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# Labor Law - Collective Bargaining - Contract Ratification and Strike Authorization Clauses as Statutory Proposals

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LABOR LAW—COLLECTIVE BARGAINING—CONTRACT RATIFICATION AND STRIKE AUTHORIZATION CLAUSES AS STATUTORY PROPOSALS—After continued employer demands to discuss contract ratification[1] and strike authorization[2] clauses, the union discontinued contract negotiations on the ground that such proposals constituted interference with its internal affairs and as such were not within the scope of mandatory collective bargaining as defined by sections 8 (d) and 9 (a) of the amended National Labor Relations Act.[3] The National Labor Relations Board found the union's action to be the result of the employer's refusal to bargain in compliance with section 8 (d) and issued an appropriate order directing the company to cease and desist from insisting upon these proposals to the point of breakdown in negotiations and to bargain collectively.[4] On appeal, *held,* these proposals were subjects within the purview of sections 8 (d) and 9 (a), and the employer was entitled to insist upon them, in good faith, to an impasse. *Allis-Chalmers Mfg. Co. v. NLRB,* (7th Cir. 1954) 213 F. (2d) 374.

This dispute illustrates a serious policy problem which has confronted the Board and courts since the enactment of federal legislation regulating labor-management relations. Sections 8 (d) and 9 (a) require the parties to bargain in good faith on all questions concerning "wages, hours and terms and conditions of employment." The parties *may* bargain concerning proposals which are not so classified, subject to the qualifications that such proposals are discussed voluntarily and are not illegal.[5] It is the responsibility of the Board and courts to define the scope of mandatory bargaining[6] by a process of inclusion and exclusion.[7] Each proposal examined is judged by its particular factual context. The criterion employed is not a subjective standard of "reasonableness" or "desirability" but is the consistency of the proposal with the basic policies of the act.[8] When a proposal is considered statutory, a party may, theoretically, insist in "good faith" upon its acceptance to a point of impasse in negotiations. Conversely, insistence upon a non-statutory proposal, even though in "good

[1] The proposed contract would be subject to ratification by the majority of the employees in the bargaining unit in an election conducted immediately after the execution of the agreement. Principal case at 377.

[2] Upon termination of an automatic thirty-day extension following expiration of the collective bargaining agreement, the union would be free to strike provided that a majority of the employees in the bargaining unit approved by secret ballot. Principal case at 377.

[3] Labor-Management Relations Act, 1947, 61 Stat. L. 141, 29 U.S.C. (1952) §§158, 159.

[4] 106 N.L.R.B. 939 (1953).

[5] Principal case at 376; Alabama Marble Co., 83 N.L.R.B. 1047 (1949).

[6] See Cox and Dunlop, "Regulation of Collective Bargaining by NLRB," 63 HARV. L. REV. 389 (1950) for an opinion that this responsibility has been misinterpreted and abused.

[7] See 12 A.L.R. (2d) 265 (1950).

[8] NLRB v. American National Ins. Co., 343 U.S. 395, 72 S.Ct. 824 (1952); NLRB v. Tower Hosiery Mills, (4th Cir. 1950) 180 F. (2d) 701, cert. den. 340 U.S. 811, 71 S.Ct. 38 (1950). See also Findling and Colby, "Regulation of Collective Bargaining by NLRB —Another View," 51 COL. L. REV. 170 (1951).

faith," to a point of breakdown in negotiations is an unfair labor practice in violation of sections 8 (a) (5) and 8 (b) (3) of the act.[9]

Proposals which condition the union's right to represent the employees as exclusive bargaining agent have generally been excluded from the area of mandatory bargaining. Upon this basis a proposal similar to the contract ratification clause considered in the principal case was excluded from the statutory category.[10] The recognition that Board certification gives the union certain rights as exclusive bargaining agent has resulted in Board and court decisions holding that the union cannot be coerced into giving up these rights,[11] and that the employer may not undercut them by unilateral action.[12] The decision in the principal case seems to be inconsistent with these decisions and it repudiates a long standing Board interpretation of the contract ratification proposal.[13] It is likely that this policy reversal, if upheld, will prove a source of bitter dispute.[14]

The decision on the strike authorization vote demand is more consistent with established policy, but nevertheless is open to question. A no-strike clause effective during the term of the contract is an issue bargainable to a point of impasse because it is considered by the Board to be compatible with the statutory objective of substituting collective bargaining for industrial strife.[15] Though the strike vote here proposed is seemingly in harmony with this policy, its classification as a statutory proposal can be criticized because it, too, tends to derogate from the representational status of the union.[16] Furthermore, it is effective subsequent to the expiration date of the bargaining agreement, thus obligating the union

9 Principal case at 376; Trial Examiner's Report, 106 N.L.R.B. 942 at 961 (1953); NLRB v. Taormaina, (5th Cir. 1953) 207 F. (2d) 251; NLRB v. Dalton Telephone Co., (5th Cir. 1951) 187 F. (2d) 811, cert. den. 342 U.S. 824, 72 S.Ct. 43 (1951). Although this indicates a real distinction between statutory and non-statutory proposals, a party may find itself unable to insist too aggressively upon its statutory proposal lest it be found in "bad faith." In this respect, perhaps the bargaining privileges of a party under statutory and non-statutory proposals may not be significantly different.

10 NLRB v. Corsicana Cotton Mills, (5th Cir. 1949) 178 F. (2d) 344. The proposal was that the union hold meetings for all members of the bargaining unit, regardless of union affiliation, to approve each decision made by the union as bargaining agent. See also NLRB v. Taormaina, note 9 supra.

11 NLRB v. A. J. Tower Co., 329 U.S. 324, 67 S.Ct. 324 (1946); McQuay-Norris Mfg. Co. v. NLRB, (7th Cir. 1940) 116 F. (2d) 748, cert. den. 313 U.S. 565, 61 S.Ct. 843 (1941).

12 Medo Corp. v. NLRB, 321 U.S. 678, 64 S.Ct. 830 (1944); May Department Stores Co. v. NLRB, 326 U.S. 376, 66 S.Ct. 203 (1945).

13 Union Mfg. Co., 27 N.L.R.B. 1300 (1940); Interstate Steamship Co., 36 N.L.R.B. 1307 (1941).

14 The Board has not followed this decision, continuing to classify the contract ratification proposal as non-statutory. Darlington Veneer Co., Inc., 113 N.L.R.B. No. 125 (1955).

15 Shell Oil Co., 77 N.L.R.B. 1306 (1948); Bethlehem Steel Co., 89 N.L.R.B. 341 (1950).

16 The Board subsequently found a similar proposal ". . . is in derogation of the status of the statutory representative and thus violates the exclusive representation concept embodied in the Act." Borg-Warner Corp., Wooster Division, 113 N.L.R.B. No. 120 (1955). The Darlington Veneer Co., note 14 supra, and the Borg-Warner cases demonstrate complete Board rejection of the decision in the principal case.

without imposing comparable responsibilities upon the company.[17] However, the court was influenced by the fact that the union was not entirely precluded from striking and that such clauses possessed current collective bargaining relevance as indicated by their inclusion in other collective bargaining agreements.[18] It should be noted that Congress considered and deliberately refrained from including any strike authorization requirements in the 1947 act,[19] except in the case of a critical industrial dispute.[20] Moreover, it should not be overlooked that the proposals in the instant case required a majority vote by all the employees in the bargaining unit, a demand contrary to well-established policies.[21] The court found it unnecessary to consider this defect since the union did not object to the proposals on this basis. This seems to place upon the party to whom a non-statutory proposal is made a responsibility to seek a modification which will correct the defect. Not only will the objecting party be required to decide whether the proposal is outside the area of compulsory bargaining, but it will also be required to determine the precise reason why it is. If it fails to make either determination correctly, it will be committing an unfair labor practice by refusing to discuss the proposal. This decision and *NLRB v. IBS Mfg. Co.*,[22] which overruled long established precedent that a demand for a performance bond is a non-statutory proposal,[23] indicate a developing tendency on the part of the courts to reassess the statutory bargaining obligation and to pay less deference to the Board's expertise.

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17 Trial Examiner's Report, note 9 supra, 963.

18 Principal case at 379.

19 H. Rep. 245, 80th Cong., 1st sess., pp. 21-22, 69-70 (1947); International Union of UAW-CIO v. O'Brien, 339 U.S. 454 at 458, n. 5, 70 S.Ct. 781 (1950).

20 Because of the many factors which bear upon the decision, it is evident that the classification of a demand as a compulsory bargaining issue becomes a highly subjective determination. But the alternative (requiring the parties to bargain on all subjects reasonably connected to labor-management relations) involves problems of equal severity. See notes 6 and 8 supra and Trial Examiner's Report, note 9 supra, at 959, 960.

21 Principal case at 381.

22 (5th Cir. 1954) 210 F. (2d) 634.

23 Scripto Mfg. Co., 36 N.L.R.B. 411 (1941); International Brotherhood of Teamsters, 87 N.L.R.B. 972 (1949). Cf. NLRB v. Dalton Telephone Co., note 9 supra.