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Labor Law - Collective Bargaining - Unprotected Activities of Union as Violation of Duty to Bargain in Good Faith

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LABOR LAW—COLLECTIVE BARGAINING—UNPROTECTED ACTIVITIES OF UNION AS VIOLATION OF DUTY TO BARGAIN IN GOOD FAITH—During negotiations for a new contract, the union engaged in harassing action against the employer by promoting an organized refusal to work overtime, extending rest periods without authorization, directing employees to refuse to work special hours, encouraging slow-downs and unannounced walkouts, and inducing employees of a subcontractor not to work for their employer. There was no specific demand which the activity was designed to enforce. The National Labor Relations Board found that this activity was evidence of a failure on the part of the union to bargain in good faith,¹ and was, therefore, a violation of section 8 (b) (3) of the amended National Labor Relations Act.² On appeal, *held*, enforcement denied, one judge dissenting. The use of economic pressure is not inconsistent with good faith bargaining. In addition, the control of such harassing tactics has been left to the states by the Supreme Court's decision in *International Union, UAW-AFL v. WERB*.³ *Textile Workers Union of America, CIO v. NLRB*, (D.C. Cir. 1955) 227 F. (2d) 409, cert. granted (U.S. 1956) 76 S.Ct. 650.

The amended National Labor Relations Act imposes upon the union,

¹ *Textile Workers of America, CIO, and Personal Products Corp.*, 108 N.L.R.B. 743 (1954). The various union actions all took place after the expiration of the old contract.

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

³ 336 U.S. 245, 69 S.Ct. 516 (1949), the so-called Briggs & Stratton case.

as well as the employer, the duty to bargain in good faith.⁴ Furthermore, both Congress and the Board have indicated that this duty applies with equal force to both parties.⁵ There is no doubt that harassing tactics by a union may be unprotected activities which subject the employees who participate in them to discharge.⁶ It has also been held that this conduct relieves an employer of his duty to bargain.⁷ Although no court has expressly said that this conduct may be used to show a violation of section 8 (b) (3), this view has certainly been suggested.⁸ The majority in the principal case observed that a union may strike during collective bargaining negotiations, and that this total withholding of services is not evidence of bad faith bargaining. From this it reasoned that a partial withholding of services cannot be considered evidence of bad faith either. But this reasoning is not so persuasive when the rights and duties of the employer and the union are compared. The employer may use the lockout, his corollary of the union's right to strike, without being guilty of an unfair labor practice under section 8 (a) (5).⁹ But, during the bargaining period, he cannot take unilateral action analogous to the harassing tactics used by the union in the principal case without being found guilty of bad faith bargaining.¹⁰ If the duty to bargain is to be the same for unions and employers,¹¹ it would seem to follow that unprotected activity by a union is as much evidence of bad faith as unilateral action on the part of the employer.¹²

The majority in the principal case argued that the *Briggs & Stratton* case precluded the Board's finding of an unfair labor practice. The *Briggs & Stratton* case held that harassing action, similar to that employed in the principal case, is neither a protected activity nor an unfair labor practice under the amended National Labor Relations Act and is, therefore, subject only to state control. Although it might be argued that these statements

⁴ Labor-Management Relations Act, 1947, 61 Stat. L. 141, 142, 29 U.S.C. (1952) §§158 (a) (5), (b) (3), (d).

⁵ See H. Rep. No. 510, 80th Cong., 1st sess., p. 43 (1947); National Maritime Union of America, 78 N.L.R.B. 971 (1948); Cox, "Some Aspects of the Labor-Management Relations Act, 1947," 61 HARV. L. REV. 274 at 282 (1948); 61 HARV. L. REV. 1224 (1948); 64 YALE L.J. 766 (1955).

⁶ NLRB v. Montgomery Ward & Co., (8th Cir. 1946) 157 F. (2d) 486; C. G. Conn, Ltd. v. NLRB, (7th Cir. 1939) 108 F. (2d) 390. See Mittenthal, "Partial Strikes and National Labor Policy," 54 MICH. L. REV. 71 (1955).

⁷ Elk Lumber Co., 91 N.L.R.B. 333 (1950); Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952).

⁸ In Phelps Dodge Copper Products Corp., note 7 supra, at 368, the Board found no unfair labor practice in the employer's refusal to bargain after the union instigated slow-downs, saying: ". . . we believe the authorized slow-down negated the existence of honest and sincere dealing in the Union's contemporaneous request to negotiate."

⁹ Morand Brothers Beverage Co. v. NLRB, (7th Cir. 1951) 190 F. (2d) 576.

¹⁰ Camp & McInnes, Inc., 100 N.L.R.B. 524 (1952) (reducing lunch period and advancing closing time); I.B.S. Mfg. Co., 96 N.L.R.B. 1263 (1951) (increasing wages and changing production schedule); NLRB v. W. T. Grant Co., (9th Cir. 1952) 199 F. (2d) 711 (shortening work week and threatening to close); Lloyd A. Fry Roofing Co., 106 N.L.R.B. 200 (1953) (abolishing or modifying rest period).

¹¹ See note 5 supra.

¹² See 64 YALE L.J. 766 (1955).

were mere dicta,¹³ and that the real basis for allowing state jurisdiction was the violence which accompanied the union action,¹⁴ the better view would be to recognize that the Supreme Court in *Briggs & Stratton* did not have before it the question of whether harassing tactics by the union may be evidence of bad faith bargaining.¹⁵ It is doubtful if the Court in that case gave any consideration to the possible application of section 8 (b) (3).

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¹³ The trial examiner in the principal case so held. *Personal Products Corp.*, note 1 supra, at 772.

¹⁴ See *Allen-Bradley Local No. 1111, UE v. WERB*, 315 U.S. 740, 62 S.Ct. 820 (1942).

¹⁵ This is the view taken by the Board and the dissenting judge in the principal case. *Personal Products Corp.*, note 1 supra, at 747; principal case at 412. It is conceivable that the Court was thinking only of §8 (b) (4) when it said that it is "... the objectives only and not the tactics of a strike which bring it within the power of the Federal Board." *International Union, UAW-AFL v. WERB*, 336 U.S. 245 at 263, 69 S.Ct. 516 (1949). An unfair labor practice under §8 (b) (4) is defined in terms of activities intended to achieve certain specified objectives. Section 8 (b) (3) is not so limited. There is no reason to exclude "tactics" as evidence of bad faith bargaining under §8 (b) (3) when that section, unlike §8 (b) (4), does not expressly refer to "objectives," and when language similar to §8 (b) (3), that in §8 (a) (5), has been interpreted to include analogous "tactics." See note 10 supra.