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the *Frank* decision its use can be expected to increase considerably in the future. Although this procedure is available to meet community health and safety problems, care must be taken in drafting authorizing legislation so as not to encroach unreasonably on the individual's right of privacy. Though some general guides have been noted and suggested, the allowable limits of such legislation is still a matter of conjecture.

CHARLES F. ANGEL

THEODORE CORONTZOS

THE GOOD FAITH REQUIREMENT IN COLLECTIVE BARGAINING

The only safe generalization which can be made as to the requirements of good-faith bargaining is that it is risky to generalize. The courts and the Board have made it abundantly clear that the determination of whether there has been compliance with the obligation to bargain in good faith, depends ultimately on the facts and circumstances of a particular case.¹

ORIGIN OF THE REQUIREMENT — THE WAGNER ACT

In section 8(5) of the Wagner (National Labor Relations) Act Congress imposed the duty upon employers covered by the law to bargain collectively with the lawful representatives of their employees.² The Act did not define "collectively bargaining" but left it up to the National Labor Relations Board, which the Act had created, to work this out within the broad scope of the agency's authority to carry out the policies of the Act. It became obvious to the Board at an early date that the goal of industrial peace would be frustrated if the obligation of bargaining collectively could be satisfied by the employer coming to the bargaining table and only going through the motions without any intention of reaching an agreement. To overcome this obstacle the Board introduced the requirement of good faith.

The duty to bargain collectively, which the Act imposes upon employers . . . is not limited to the recognition of employees' representatives *qua* representatives, or to a meeting and discussion of terms with them. The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issues presented. . . .³

This statutory interpretation by the Board of the meaning of the duty

¹McLean Arkansas Lumber Co., 109 N.L.R.B. 1022, 1036-37 (1954).

²49 Stat. 453 (1935), 29 U.S.C. § 158 (1952).

³Highland Park Mfg. Co., 12 N.L.R.B. 1238, 1248 (1939), *enforced*, 110 F.2d 632 (4th Cir. 1940). See also 84 N.L.R.B. 744 (1949), *enforcement denied*, 184 F.2d 981 (4th Cir. 1950), *aff'd*, 341 U.S. 322 (1951).

to bargain collectively was fully endorsed by the courts. For example, the Court of Appeals for the Seventh Circuit said:⁴

The statute requires of the employer that he bargain collectively and whether he does so depends upon the character of his acts of commission or omission. . . . [T]he trier of facts must determine whether the acts proved were rendered in good faith. . . . We think the Board had full authority to determine as a fact whether petitioner (employer) . . . had actually the intent to bargain, sincerely and earnestly,—whether the negotiations were captious and accompanied by an active purpose and intent to defeat or obstruct real bargaining.

Thus in the earliest years of the Wagner Act the Board and the courts arrived at the “good faith” requirement as a matter of statutory interpretation and worked out a broad definition of its meaning. As early as 1939 the good faith requirement was simply defined as requiring that the employer “enter into the discussion with a fair and open mind, and sincere purpose to find a basis of agreement.”⁵

Growth of the Doctrine by Application

An examination of the cases decided on the basis of the good faith requirement in the years prior to 1947 reveals a gradual development of the good faith requirement through its application to concrete situations presented to the Board. Good faith is negatived when the employer: declines to sign the agreement entered into;⁶ grants unilateral wage increases during the negotiations;⁷ refuses to examine the employees’ proposals or to justify management’s opposition;⁸ fails to meet with the union within a reasonable time and at a suitable and convenient place;⁹ does not give his negotiators sufficient authority to reach an agreement,¹⁰ deliberately delays the negotiations and is unwilling to actively enter into the discussion;¹¹ exerts pressure in the discussions in the form of threats or reprisals;¹² refuses to offer counter proposals when requested to do so or refuses to include a clause recognizing the union;¹³ insists that the union sign the agreement as a group of employees rather than as a union.¹⁴ This list is intended to be neither exhaustive nor typical. It serves rather to illustrate the Board’s and the courts’ over-all approach to the problem during the period prior to 1947. The problems were solved not according to any well defined rules

⁴*Singer Mfg. Co. v. NLRB*, 119 F.2d 131, 133-34 (7th Cir. 1941), *cert. denied*, 313 U.S. 595 (1941).

⁵*Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939).

⁶*H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941).

⁷*NLRB v. Barret Co.*, 135 F.2d 959 (7th Cir. 1943).

⁸*NLRB v. Geo. P. Pilling & Son Co.*, 119 F.2d 32 (3d Cir. 1941).

⁹*NLRB v. P. Lorillard Co.*, 117 F.2d 921, 924 (6th Cir. 1941), *rev'd on other grounds*, 314 U.S. 512 (1942).

¹⁰*Republican Publishing Co. v. NLRB*, 73 N.L.R.B. 1085 (1947), *enforced*, 174 F.2d 474 (1st Cir. 1949), *adjudication in contempt*, 180 F.2d 437 (1st Cir. 1950).

¹¹*NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

¹²*Supra* note 5.

¹³*McQuay-Norris Mfg. Co. v. NLRB*, 116 F.2d 748 (7th Cir. 1940), *cert. denied*, 313 U.S. 565 (1941).

¹⁴*Louisville Refining Co. v. NLRB*, 102 F.2d 678 (6th Cir. 1939), *cert. denied*, 308

but by the pragmatic case by case approach, the Board and the courts applying the above mentioned definition of "good faith" to the totality of the employer's conduct in each particular alleged violation.¹⁵

The Board and the courts in this period were not concerned solely with the indicia of employers' bad faith. They were also guided by general considerations which tended to indicate whether or not the employer had abided by the spirit of the Act. As one author has noted, a willingness to discuss all the matters properly within the scope of collective bargaining and a willingness to change positions and modify demands were most often considered in determining whether there had been good faith bargaining.¹⁶

Though there may have been some sacrifice of the employer's freedom to exact the best terms possible, it must be remembered that the Board was obligated to effectuate, as a matter of policy, the all-important step toward the goal of industrial peace—union recognition. Consequently, the Board saw good faith bargaining in its relationship to this end. It is not surprising to find as a unifying factor in variegated factual situations the Board's search for "an attitude which showed recognition of the union as an equal contracting partner with whom the employer is not only willing to reach an agreement but desirous of doing so."¹⁷

It has been further suggested that the good faith requirement was forged by the Board as a handy tool to prevent management from strangling incipient unionism by giving it the run-around, and also as a weapon to compel employers to take the new unions seriously.¹⁸

Duty of Union to Bargain in Good Faith

Since the Act made it unlawful only for the employer "to refuse to bargain collectively"¹⁹ the cases did not deal with the question whether the union was acting in good faith. Even though there is dictum in the *Globe Cotton Mills* case²⁰ to the effect that both parties must fulfill the good faith requirement, it was pretty much assumed that the whole purpose of the union's existence was to bring about collective bargaining on behalf of its representatives; consequently it was presumed to act in good faith. However, the union could by its actions place itself beyond the pale of the good faith standard by violating its contractual agreement with the employer.²¹ In the *Times Publishing* case²² the union submitted a complete contract and refused to discuss its terms on the ground that this was forbidden by its constitution. The Board held that the refusal of the employees to bargain in good faith served to cancel out this obligation on the part of the employer. Where the union had submitted proposals that were not required by the Act and had rejected a bonafide counter proposal by

¹⁵Times Publishing Co., 72 N.L.R.B. 676 (1947).

¹⁶Comment, 61 HARV. L. REV. 1224 (1948).

¹⁷*Id.* at 1225.

¹⁸GREGORY, LABOR AND THE LAW 401 (2d ed. 1958).

¹⁹47 Stat. 453 (1935), 29 U.S.C. § 158 (5) (1952).

²⁰*Supra* note 5.

²¹NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939).

the company, there was a similar ruling.²³ While the refusal of the company to furnish the union with information relating to the provisions covered in the bargaining agreement was ordinarily some proof of lack of good faith by the employer,²⁴ the Board refused to find an absence of good faith when there was no evidence adduced to show that the negotiations between the company and the union were in any manner impeded by the company's failure to furnish this data. However, the Supreme Court later vacated this latter decision.²⁵

CHANGES AND DEVELOPMENTS UNDER THE TAFT-HARTLEY ACT

The passage of the Taft-Hartley (Labor Management Relations) Act in 1947 provided a statutory basis for the good faith requirement and imposed the obligation to bargain in good faith on the employee as well as the employer.²⁶ This Act declared in section 8(b)(3): "It shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer. . . ." The new law then proceeds to define collective bargaining in section 8(d) and imposes on both employer and the representatives of the employees the obligation to "meet at a reasonable time and confer in good faith with respect to wages, hours and other terms and conditions of employment."²⁷

Both of these important changes made it clear that Congress had not only approved the judicial interpretation of making good faith a regular and integral part of collective bargaining, but also revealed the importance which Congress attached to this concept in using it to overcome the one-sidedness that had developed under the Wagner Act. In the light of this congressional approbation, the case history of the good faith requirement serves a two-fold function under the Taft-Hartley Act: First, the standards and tests used by the court and the Board in dealing with the employer are to continue to have application for management under the new legislation; and second, as Congress indicated when it adopted section 8(b)(3), the Board will be guided by its past decisions in judging labor's fulfillment of this newly imposed duty.²⁸ The Board lost no time in pointing out that the requirement of section 8(b) would be similar to those set forth in its own decisions and those of the courts before the enactment of the Taft-Hartley Act.²⁹

Two other important changes which relate to good faith should be noted. The first pertains to the freedom of the parties. Senator Walsh

²³NLRB v. Express Publishing Co., 128 F.2d 690 (6th Cir. 1942), cert. denied, 317 U.S. 676 (1942).

²⁴Sherwin-Williams Co., 34 N.L.R.B. 651 (1941), enforcement granted per curiam, 130 F.2d 255 (3d Cir. 1942); Pioneer Pearl Button Co., 1 N.L.R.B. 837 (1936); J. H. Allison & Co., 70 N.L.R.B. 377 (1946), enforcement granted, 165 F.2d 766 (6th Cir.), cert. denied, 335 U.S. 814 (1948).

²⁵Pool Mfg. Co., 70 N.L.R.B. 540 (1946), vacated, 339 U.S. 577 (1960).

²⁶61 Stat. 136, 149 (1947), 29 U.S.C. § 158 (1952).

²⁷1947 U.S. CODE CONG. & AD. NEWS 1135. The legislative history of the Act indicates that it was intended to paraphrase the courts' and the Board's decisions.

²⁸CONF. REP. No. 510, 80th Cong., 1st Sess. 43 (1947).

²⁹National Maritime Union, 78 N.L.R.B. 971 (1948), enforcement granted, 175 F.2d 636 (2d Cir. 1949), cert. denied, 338 U.S. 954 (1950).

had explained in the congressional debate on the Wagner Act that there would be no compulsion to force labor and management to come to an agreement: "[It is] the very essence of collective bargaining that either party shall be free to withdraw if its conditions [are] not met."⁸⁰ This same thought was repeated by the court in the *Jones & Laughlin* case where it pointed out that the act does not compel any agreement whatever.⁸¹ Section 8(d) of the Taft-Hartley Act incorporates this limitation into the statute by stating that the parties shall neither be compelled to agree to a proposal nor to make a concession.

The other change is indirect and not so important. It touches on the freedom of speech doctrine. One of the indicia of bad faith on the part of the employer under the Wagner Act was hostile speech in the course of the bargaining relationship. The amendments to section 8 added subsection (c) which gave full protection to the expression of views short of "threat of reprisal or force or promise of benefit."⁸² It still might be possible to consider the speech of the employer in judging the question of good faith under a "total atmosphere of the case" approach, but the section 8(c) free speech protection would act as a limiting factor.

Employers' Duty

In a large measure the Board and the courts continued, after the Taft-Hartley Act, to deal with cases involving management's alleged violations of the good faith requirement as they had in the past. They applied the same definition, used the same tools of statutory construction, and continued to insist that "each case must turn upon its particular facts."⁸³ Under the Wagner Act the Board was charged with the duty to protect struggling new unionism and to see that it was the bargaining unit for *all* the employees in a particular plant. But the amendments contained in the Taft-Hartley Act brought on the "new approach" which put the employer on an equal plane to compete with the union for the loyalty of his employees.⁸⁴ Yet an examination of the cases involving the employer's good faith bargaining does not reveal any clear shift by the courts and Board in favor of the employer. An attempt by the company to make a deal directly with the employees over the heads of the union was held improper.⁸⁵ In the *Otis* case⁸⁶ the Court of Appeals for the Second Circuit agreed with the Board that the company should have provided the union with time study data in its possession. In a somewhat related situation under the Wagner Act where the company refused to turn over its wage study to the union but invited the union to make its own, it was held not to violate the good faith requirement.⁸⁷

While it was generally assumed in the early days of the Wagner Act

⁸⁰70 CONG. REC. 7571 (1935).

⁸¹NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

⁸²61 Stat. 140 (1947), 29 U.S.C. § 158 (1952).

⁸³*Truitt Mfg. v. NLRB*, 351 U.S. 149 (1956).

⁸⁴COX, CASES ON LABOR LAW 151 (4th ed. 1958).

⁸⁵*Order of Ry. Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944).

⁸⁶NLRB v. *Otis Elevator Co.*, 208 F.2d 176 (2d Cir. 1953).

⁸⁷*Crompton-Highland Mills*, 70 N.L.R.B. 206 (1946), *enforcement denied*, 167 F.2d 662 (5th Cir. 1948), *rev'd and remanded*, 337 U.S. 217 (1949).

that an employer who refused to discuss a proposed wage increase because of his professed inability to pay was not bargaining in good faith,³⁸ yet it was not until 1955 in the *Truitt* case³⁹ that the United States Supreme Court gave full support to this view. Those who had hoped for a sharp change from the pro-employee bias of the old Board found no support in the good faith cases. In this connection, in a rather pessimistic note, one of their number concludes:⁴⁰ "While the Board and the courts frequently profess they decide relevancy on a case by case basis, there is a presumption . . . that the union's request, in itself, is a strong indication that the data sought is germane to the issues. The burden of proof to the contrary rests on the employer."

A fair conclusion, therefore, is that rather than a change based on policy considerations, the cases on employers' good faith bargaining under the Taft-Hartley Act indicate a further development and clarification along lines already established under the Wagner Act.

Since a detailed examination of the growth and clarification of the good faith requirement under the Taft-Hartley Act is beyond the scope of this paper, only one typical development will be considered here. Cases involving the duty of management to furnish information indicate that the Board's policy has not essentially changed. It is now settled through the case decisions under the Taft-Hartley Act that it is an unfair labor practice for an employer to refuse to furnish the bargaining representative with information concerning individual earnings,⁴¹ job rates and classifications,⁴² merit increase,⁴³ pension data,⁴⁴ time study data,⁴⁵ incentive earnings and the operations of the incentive system,⁴⁶ and piece rates.⁴⁷ Moreover, employers must assist the union even when the union has alternate sources for obtaining the information.⁴⁸ Management is likewise required to furnish financial data when it claims inability to grant wage increases and other benefits involving monetary outlays.⁴⁹ The companies need not, however, present the information solicited when it is not relevant to any bargainable issue.⁵⁰

Employees' Duty

As has already been pointed out, the good faith decisions prior to 1947 serve as "benchmarks and guideposts to establish the bargaining obligations

³⁸GREGORY, LABOR AND THE LAW 409, 410 (2d ed. 1958).

³⁹*Supra* note 33.

⁴⁰Comment, 35 U. DET. L.J. 499 (1958). The writer concludes that under the guise of promoting good faith the courts and the Board are destroying the free enterprise system on which it is based. *Id.* at 504.

⁴¹NLRB v. Item Co., 220 F.2d 956 (5th Cir.), *cert. denied*, 350 U.S. 836, *rehearing denied*, 350 U.S. 905 (1955), *cert. denied*, 352 U.S. 917 (1956).

⁴²Taylor Forge & Pipe Works v. N.L.R.B., 234 F.2d 277 (7th Cir. 1956).

⁴³NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948).

⁴⁴Phelps Dodge Cooper Products Corp., 101 N.L.R.B. 360 (1952).

⁴⁵*Supra* note 36.

⁴⁶Dixie Mfg. v. NLRB, 180 F.2d 173 (6th Cir. 1950).

⁴⁷Vanette Hosiery Mills v. NLRB, 179 F.2d 504 (5th Cir. 1950).

⁴⁸B. F. Goodrich Co., 80 N.L.R.B. 1151 (1950).

⁴⁹NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952).

⁵⁰NLRB v. Wyman & Free Mfg. Co., 187 F.2d 947 (2d Cir. 1951).

of unions.’⁵¹ Armed with this new statutory grant of power, the Board was empowered to hold labor to the same good faith requirements as capital. This change also provided another weapon in the hands of the small local employer under pressure from a powerful international union to enable him to seek the help of the government under the claim of bad faith negotiating. In the *American Newspapers Publishing* case⁵² the union had maintained a constant threat of strike to force the employer to disregard the Board’s ban on closed shops. During negotiations the union refused to sign a contract of more than sixty days duration showing no justification other than the illegal goal of a closed shop. The Board, affirmed by the court, held this was in violation of the requirement to bargain in good faith.

Even though there is no abundance of cases on employees’ disregard for the established canons of good faith, there is a sufficient number to show that the Board and the courts have followed the adage that “what is sauce for the goose is sauce for the gander.” The “illegal conditions” cases are a good illustration. Under the Wagner Act if a company insisted upon conditions giving individual contracts precedence over the contract with the union⁵³ or refused to allow a union recognition clause,⁵⁴ the Board held that such action constituted bargaining in bad faith. Under the Taft-Hartley Act, when the union insisted upon a prohibited hiring hall provision⁵⁵ or an outlawed closed shop union security clause,⁵⁶ the same “illegal condition” standard was applied to find the employees had violated their good faith requirement.

While it is clear from the last cited case that if the union seeks an “unlawful” objective, *pari ratione*, it will be held to be in violation of good faith bargaining, the same cannot be said about the use of “unlawful” means by the union to achieve a lawful goal. Since the Supreme Court had said that recurrent and intermittent strikes were not within the scope of “other concerted activities” protected by section 7 of the Act,⁵⁷ the Board assumed that such activities were in violation of the employees’ duty under section 8(d). An approach to this position by the Board was taken in the *Phelps-Dodge* case⁵⁸ where it was found that the use of unprotected activity such as “slow downs” were not in keeping with the good faith standard and consequently relieved the employer of his corresponding duty. The issue was met head on in the *Personal Products* case⁵⁹ where the Board found the union had violated its obligation to bargain in good faith by initiating a series of unprotected harassing tactics to exert pressure on the company while negotiations were in progress. But the Court of Appeals reversed

⁵¹Leiter, *The Meaning of Collective Bargaining*, 6 LAB. L.J. 835 (1955).

⁵²*American Newspaper Publishers Ass’n. v. NLRB*, 20 CCH Lab. Cas. ¶ 66,691, 193 F.2d 782 (7th Cir. 1951), *aff’d*. 345 U.S. 100 (1953).

⁵³*Interstate S. S. Co.*, 36 N.L.R.B. 1307 (1941).

⁵⁴*National Motor Rebuilding Corp.*, 19 N.L.R.B. 503 (1940).

⁵⁵*National Maritime Union*, 78 N.L.R.B. 971 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950). The Board said this is a violation of the good faith obligation because it evinces a mind closed and without purpose to find a basis for agreement, an attitude which the Board and the courts have found to be incompatible with good faith bargaining. *Id.*, 78 N.L.R.B. at 981.

⁵⁶*Penello v. International Union, UMW*, 88 F. Supp. 935 (D.D.C. 1950).

⁵⁷*Automobile Workers v. Wisconsin Board*, 336 U.S. 245 (1949).

⁵⁸*Supra* note 44.

⁵⁹*Matter of Textile Workers Union*, 108 N.L.R.B. 743 (1954).

the Board's decision, pointing out that engaging in "unprotected activity" makes the employees liable for discharge by the company but this does not furnish the basis for declaring that the union had not engaged in good faith bargaining.⁶⁰ The court said, "There is not the slightest inconsistency between genuine desire to come to an agreement and the use of economic pressure to get the kind of agreement one wants."⁶¹

This decision has been subjected to severe criticism.⁶² It has been pointed out that the dissent was correct in saying that the Board should be able to take into account these union "tactics," together with all the other relevant factors on the entire record, in order to determine whether there has been a failure to bargain in good faith. Further, it was easy here to conclude that the union was no longer attempting to bargain but rather was substituting physical force for persuasive reasoning. The same writer also argues that there cannot be the realistic communication between the bargaining parties that one would ordinarily associate with good faith bargaining when one party at the bargaining table threatens the other unfairly. He concludes that to equate a lawful economic strike with a series of harassments is to seize upon a far-fetched basis to justify a reversal of the Board's decision.⁶³

A different conclusion was reached in another law review article⁶⁴ in which the writer points up the failure of the Board to distinguish between the Act's denying protection to certain activities of the union and its giving the Board the power to forbid them. The latter is what the Board in effect would accomplish by determining that these "unprotected activities" constituted a violation of sections 8(b)(3) and 8(d). In the absence of a clear congressional mandate, the author concludes, the Board should not be allowed to extend the scope of the meaning of good faith bargaining by declaring that engaging in "unprotected activity" is evidence of the lack of a sincere desire to reach an agreement. Further, the Board should not expand the good faith requirement to require some sort of fair dealing under 8(b)(3) which would be incompatible with any form of "unprotected activity." Yet the Board has not been reconciled to this position as is shown by its decision in the *Boone County* case,⁶⁵ where it found the union guilty of an unfair labor practice for engaging in an activity not protected by section 7 when the union called a strike over a grievance that should have been covered by the grievance clause in the bargaining agreement.

It would seem that both of the above-cited writers are a bit extreme. Insofar as determining whether the good faith requirement has been fulfilled, there should be room for a middle ground. It seems clear that in the absence of specific legislation, to convert such a broad field of employee activity as that not protected by section 7 into proof per se of bad faith

⁶⁰Textile Workers Union v. NLRB (Personal Products case), 227 F.2d 409, 410 (D.C. Cir. 1955), cert. denied, 352 U.S. 864 (1956).

⁶¹*Id.*, 227 F.2d at 410.

⁶²Recent Decision, 41 MARQ. L. REV. 200 (1957).

⁶³*Id.* at 205.

⁶⁴Comment, 71 HARV. L. REV. 502 (1957).

⁶⁵International Union, UMW, 117 N.L.R.B. 1095 (1957).

is to incur the danger of by-passing the all-important subjective good faith test. On the other hand, in order to use the "totality of conduct" test of the *Singer* case,⁶⁶ the Board should be left free to scrutinize all the factors that reveal the employees' intention during the negotiations and should not be precluded from considering "unprotected activities" in making this evaluation.

THE PROBLEM OF DETERMINING "GOOD FAITH"

Arriving at a "Good Faith" Test

A consideration of the *Boone County* case⁶⁷ also raises the problem of how to determine when the parties are bargaining in good faith. Early critics of the NLRB decried the futility of trying to "legislate a state of mind." The need to reach in some manner the subjective state of mind of parties who are caught up in our legal processes is as old as our legal institutions themselves. Nevertheless the problem here takes on a peculiar quality, for the solution must be tailored to fit the needs of an administrative agency dealing with the rights and duties of industrial groups, rather than the needs of a court of law judging the conduct of an individual. To carry out its purpose the Board from the beginning had to find some way to determine whether the employer was sincerely intent on reaching an agreement or whether he was going through the motions of collective bargaining for some ulterior purpose. Since states of mind, attitudes, and intents are difficult to lay bare, the Board sought to reach its goal of determining the employer's subjective intent in the light of what could be reasonably inferred from a scrutiny of all the established facts. Though their language differed somewhat, both the Board⁶⁸ and the courts⁶⁹ recognized that they must endeavor to reach the subjective intent of the parties and that this could be ascertained only by reference to all the relevant facts.

A further refinement known as the "negative test" was worked out by Judge McGruder in the second *Reed & Prince* case⁷⁰ when he defined bad faith as the desire not to reach an agreement with the union and then examined the evidence by asking whether a normal employer who was willing to come to an agreement with the union would have followed the same course of action. Since "general propositions do not decide concrete cases,"⁷¹ this test has merit in that it helps to facilitate the courts' task of applying the general to the particular.

The experience of the Board and the courts over the years in judging the question of good faith has resulted in the establishment of certain indicia of bad faith. In some situations the acts or omissions are only prima facie evidence; in other cases they are conclusive proof of bad faith. The ten-

⁶⁶*Singer Mfg. Co. v. NLRB*, 119 F.2d 131 (7th Cir.), cert. denied, 313 U.S. 595 (1941).

⁶⁷*Supra* note 65.

⁶⁸*Gay Parce Undergarment Corp. (David I. Cohen)*, 91 N.L.R.B. 1363 (1950).

⁶⁹*NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st Cir.), cert. denied, 313 U.S. 1119 (1941).

⁷⁰*NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), cert. denied, 346 U.S. 887 (1953). This case is discussed in Cox, *The Duty to Bargain in Good Faith*,

71 *HARV. L. REV.* 1401, 1417 (1958).

⁷¹Mr. Justice Holmes dissenting in *Lochner v. New York*, 198 U.S. 45, 76 (1905).

dency toward crystallization of the tests and away from the balancing of intangible factors has become known as the "per se" approach. For example, an employer's refusal to sign a written agreement has been held conclusive evidence of bad faith,⁷² and the employer's making unilateral changes in position designed to reduce the strength of the employees' representative seeking to bargain has been treated as at least prima facie evidence of bad faith.⁷³ However, in at least one case the Supreme Court has reversed the Board's finding that particular employer conduct was per se an unfair labor practice.⁷⁴

As Chamberlain in his work on collective bargaining⁷⁵ makes clear, it was inevitable that the good faith decisions should concretize to some extent the criteria of good or bad faith and thus tend to accumulate a body of "objective" standards for determining the question of good faith violation. But this "per se" approach is effective only in the case where there has been an obvious violation. In the more difficult cases there is the danger, inherent in the need of determining by external evidence the subjective state of mind, of over simplifying the problem by substituting the means (accepted per se criteria of bad faith) for the end (the true state of mind of the alleged violator). Both the Board⁷⁶ and the courts⁷⁷ have continued to be aware for the most part of the need to resist this temptation. In so doing they have had the expressed approval of Congress as demonstrated by the legislative history of the Taft-Hartley Act. The House Bill had provided for a series of objective standards that would determine whether or not the parties had acted in good faith.⁷⁸ This provision was deleted from the Act in its final form, showing a congressional rejection of the per se approach and at the same time an approval of the courts' and Board's traditional method of searching for the parties' subjective intent on a case-by-case basis.⁷⁹

The Freedom of the Bargainers and Their Good Faith Obligation

During debate on the Wagner Act in the Senate, one of its protagonists categorically asserted that it does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory.⁸⁰ Since this assurance was nowhere provided for in the Act, the job of reconciling the freedom not to enter into a collective bargaining agreement with the duty to make a sincere effort to find a basis of agreement was dumped into the lap of the Board and their judicial watchdogs, the courts. The difficulty would have been avoided if there had been some insistence that the employer must reach some kind of bargaining agreement with his employees' representatives, once they had been certified as a bargaining unit. But there

⁷²NLRB v. Highland Park Mfg. Co., 110 F.2d 632, 639 (4th Cir. 1940).

⁷³NLRB v. Stanislaus Implement Co., 226 F.2d 377, 381 (9th Cir. 1955).

⁷⁴NLRB v. American Nat. Ins. Co., 343 U.S. 395, 409 (1952). This case is discussed again in the text accompanying note 84 *infra*.

⁷⁵CHAMBERLAIN, COLLECTIVE BARGAINING 301-03 (1st ed. 1951).

⁷⁶Southern Saddlery Co., 90 N.L.R.B. 1205 (1950).

⁷⁷Joy Silk Mills v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

⁷⁸H.R. REP. No. 245, 80th Cong., 1st Sess. 19 (1947).

⁷⁹*Supra* note 64, at 502.

⁸⁰*Chamberlain* note 70, at 1400.

was no such insistence. The Board under the Wagner Act tended to resolve the conflict by imposing limitations on the employer's freedom in bargaining activity. The Taft-Hartley Act sought to prevent this tendency by spelling out in the statute that the parties were not obliged to come to an agreement, and yet in the same section it reaffirmed the good faith requirement with its demand of sincerely trying to reach an agreement, thereby again leaving the Board to its own devices to work out a solution that would reconcile the contrasting concepts.⁸¹

Perhaps the new act at least made clear that the problem does not lend itself to a simple solution by adding a line to the statute. Faced with this problem Gregory has concluded that reconciling governmental pressure on both sides to enter into an agreement with complete freedom from the government as to the terms of the agreement is as bad as trying to serve both God and mammon.

The Board and the Supreme Court piously reiterate that section 8(a)5 does not compel employers to agree to anything. But as a practical matter, employers find it almost impossible to avoid commitment to some extent over matters on which they are compelled to bargain under the statute. The difference between this and a direct statutory command from Congress that certain matters must be included in contracts is only one of degree.⁸²

Cox, in a more moderate tone, voices the same concern when he claims that in attempting to insure the parties' abidance by the good faith obligation, "the law has crossed the threshold into the [bargaining] conference room and now looks over the negotiator's shoulder. . . . [I]s the next step to take a seat at the conference table?"⁸³ While Gregory sees no way to reconcile the basic conflict, Cox indicates that the Board and the courts are not moving in the right direction to find the solution.

It would be difficult, then, not to conclude that there is a considerable body of expert opinion that feels the Board and the courts have untied this gordian knot by cutting down on the freedom of the employer not to enter an agreement. But query whether this pessimism regarding the freedom of the bargaining parties is entirely borne out by the cases? An examination of some of the more important cases would indicate this conclusion is at least questionable.

In the *American National Insurance* case⁸⁴ the company insisted upon a management clause which left in its hands the final responsibility for promotions, discipline, and the scheduling of work *with no recourse to arbitration on these matters*. The Board held that this was a violation of section 8(a)(5) of the amended Act because this insistence upon the final say concerning terms and conditions of employment was tantamount to a refusal to bargain on such matters. The Supreme Court reversed the Board's holding, saying its view was needlessly technical since the company would not have been guilty of an unfair labor practice if, instead of

⁸¹See text accompanying notes 31, 32 *supra*.

⁸²GREGORY, *LABOR AND THE LAW* 413 (2d ed. 1958).

⁸³Cox, *supra* note 70, at 1403.

⁸⁴*NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

proposing a clause that removed some matters from arbitration, it had simply refused in good faith to agree to the union's proposals for limited arbitration.⁸⁵ The court also stated that it is not for the Board to pass on the substantive terms of the bargaining agreement. If the employer can use his bargaining strength and skill to get an extremely favorable contract (or *visa versa* for the employees), this should not be interfered with by the Board. The court took a different view, however, in finding against the employer in the *Majure* case⁸⁶ where the company did not make any positive proposals regarding a management clause in their favor, but instead flatly refused to sign an agreement unless management was given the right unilaterally to control each and every feature of wages, hours, and other conditions of employment. Taken together the two cases reveal the courts' continuing effort to strike a reasonable balance between the often conflicting goals of good faith bargaining and freedom to bargain without unduly sacrificing either goal.

In a recent case,⁸⁷ one of the grounds on which the Board had found the company guilty of failing to bargain in good faith was its insistence on provisions in the bargaining agreement which gave the union little, if any, real voice in important aspects of employment relations. But in refusing to go along with the Board on this ground the Fifth Circuit said the fact that the employer insisted upon a contract which left the employees in substantially no better state than they were in without it, is not a failure to bargain in good faith.⁸⁸ One might well agree with an analysis of the case which stated that there was good precedent for finding a lack of good faith by management in view of the company's record as a whole, particularly since it failed to give any reason why such a contract was necessary.⁸⁹ However, the case is cited here because it reveals the court bending over backward to leave management free in the exercise of its bargaining power; hence it lends strong support to the *American National Insurance* case⁹⁰ in casting some doubt on the thesis that the courts are committed to a policy of passing on the substantial term of the bargaining agreement and of continuously encroaching on the freedom of the bargainers. Perhaps even the "experts" are guilty here of a somewhat exaggerated generalization.

THE VALIDITY OF THE GOOD FAITH REQUIREMENT

An examination of some of the critical writings on the subject of the good faith requirement bears out Holmes' dictum that "when you realize that you are dealing with a matter of degree you must realize that reason-

⁸⁵See GREGORY, *op. cit. supra* note 82. He admits that this case does check his sweeping charge of the loss of management prerogatives in the name of good faith bargaining, but he summarily dismisses the case as being unsound as an "open sesame" for management clauses that would deliver all the control of bargaining into the company's hand as though the *Majure* case, note 86 *infra*, didn't exist, and the limiting of each case to its particular facts were not an operating principle!

⁸⁶*Majure v. NLRB*, 198 F.2d 735 (5th Cir. 1952).

⁸⁷*White's Uvalde Mines v. NLRB*, 117 N.L.R.B. 1128 (1957), *rev'd*, 255 F.2d 564 (5th Cir. 1958).

⁸⁸The court agreed with the Board that the company, by making threats and promises to the employees and by instituting several unilateral wage increases without consulting the union, had violated 8(a)(1). *Id.*, 255 F.2d at 566.

⁸⁹Recent Decision, 34 NOTRE DAME LAW. 125 (1958).

⁹⁰*Supra* note 84.

able men may differ widely as to the place where the line should fall."⁸¹ The phrase "differ widely" reaches its most extreme illustration in the writings of Professor Sylvester Petro who would solve the various complex problems that collective bargaining entails by the simple expedient of requiring only that the employer listen to everything that the union negotiators have to say and be able to reply to every suggestion or proposal with an unqualified "No." For him the great enemy that seeks to thwart this simple solution of the problems is the use of political pressure which works its way into the collective bargaining picture under the disguise of the "good faith requirement."⁸² He takes the position that the good faith doctrine was conjured up by a bureaucratic board aided and abetted by some of the courts in an effort to have the terms of the bargaining agreement determined by law instead of by natural economic forces. Apparently the clearer minds—the Supreme Court in its better moments, and the people as a whole—have never approved of this type of federal interference in private business.⁸³ In view of the legislative history of the Taft-Hartley Act, the frequent pronouncements of the Supreme Court in the past twenty years, and the writings of the various interested groups in our society,⁸⁴ it is hard to believe that Petro's book was not written in 1937 instead of 1957. The best that can be said of that writer's commentary on good faith bargaining is that it is part of the over-all theme of the book—government intervention should not be part of the labor policy of a free society. Until he enlightens the reader on how to turn back the clock, there is the distinct possibility that Professor Petro's reflections on this particular problem will continue to receive no serious attention.

Gregory sees the good faith requirement as a useful tool that has served its purpose and should now be discarded. It was useful to the Board in the days of the Wagner Act in fulfilling its task of helping to put incipient unionism on its feet. But now, except in certain areas in the south, unions no longer need artificial assistance from the government to command respect and to have their requests taken seriously. He therefore concludes:⁸⁵

A far more healthy bargaining climate would prevail in this country if section 8(a)(5) were stricken from the NLRA and the content of collective agreements were left to be worked out by direct dealings between employers and unions. Such a step would no doubt check the organization of employees and union success in parts of the south. But it is quite possible that the ingenuity of Congress could invent some special procedure to protect the interests of newly-formed local unions. . . .

This conclusion is questionable. It has already been noted⁸⁶ that the case histories in this field will not bear out the unqualified contention that

⁸¹Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926) (dissenting opinion).

⁸²PETRO, *THE LABOR POLICY OF A FREE SOCIETY* 214-17, 254-56 (1957).

⁸³*Id.* at 216.

⁸⁴Not even the National Association of Manufacturers could be cited in support of this contention of Petro's as evidenced by their endorsement of the good faith requirement at page 28 of their booklet *INDUSTRY BELIEVES*.

⁸⁵GREGORY, *op. cit. supra* note 82, at 414.

⁸⁶See text accompanying notes 84 and 87 *supra*.

the bargaining parties are no longer substantially free to work out the terms of the agreement. It is not realistic to bolster this conclusion by playing down the needs of union organization in our social structure. Unionism is an institution our free society has developed to meet the needs of the laboring classes to achieve social justice. With the increase of technical know-how and automation, the number of "white collar" workers is likely in the near future to far outnumber the "blue collar" workers. Consequently the problem of giving these office workers a representative place in our industrial democracy can scarcely be limited to a few areas in the south. Finally, would it be wise for Congress to abandon a workable tool just to test the ingenuity of its members? At best it seems somewhat disingenuous to expect some "procedural invention" of Congress to fill the vacancy left after throwing out the baby with the bath. Gregory's conclusion takes no cognizance of the role of the good faith clause in enabling the government to exact a standard of conduct in the process of negotiating the bargaining agreement, and it offers no substitute for controlling the activities of the industrial giants of both capital and labor in the interest of the common good, save by the discredited technique of trial by combat.

In sharp contrast to the "good faith must go" school of thought is the position taken by Mary Dooley in the *Labor Law Journal*.⁹⁷ Although she is concerned there with the obligation of the employee only, the general tenor of her article is susceptible to broader implications. Her viewpoint is based on her findings of steady progress by the Board, first in its job of applying the statutory standard of good faith bargaining to the latest developments which challenge the role of government in industrial relations, and second in the overwhelming concurrence of the courts' conclusions with those of the Board. Typical of her findings on the first point are those in the area of determining what kind of activity is allowed the employees during the negotiations. Instead of inconsistency and radical change,⁹⁸ she finds that "the Board and the Courts are gradually siphoning the unprotected types of conduct from the unprotected illegal activities"⁹⁹ according to a practical case by case pattern. On the second point she says: "[I]n considering charges of inconsistency and irrelevance of Board decisions to the facts of industrial life, the evidence shows that 90% of the Board's decisions have been approved by the courts on appeal."¹⁰⁰ Obviously undaunted by the oft-voiced fears of government intrusion in this field, she regards the Board's role of positive intervention in the collective bargaining process as something to be determined by the test of workability.

The value of the Dooley analysis is that it steers clear of theoretical speculation and sweeping generalizations and attempts to see no further than the sum total of the cases at hand. She seems keenly aware that here too an ounce of history is worth a pound of logic. Looking back on the

⁹⁷Dooley, *Union's Duty to Bargain Collectively with the Employer*, 8 LABOR L.J. 249 (1957).

⁹⁸See text accompanying notes 62 and 61 *supra*.

⁹⁹Dooley, *supra* note 97, at 255.

history of the NLRB cases, it would have been difficult to predict the future course of the development of law and at the same time it is difficult to deny that it has undergone a fairly consistent development. It is perhaps as Chamberlain says when he reasons that since the "relationship between individuals and groups within society undergo change . . . at times in this process of change perhaps nothing but expedient solutions may appear possible."¹⁰¹

Realizing that one cannot encompass within a short article all of the issues involved in a given subject, it is still rather surprising that Miss Dooley failed even to intimate that "workability" was not the sole test which would determine whether or not the Board would be given the "role of positive intervention in the collective bargaining process."¹⁰² Few would question the role of the Board in setting up standards of conduct within which the bargaining parties must operate since it is the duty of the Board to apply a statute that seeks to effectuate a national policy aimed at fostering industrial peace. But it is quite another thing to give this same agency the added power of assisting in formulating the agreement itself, particularly when the statute expressly states that the parties shall be free *not* to reach an agreement. It is submitted that the immediate test is whether Congress would amend the act to grant the Board this power, and that since this seems unlikely, there is even less likelihood that the courts would approve of such a step in the absence of statutory change.

The recent *Borg-Warner* decision¹⁰³ by the Supreme Court involved the question of whether an employer had bargained in good faith when he refused to sign a contract without a clause requiring a secret ballot among *all* the employees (union and nonunion) on whether to accept the company's last offer before a strike should be called. The majority of the Court agreed with the Board that this was a violation of good faith bargaining by the company, since this provision contravened a basic policy of the Act by weakening the independence of the employees' representative. However, even though there was sufficient precedent to hold with the majority and limit the case to its particular facts, the Court split 5-4. In a strong dissent the minority expressed the fear that the decision may open the door to an intrusion by the NLRB into the substantive aspects of bargaining which go beyond anything contemplated by the Act or suggested in prior decisions of the Court.¹⁰⁴ In the decision of the Board¹⁰⁵ there was also a sharp dissent on this same issue by former Board chairman Farmer and present chairman Leedom. They questioned the propriety of attempting to determine what type of bargaining demands may be insisted upon to the point of impasse.¹⁰⁶ This strong opposition at both Board and Supreme Court levels to even an *indirect* attempt to pass on the substantive terms of the contract, taken together with the decision in the *White* case,¹⁰⁷ hardly sup-

¹⁰¹CHAMBERLAIN, *COLLECTIVE BARGAINING* 485 (1st ed. 1951).

¹⁰²Dooley, *supra* note 97, at 286.

¹⁰³NLRB v. Borg-Warner Corp., 356 U.S. 342, 349-50 (1958).

¹⁰⁴Comment, 11 STAN. L. REV. 188 (1959), criticizes the decision.

¹⁰⁵42 LAB. REL. REP. Analysis 5 (1958).

¹⁰⁶*Id.* at Analysis 1.

¹⁰⁷*Supra* note 87.

ports the conclusion that the Board, with the Court's blessing, is ready to assume a positive role of direct intervention in the bargaining process.

No appraisal of the value of the good faith requirement should overlook a leading article in the June, 1958, issue of the *Harvard Law Review* by Professor Cox.¹⁰⁸ It is a thorough, up-to-date critique of the whole problem of good faith bargaining and is by one of the recognized authorities in the labor law field. The author assumes both the value and the continuance of the good faith requirement. But he is concerned that the subjective test, as a result of recent judicial and administrative decisions, is in danger of being replaced by some kind of objective standard of good faith bargaining practice which would lead to government regulation of the processes of collective bargaining. He makes effective use of the *Truitt* case¹⁰⁹ to demonstrate that the Board, with the Supreme Court's approval, has "undertaken to regulate the manner in which collective bargaining is conducted regardless of the actor's state of mind."¹¹⁰

The Board in the *Truitt* case decided that it was a matter of "settled law" that failure to substantiate a claim of inability to pay increased wages by withholding information is a failure to bargain in good faith. The Supreme Court approved without making any attempt to determine whether, in view of all the pertinent facts of the case, the employer nevertheless might have had a sincere desire to enter into an agreement with the union. In support of his decision, Justice Black cited the *Pioneer Pearl Button Co.* case,¹¹¹ which in Cox's opinion "does not remotely suggest that such proof standing alone would be enough to support a finding of bad faith."¹¹²

The net result of this per se approach, in Cox's view, is to interpret the statute to impose an obligation to conform to good bargaining practices, "which necessarily means any practice which the NLRB or courts deem requisite in the light of such standards as they can derive from the writings of 'experts'" instead of following the wiser, traditional approach of requiring "only bona fide recognition coupled with some kind of discussion looking towards an agreement, thus leaving bargaining practices to voluntary improvement as the relationship between a company and a union matures."¹¹³

Professor Cox, himself, suggests a possible explanation why one might reserve judgment on some of his conclusions when he observes that it is too soon to decide that the Supreme Court is committed to the rationale of the *Truitt* case, and that its decision is limited to its own particular factual situation.¹¹⁴ It already has been indicated¹¹⁵ that there are ample grounds upon which to conclude that not only is the Supreme Court not committed but neither is the Board necessarily committed to a policy of

¹⁰⁸Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

¹⁰⁹*Truitt Mfg. Co. v. NLRB*, 351 U.S. 149 (1956).

¹¹⁰Cox, *supra* note 108, at 1430. This same point was made more succinctly by Mr. Justice Frankfurter in his partial dissent in the *Truitt* case.

¹¹¹1 N.L.R.B. 837 (1936).

¹¹²Cox, *supra* note 108, at 1433.

¹¹³*Id.* at 1435.

¹¹⁴*Ibid.* The author curiously labels this limiting language by the Court as an "avenue of retreat."

¹¹⁵See text accompanying note 89 *supra*.

governmental regulation of the collective bargaining agreement. Furthermore, while the academician can indulge in the luxury of weighing the implications of a particular case for long-range public labor policy, the court has to come up with a decision on the concrete problem brought before it. The need to restrict its horizon is especially acute when dealing with a statutory standard such as good faith, which can have meaning only in its application to a particular set of facts in a particular case. Even at this level, at least one analyst¹¹⁶ felt that the Court was ruling out the per se approach in the *Truitt* case when it cautioned that this decision did not mean that in every case where economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence.

Even if one takes a pure policy approach to Cox's conclusion, there is reason not to concur. He concedes that the *Truitt* case exemplifies one of the ways in which the law grows—that which has been strong evidence for a time of subjective bad faith comes to be sufficient proof standing alone—but he intimates that its justification is dependent upon a conscious examination of the underlying questions of policy and this justification is lacking here.¹¹⁷ This reasoning is at least puzzling. As a matter of policy the union should have adequate information on the statutory subjects of collective bargaining so there can be a meeting of minds at the bargaining table. It is a matter of record that the employer usually controls this information and has often in the past used it to thwart reaching an agreement. After the *Truitt* case, the Court served notice on management that it best think twice before withholding necessary information. At the same time the Court is in a position to say that under the circumstances presented in another case, the withholding may not have been in bad faith. To some degree, at least, the same reasoning can be applied to the *Personal Products* and *Boone County* cases (the second and third in the trinity of cases mainly relied on here by Professor Cox).¹¹⁸

In the interest of creating an atmosphere conducive to a sincere and honest attempt to reach an agreement, the Board, in making a statutory interpretation regarding the union's actions, which frequently in the past have been associated with the subjective intent not to reach an agreement, ruled that such activities may stand alone as proof of bad faith. This is just what the Board has done in the past regarding employers' actions, e.g., written agreements and unilateral changes, even though there was no mention of these things in the statute. Hence the Board's view should offer no problem for the union acting in good faith, but rather serve only to exert pressure on the laggards. Besides, the trial examiner and the Board are often a little closer to the realities of the industrial competition between capital and labor than the detached theorist, and therefore more apt to know the point where theory must be tempered by practical expediency. As a matter of practical necessity, they are often forced to create this kind of presumption to facilitate their task of applying the law effectively,

¹¹⁶Jenkins, *The Supreme Court and the N.L.R.B.*, 9 *LAB. L.J.* 425 (1958).

¹¹⁷Cox, *supra* note 108, at 1433.

¹¹⁸*Id.*, at 1424.

leaving it to the courts and ultimately to the legislature to operate as a check on their decisions.

A further basis of dissent from the Cox position follows from a reading of his historical resumé. The reader justifiably wonders how the Board and the courts have managed to avoid until the present the per se peril, with its seemingly inevitable result of government regulation of collective bargaining, because he writes that as early as 1945 both the Board and the courts had indicated in the *May* case, that unilateral action by the bargaining employer is an unfair labor practice per se.¹¹⁹ Would not the same deductions that are made by that author from the *Truitt* case, be applicable to the *May* case, other things being equal, so that the subjective test for good faith should have been on its way out (with all the attendant dire consequences) some time ago? Or is there some undisclosed reason to think that the administrative and judicial bodies are less flexible now than they were in the middle forties? If there is not, it is reasonable to conclude that the Board and courts are not now radically departing from their customary approach to the problems of good faith bargaining.

Implicit in Cox's whole treatment of the good faith question is the idea that maturity in bargaining relations can be achieved only to the degree that the Board and the courts exercise a minimum role in the formulation of the bargaining agreement. Ideally of course, the mature collective bargaining relationship can be achieved primarily by the two parties involved. But as a practical matter there is often need for a third party with power to create and preserve the minimum conditions under which fair and honest negotiations can be carried on. Reluctantly, but necessarily, the government has been required to be this third party. For example, the Wagner Act theoretically required only that the Board see to it that management and labor got together and from this it was expected that there would follow a mature relationship without any further action on the agency's part. The origin, growth and development of the good faith doctrine up to 1947 clearly demonstrates that mature bargaining was found to go hand in hand with enforcement of a statutory standard of bargaining conduct.

What about the past thirteen years? Have we now reached that high plateau of mutual understanding and trust between employer and employee wherein bargaining as a "brute contest of economic power" has been replaced by "reason, a sense of responsiveness to government and public opinion, and moral principle,"¹²⁰ so that the Board can afford to play a less vigorous role in working out and applying the basic rules which insure fair play from both sides in arriving at a collective bargaining agreement? An affirmative answer would have to be based on proof that de facto there has been a decided improvement in labor-management relations in the past few years. According to one experienced researcher in the labor relations

¹¹⁹ *May Dep't. Stores Co. v. NLRB*, 326 U.S. 376 (1945).

¹²⁰ Cox, *supra* note 108, at 1409.

field, quite the contrary is true.¹²¹ The situation has steadily deteriorated in the past decade and the hardening of the lines of opposition reaches its peak at the bargaining table where every word is carefully measured so that all openings for a friendly give and take are rigorously excluded. The writer goes on to advocate the development of various common interest projects between labor and management in an effort to build up mutual understanding and confidence so that the fruits of these efforts will be realized in the bargaining process.

The pertinency of this information to the good faith obligation is obvious. The Board, since it must deal in the present, cannot afford to be guided by the hoped-for future. It must proceed pragmatically from case to case, measuring its exercise of statutory power according to the need presented by the particular facts of each case. It must allow the bargaining parties full freedom to negotiate their own agreement, but within the limits of the standards that have been arrived at through the combined efforts of Congress, the Board and the courts, in order to preserve this freedom for both management and labor. Time has shown that it would have been rash in the past to have predicted that the Board and the courts would fail to accomplish this objective, once there has been a review of their *record as a whole*. This should serve as a caveat to one who attempts to judge the future. After all the evidence is in, it might well call for the same verdict.

This questioning of Cox's basic premise and some of his general observations is intended to be only a partial dissent. Professor Cox's desire to maintain the subjective good faith test and his concern about its possible abandonment or diminution should be heartily endorsed. The good faith requirement was born of the need to hold up a standard of conduct so that justice might be served in the process of collective bargaining. As part of the natural evolution, there developed certain "rules of law" to serve as guides in deciding future cases. But because the law is not a dry collection of regulations but a living body of principles, the good faith doctrine must continue to grow; and this growth is contingent upon a continual employment of a test that is neither static nor arbitrary to determine whether the good faith requirement has been met. The so-called objective test fails on both counts. It would permit the duty to bargain in good faith to crystallize into a set of rigid rules. This would be inadequate to meet the diversified industrial problems arising from the American industrial scene. It would also be an open invitation to the unscrupulous employer or union to defeat its purpose of establishing a just result by living according to the letter but not the spirit of the regulation.¹²² Then, too, the per se approach is an easy prey to arbitrariness. The formulation of rules would be in the

¹²¹Sidney Hillman Address by Goldberg, *The State of Labor-Management Relations, 1958-1959*, Univ. of Wis., Nov. 5, 1958. This same hardening of relations at the bargaining table in states where there are "Right to Work" laws is noted by MEYER, *RIGHT TO WORK IN PRACTICE* (Report to the Fund for the Republic) 41 (1959).

¹²²The subjective test has the advantage of exacting a beneficial coercive effect by its element of uncertainty—akin to Mr. Justice Holmes' thought that "the law is full of instances where a man's fate depends on his estimating rightly some matter of degree." *Nash v. United States*, 229 U.S. 373, 377 (1913).

hands of the specialist, and thus the problem of the limitations of "rule by expert" would reappear.¹²³

In conclusion, it is submitted that the good faith requirement determined by the subjective test can continue to play a role in the development of our industrial democracy that parallels the role the due process requirement has played in our political democracy. For this reason (as well as other reasons already outlined) its continuation thus formulated is necessary to the achievement of industrial peace based upon justice. In the hands of the Supreme Court, the due process clause has been a yardstick to measure both federal and state action to determine if there has been a violation of "those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions."¹²⁴

Although the "flow of decisions" on due process has established a body of settled law, it constantly remains open to allow the courts to solve new situations not embraced in previous decisions.¹²⁵ To the end that decency and fair play be served in the drafting of the collective bargaining agreement — an objective of tremendous significance since it serves as a law within the law to regulate the daily lives of millions of men and women in industry — the good faith requirement has built up a substantial body of established precedent. But it cannot be chained to the past. It should be geared to the realities of the present. The good faith requirement must, like the due process requisite, remain flexible so that it will continue to be an effective instrument in the service of industry and the common good by continuing to hold management and labor to a standard higher than self interest.¹²⁶

REV. EMMETT P. O'NEILL

¹²³Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

¹²⁴Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

¹²⁵See, e.g., *Rochin v. California*, 342 U.S. 165 (1952).

¹²⁶On February 23, 1960, the Supreme Court in *NLRB v. Insurance Agents' Union*, 80 Sup. Ct. 419 (1960), ruled that the use of unorthodox forms of economic pressure by a union to enforce its bargaining demands in contract negotiations does not, of itself, amount to a refusal to bargain in good faith. This is evidence of the Court's refusal to label arbitrarily particular action as inconsistent with the duty to bargain in good faith.