.⁷⁹ There is even support in the legislative history for attempting to insure “balanced bargaining relations.”⁸⁰

The immediate problem is not, however, one of authority but the necessity or wisdom of its exercise. Perhaps the Board is aware of the problem, judging by its recent statement that “our duty

⁷⁶ Ibid.

⁷⁷ 356 U.S. 342 at 358 (1958).

⁷⁸ American National Ins. Co., 343 U.S. 395 at 404 (1952).

⁷⁹ See the Heinz case, 311 U.S. 514 (1941).

⁸⁰ See note 70 *supra*.

under the Act is . . . to determine whether the obligation of good faith bargaining has been met rather than to establish ideal bargaining conditions.”⁸¹ The question is whether by this statement the Board was merely defending the course on which it had embarked in *Truitt*, *Phelps-Dodge*, and *Personal Products*, or announcing a return to its original concept of the duty to bargain in good faith as simply “the serious intent to adjust differences and to reach an acceptable common ground.”⁸²

⁸¹ *Pine Industrial Relations Committee, Inc.*, 118 N.L.R.B. 1005 (1957).

⁸² NLRB FIRST ANNUAL REPORT 84-86 (1936).