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Collective Bargaining—NLRB Order Prohibiting Boulwarism Held Enforceable

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RECENT CASES

COLLECTIVE BARGAINING — NLRB ORDER PROHIBITING BOULWARISM HELD ENFORCEABLE

In the summer and fall of 1960, the General Electric Company[1] and the International Union of Electrical, Radio, and Machine Workers, AFL-CIO (IUE)[2] met informally and conducted formal negotiations in an attempt to arrive at a collective bargaining agreement. The relevant facts surrounding the 1960 negotiations are numerous and complex, to the extent of defying precise recitation. The following is intended not to exhaust, but rather to highlight the most significant features of the monumental record.

Any attempt to gain insight into the legal controversy arising out of the 1960 negotiations must begin with an awareness of the company's unique approach to labor relations and its development.[3] After a 1946 strike and settlement proved devastating to G.E., even though the company had been historically a generous and enlightened employer, it was decided that an entirely new tack must be taken in dealing with labor,[4] and Lemuel R. Boulware, a company vice-president with a recognized expertise in marketing, was assigned the task of overhauling G.E.'s employee relations policy. Drawing on both his personal experience and G.E.'s well-developed methods of consumer marketing, Boulware created a novel labor policy revolving around marketing concepts, treating employees as "job consumers" and employment contracts as "products."[5] The Boulware system has been in use at G.E. with great success since the defeat of 1946, and has been refined to an almost scientific precision.

At the very foundation of the Boulware system is the creating of a favorable "marketing" atmosphere by a constant and intense employee communication program, instilling in employees a pride in their function within the company and stressing at all times G.E.'s genuine and almost paternalistic interest in their welfare. Underlying this broad base is a clear orientation towards collective bargaining situations, and indeed it is in bargaining that the marketing analogy of the Boulware system is most fully developed. The contract offer as the "product" must be so fashioned as to

1. Hereinafter referred to as G.E.

2. Hereinafter referred to as the Union.

3. *See generally* H. NORTHRUP, BOULWARISM (1964) for a full and sympathetic account of the Boulware method by a former G.E. executive. *See also* D. CULLEN, NEGOTIATING LABOR-MANAGEMENT CONTRACTS 20-28 (N.Y. State School of Industrial and Labor Relations Bulletin 56, 1965); Cooper, *Boulwarism and the Duty to Bargain in Good Faith*, 20 RUTGERS L. REV. 653 (1966); Gross, Cullen, and Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 CORNELL L. REV. 1009, 1025-27 (1968).

4. D. CULLEN, *supra* note 3, at 21.

5. *Id.* at 22.

make it attractive and marketable to potential "consumers." Creating this "product" therefore, becomes an elaborate multi-stage process beginning with its "scientific" development on the basis of a multiplicity of factors, including employee desires which are widely solicited by management-conducted surveys and exit interviews, union demands, and terms and conditions of recent bargaining agreements reached by other bargaining parties both within and without the industry.[6] Once this great mass of information has been gathered, specific proposals are formulated by balancing employee interests against equity and debt commitments in light of general economic and industry conditions; the end-product is a "fair, firm offer" intended to be just and attractive to employees, and representing a position from which G.E. will not budge except in the event of a proven error in the company's "calculations" or to change the "mix" of benefits at the option of the Union.[7] It has been noted that there really is no magic in the Boulware formulation of a contract offer[8]—what is novel is that Boulwarism has created its own mystique, and has so effectively marketed itself that one is almost convinced of its "laboratory" procedure and "scientific" formula.

Even before the completion of the "product development" stage, the company communication system is attuned to the upcoming presentation of the fully-formulated "product," creating a sense of anticipation and perhaps lending credibility to the "scientific" proceedings taking place. And finally when the "product" is ready to be unveiled, G.E. summons all its advertising mastery and presents the "fair, firm offer" to employees and the public through a massive barrage of publicity in a concerted effort to convince all that the proposal is both equitable and absolutely firm.[9] Nearly every conceivable media is utilized in the campaign—television, radio, personal contact, letters, slingers, and the well-developed plant communication system which includes both daily bulletins and weekly newspapers.[10] Although the success and reinforcement of the Boulware dogma at G.E. is directly traceable to the peculiarities of the particular labor situation,[11] one cannot help but note that the masterful command of

6. Cooper, *supra* note 3, at 668.

7. Gross, Cullen, and Hanslowe, *supra* note 3, at 1025.

8. D. CULLEN, *supra* note 3, at 22.

9. N.L.R.B. v. General Electric Co., 418 F.2d 736, 741 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970) [hereinafter cited as instant case.]

10. Cooper, *supra* note 3, at 660. Judge Kaufman was guilty of no overstatement in his majority opinion in the instant case when he termed the publicity campaign in 1960 a "veritable barrage of publicity." Instant case at 740. To give some indication of the massiveness of the propaganda flow, a survey taken during the negotiations and strike found that employees at Schenectady received 246 separate written communications alone, while those at Pittsfield, Massachusetts received 277. Gross, Cullen, and Hanslowe, *supra* note 3, at 1026.

11. *See* D. CULLEN, *supra* note 3, at 25, where several reasons are given for Boulwarism's great success in the peculiar G.E. setting:

the media gives Boulwarism a convincing circularity—the message of the media that G.E. will "do right voluntarily" for employees by constant repetition becomes an independent "truth" and somehow serves to prove the genuineness of the Boulware motives; in effect, a remarkable self-fulfilling prophecy.

The company's conduct of the 1960 negotiations, characterized by unilateral action, an unbending toughness, and attempts to heighten the divisiveness of the Union, provides an empirical case study of Boulwarism in action. At an informal meeting in June prior to the beginning of formal negotiations, G.E. informed the Union that it would unilaterally institute a contributory group accident and life insurance plan for all employees, but that if the Union objected, it would limit the plan only to non-union employees. When the Union objected that the employer was required to bargain over such a change, G.E. cited the 1955 Union-G.E. Pension and Insurance Agreement, by which each party waived the right to require the other to bargain over the defined subject matter. Finally, G.E. instituted the insurance program for non-union employees only over the Union's objection.[12]

The Union presented its demands in June, and was promptly met with charges that the proposals were "astronomical" and "ridiculous." Immediately following the presentation of the Union demands, the communication campaign called for under the Boulware approach began to grind out propaganda asserting the unreasonableness of the Union's position, the "fairness" and "firmness" of the G.E. offer soon to be released, and the genuine concern which G.E. maintains for employee interests.[13] During the subsequent months of bargaining, G.E. declined to respond specifically to proposals of the Union, instead speaking generally to economic conditions and "level of benefits." G.E. did promise, however, that the Union's demands would be considered in formulating the company's proposal under the Boulware scheme of "product development."[14] Finally, on August 29, the "fair, firm offer" was presented to the Union informally and after only

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1) only one-quarter of all employees are represented by the IUE, the largest union, and a full one-half of all employees are non-union; 2) the United Electrical Workers Union (UE), the second largest union, is an ardent rival of the IUE and is anxious to regain its former position of dominance; 3) the IUE itself has suffered great internal strife; 4) by pursuing a policy of plant decentralization, the company has been able to isolate strong union plants, and create an implicit threat of loss of work to newer plants; and 5) the contract proposals at G.E. have been quite good. All of these taken together make it very difficult for the IUE to sustain a strike, particularly one of sufficient intensity to do any harm to the resilient G.E. production.

12. Instant case at 742.
13. *Id.*
14. *Id.*

one day of private discussion and against the pleas of the Union, the communication machine went into full operation, publicly unveiling the "product" and propagandizing its just features and "firmness."[15]

During the month of negotiations which followed, the Union repeatedly made requests for cost information on the company proposals, all of which were denied on the grounds that G.E. was discussing "levels of benefits" and not cost, and that the information requested was not available in the form the Union had specified. This conduct on the part of G.E. was in sharp contrast to its earlier co-operation in providing excellent data during the pre-negotiation period.[16] When the negotiations reached an apparent impasse in late September, in order to increase the pressure on the Union, G.E. announced that two important features of the offer, the three percent wage increase and the insurance pension benefits, would be put into effect immediately for non-union employees only, even before the end of the existing contract. This change was effectuated over the Union President's expressed fears that subsequent bargaining would be seriously hindered.[17] In the face of an imminent strike (which finally did take place on October 2), several attempts were made by G.E. officials at scattered plants to bargain directly with the locals,[18] all of which proved unsuccessful. G.E.'s adamancy persisted during the strike, with a refusal to provide definite contract language until the Union had finally chosen the options it desired.[19] The Boulware toughness was not to fade in the face of the utter defeat of the Union, as G.E. refused to enter into a joint strike settlement. On October 22, the Union signed a memorandum agreement while G.E. issued a unilateral "letter of intent."[20]

During the course of negotiations, the Union filed unfair labor practice charges with the National Labor Relations Board,[21] and on April 12, 1961, the General Counsel filed a complaint alleging that G.E. had violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act.[22] The Trial Examiner conducted hearings between July 1961 and January 1963, producing over ten thousand pages of testimony and resulting in the issuance of an Intermediate Report on April 1, 1963, which

15. *Id.* at 742-43.

16. *Id.* at 743.

17. *Id.*

18. Locals were contacted at Schenectady, Lynn, Pittsfield, Waterford, Louisville, Bridgeville, and Syracuse. *Id.* at 725.

19. *Id.*

20. *Id.* at 745-46.

21. Hereinafter referred to as the Board.

22. National Labor Relations Act, 29 U.S.C. §§ 158(a) (1), (a) (3), (a) (5) (1964). The § 8 (a) (3) charge referred to entirely local events at the Augusta, Georgia plant and are not in issue here. Instant case at 746.

found G.E. guilty of several violations.[23] Among the findings of the Trial Examiner was one which broadly castigated G.E.'s conduct—it held that the "totality" of the company's behavior was indicative of an attitude inconsistent with the section 8(a)(5) requirement of "good faith."[24] The Board affirmed the findings of the Trial Examiner as to both the specific and general violations in a divided decision on December 16, 1964, predicating the overall refusal to bargain in "good faith" on G.E.'s "entire course of conduct."[25] A divided court of appeals on October 28, 1969,[26] granted enforcement of the Board's order.[27] *Held,* an employer violates section 8(a)(5) by refusing to bargain in good faith, where he maintains a "take-it-or-leave-it" attitude towards negotiations, emphasizing the powerlessness

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23. The Trial Examiner found specific violations of § 8(a)(5) in: 1) the take-it-or-leave-it proposal on accident insurance; 2) the refusal to divulge relevant information to the Union; and 3) the attempts to deal directly with the locals. General Electric Co., 150 N.L.R.B. 192, 193 (1964).

24. Based on this broad violation, the trial examiner recommended as a remedy the usual cease-and-desist order, including: 1) a cease and desist from refusing to bargain collectively in good faith in national level bargaining; 2) a cease and desist from inhibiting the exercise of § 7 rights. The recommended order would also require the posting of a prepared notice which constituted a pledge to follow the Board's order, and the notification of the Regional Director within twenty days of what steps were taken to comply with the order. 150 N.L.R.B. 192, 196-97 (1964). This recommended order was subsequently adopted in full by the Board.

25. *Id.* at 197-98.

26. The bizarre events in the four and a half years between the Board's decision and the court of appeals' hearing of arguments were noted dolefully by Judge Kaufman in his majority opinion, while Judge Friendly's dissent spoke of the "venerable age" of the case as one good reason "for declining to churn up waters that already are troubled enough." Instant case at 773. After the Board's decision, the Union and G.E. raced to file their petitions, with the Union claiming it filed in the District of Columbia Circuit fourteen seconds before G.E. filed in the Seventh Circuit. To resolve this dilemma, the Board suggested as a logical compromise the Second Circuit, the site of most of the occurrences in question, a suggestion agreed to by the District of Columbia and the Seventh Circuits. IUE v. N.L.R.B., 343 F.2d 327 (D.C. Cir. 1965); G.E. v. N.L.R.B., 58 LRRM 2694 (7th Cir. 1965). It took another year to determine the Union's status in the action as an intervenor. N.L.R.B. v. General Electric Co., 59 LRRM 2094, 2095 (2d Cir. 1965), *vacated and remanded,* IUE v. N.L.R.B., 382 U.S. 366 (1966), *modified on remand,* N.L.R.B. v. General Electric Co., 358 F.2d 292 (2d Cir. 1966), *cert. denied,* 385 U.S. 898 (1966). The Board's petition for enforcement was then consolidated with G.E.'s petition for review. N.L.R.B. v. General Electric Co., 358 F.2d 292 (2d Cir. 1966), *cert. denied,* 385 U.S. 898 (1966). Finally, the parties exhausted another eighteen months in trying to reach agreement out of court. Instant case at 739.

27. The court also affirmed the findings of specific violations by the Board, holding:
1) Unilateral action by the employer over a mandatory subject of bargaining, combined with a refusal to bargain even though based on a negotiated agreement between the parties to waive the right to require the other to bargain over specified matter, is a violation of § 8(a)(5) notwithstanding § 8(d). Instant case at 749.
2) Where an employer fails to provide information relevant to negotiations within a reasonable time, it has violated § 8(a)(5). *Id.* at 752-53.
3) An employer engaged in national negotiations with an exclusive bargaining representative commits an unfair labor practice in violation of § 8(a)(5) by offering separate settlements to locals. *Id.* at 755.

and the uselessness of the Union to its members, and at the same time conducts a communications program depicting himself as the true friend of the employees' interests, further discrediting the Union, and seriously limiting the employer's ability to change his position. *N.L.R.B. v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969).

Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [9(a)]. . . ."[28] Despite the deceiving simplicity of the bare language of section 8(a)(5), the precise scope and nature of the duty imposed on the employer is not easily defined and has been a source of confusion since the enactment of the National Labor Relations Act. The problem is due at least in part to the fact that the section 8(a)(5) duty to bargain functions at varying levels within the collective bargaining relationship. At its surface level, section 8(a)(5) requires that the employer grant formal recognition to the status of the union as bargaining representative, and indeed, recognition itself was a grave problem in the immediate contemplation of the Act.[29] Beyond this external level of recognition, section 8(a)(5) delves into the nature of the bargaining relationship, and demands that the employer, in pursuance of his duty to bargain, must do substantially more than merely "go through the motions" of bargaining without any serious attempt to arrive at an agreement.[30] Probing deeper into the very vitals of the bargaining relationship, section 8(a)(5) requires that both the objective conduct and the subjective state of mind of the employer not be inconsistent with the exercise of the section 7 right of employees to bargain collectively through their section 9(a) representative. In its final stage,

28. 29 U.S.C. § 158(a)(5) (1964).

29. Senator Walsh, Chairman of the Senate Committee on Labor and Education at the time of the enactment of the N.L.R.A., conceived § 8(a)(5) as being limited to this level, and in a much-quoted comment asserted that § 8(a)(5) was to do no more than escort the union representative in the door and seat him at the bargaining table with the employer. Cooper, *supra* note 3, at 654.

30. *See* N.L.R.B. v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943), which, in dealing with a sham bargaining situation, interpreted the duty to bargain as an "obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement." Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1412-13 (1958), elaborates on sham bargaining and the necessity of the application of § 8(a)(5):

> It was not enough for the law to compel the parties to meet and treat without passing judgment upon the quality of the negotiations. The bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition. The N.L.R.B. reports are filled with cases in which a union won an election, but lacked the economic power to use the strike as a weapon for compelling the employer to grant it real participation in industrial government. As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of collective bargaining without the substance.

there is great reliance on what is only left unsaid in section 8(a)(5), on the implicit ideal of rational and informed bargaining over issues of substance between equal partners at the bargaining table,[31] and on the obligation of the employer not only to act, but to act in good faith.[32] To give section 8(a)(5) meaning within the scheme of the Act, it is necessary to view it as a multi-leveled legal requirement imposed on the employer, essential to the implementation of the general policy of the Act promoting employee participation in the fixing of the terms and conditions of employment.

Since the very early days of the Act, the Board has ranged through the various levels of section 8(a)(5) enforcement, gaining entry into the intimacies of bargaining relationships, and seeking out in its policing role, conduct which falls short of the statutory standard. In the 1947 Taft-Hartley review of the Act, Congress, in enacting section 8 (d), recognized the Board's far-ranging role, and gave tacit approval to the determinations of law under section 8(a)(5) in the Board's *ad hoc* adjudication by defining the duty "to bargain collectively" as requiring "meet[ing] at reasonable times and confer[ring] in *good faith* with respect to wages, hours, and other terms and conditions of employment."[33] At the same time, underlying this approving mood was a legislative fear that the Board's discretionary role ran dangerously close to an intervention into the substance of bargaining, and that section 8(a)(5) might be construed by the Board as a *carte blanche* into that sacrosanct domain.[34] To protect against this danger, Congress made it clear to the Board in the body of section 8 (d) that the section 8(a)(5) obligation "does not compel either party to agree to a proposal or require the making of a concession."[35]

Conscious of the section 8 (d) mandate and prohibition, the Board has carefully engaged in enforcing section 8(a)(5) at its most delicate

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31. *See* Cox, *supra* note 30, at 1409.

32. The "good faith" addendum to § 8(a)(5) seems to have its origin in a report of the Senate Committee on Education and Labor, which stated that the objective of § 8 (a) (5) was to impose on the employer the broad duty, correlative to the § 7 right of employees to bargain collectively: "to recognize such representatives as they have been designated and to negotiate with them in a *bona fide* effort to arrive at a collective bargaining agreement." S. REP. No. 573, 74th Cong., 1st Sess. 12 (1935).

The Board quickly adopted the good faith requirement, and asserted its necessity in its first annual report:

"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." 1 NLRB ANN. REP. 85, cited in N.L.R.B. v. Insurance Agents' Int'l Union, 361 U.S. 477, 485 (1960).

33. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964) (emphasis added).

34. Instant case at 767. Cox, *supra* note 30, at 1415.

35. 29 U.S.C. § 158 (d) (1964).

level, where the union has been recognized and the parties entertain desires to reach an agreement, and in the course of its policing of bargaining conduct has developed the requisite elements of the duty to bargain in good faith. To fulfill his duty, the employer has been held to a "good faith" state of mind, a subjective determination based on the objective facts of the totality of the employer's conduct.[36] Irrespective of subjective good faith, particular objective facts have, in themselves, been identified as so contrary to the duty "to bargain collectively" as to constitute refusals to bargain "in fact"[37] and therefore per se violations of section 8(a)(5).[38] Among these are a refusal to sign a written agreement,[39] a unilateral change in the terms of employment during negotiations,[40] and a refusal to put forth available information relevant to bargaining in order to substantiate a claim.[41] In *N.L.R.B. v. Katz*,[42] decided in 1962, the United States Supreme Court explicitly granted approval to the Board's structuring of the law under section 8(a)(5) into objective refusals to bargain and subjective bad faith, and vigorously held that: ". . . the Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement."[43]

The G.E. case, with all its complexities and peculiarities, came before the Board only two years after the Supreme Court had promulgated the

36. The required good faith state of mind has been variously described. Judge Magruder, in N.L.R.B. v. Reed & Prince Mfg. Co., 205 F.2d 131, 135 (1st Cir. 1953), proposed that the employer must "make some reasonable effort in some direction to compose his differences with the union." The Board is fond of recalling the test cited in its first annual report: "a serious intent to adjust differences and to reach a common ground," cited in General Electric Co., 150 N.L.R.B. 192, 194 (1964). In any case, the essential element of subjective good faith is a certain "willingness to compromise," yet not quite a willingness to "concede," for concession is expressly ruled out as a test of good faith by § 8(d). Cox, *supra* note 30, at 1414. The distinction between compromise and concession appears to be very fine indeed.

37. *See* N.L.R.B. v. Katz, 369 U.S. 736 (1962), where the United States Supreme Court strongly affirmed the Board's findings under a per se approach, apparently resolving a long standing controversy dating back to N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1956), over whether the Board could find a § 8(a)(5) violation without subjective bad faith. The Court asserted that in the case of a refusal to bargain "in fact," one need not even reach the issue of good faith in finding a violation, and held: "(a) refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach an agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargins to that end." N.L.R.B. v. Katz, 369 U.S. 736, 743 (1962).

38. *See* Cox, *supra* note 30, 1420-32, for a critical review of the per se approach to bargaining under § 8(a)(5).

39. H. J. Heinz v. N.L.R.B., 311 U.S. 514 (1941).

40. N.L.R.B. v. Katz, 369 U.S. 736 (1962).

41. N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1956); Pioneer Pearl Button Co., 1 N.L.R.B. 837 (1936).

42. 369 U.S. 736 (1962).

43. *Id.* at 747.

broad *Katz* mandate. Drawing on the strength of *Katz,* expressly quoted at the beginning of the Board's opinion, the Board deftly penetrated G.E.'s massive and comprehensive course of conduct, and launched a broad indictment of the Boulware approach. In response to G.E.'s main contention that it could not have violated section 8(a)(5) since it was desirous of entering into an agreement, had met and conferred with the bargaining representative on all mandatory subjects of bargaining, and had not taken unlawful unilateral action, the Board replied that refraining from this proscribed conduct was not enough, and that by entering into negotiations with a take-it-or-leave-it attitude G.E. had shown itself to be lacking "the serious intent to adjust differences and to reach an acceptable common ground"[44] required in fulfillment of the statutory duty to bargain in good faith. "Good faith bargaining" was defined by the Board as involving not only an external "procedure for meeting and negotiating," but also a "bona fide intention."[45] The publicity campaign designed to "disparag[e] and discred[it] the statutory representative in the eyes of its employee constituents" and "to create the impression that the employer rather than the union is the true protector of the employees' interests," was found to be wholly inconsistent with a good faith "minimum recognition" of the active bargaining role that the union is entitled to play in the "shared process" of negotiation.[46] In a like manner, G.E.'s conduct at the bargaining table was held by the Board to fall short of "the concept of meaningful and fruitful negotiations" envisaged by the Act, in that G.E. had set itself up as a "sort of administrative body" with sole responsibility for the terms and conditions of employment, while the Union was relegated from its rightful status of "joint participant" to a mere "advisor."[47] The practical effect of the total Boulware plan, according to the Board, was G.E.'s consciously leading itself into a position from which it would be unable to respond to union proposals even it it cared to.[48] Finally, the Board asserted that the publicity campaign and the conduct at the bargaining table were natural complements of each other, and together "were calculated to disparage the Union and to impose without substantial alteration Respondent's 'fair and firm' proposal, rather than to satisfy the true standards of good faith bargaining required by the statute."[49] Realizing the broadness of the Boulware plan, the Board closed its opinion by predicating its determination of subjective bad faith on G.E.'s "entire course of conduct" —"its failure to furnish relevant information, its attempts to deal separately

44. 150 N.L.R.B. 192, 194 (1964).
45. *Id.*
46. *Id.* at 194-95.
47. *Id.* at 195.
48. *Id.* at 196.
49. *Id.*

with locals and to bypass the national bargaining representative, the manner of its presentation of the accident insurance proposal, the disparagement of the Union as bargaining representative by the communication program, its conduct of the negotiations themselves, and its attitude or approach as revealed by all these factors."[50]

The Board's decision in G.E. was hardly revolutionary — on the contrary, the Board took great pains to fit its language into the traditional subjective bad faith cast, and expressly warned that it was making no specific rules.[51] It was remarkable, however, in that the Board went far in developing the underlying considerations of recognition of the statutory representative and joint participation in the bargaining process contemplated by the Act as a whole and specifically by the section 8(a)(5) duty to bargain. In direct contrast, the split decision of the court of appeals was far less satisfying in terms of development of legal principles, but at the same time far stronger in indicting Boulwarism by creating a reasonably concrete rule much in the same vein as that of the Supreme Court in *Katz*.

Writing for the majority, Judge Kaufman upheld the Board's finding of an overall failure to bargain in good faith based on the "totality of the circumstances," maintaining that G.E.'s conduct lacked subjective good faith in that "it implies that the Company can deliberately bargain and communicate as though the Union did not exist, in clear derogation of the Union's status as exclusive representative of its members under section 9(a)."[52] The court went even further than the Board's general grounds, however, and relying on *Katz* held that regardless of subjective good faith an employer's combining of "take-it-or-leave-it" bargaining with a publicity campaign so stressing the "unbending firmness" of the position adhered to that no changes could be made, constitutes a refusal to bargain "in fact" and a per se violation, as it necessarily precludes any meaningful negotiations.[53] The communications program was clearly central to both facets of

50. *Id.*

51. "Nothing in our decision bars fact-gathering or any specific methods of formulating proposals. We prescribe no timetable for negotiators. We lay down no rules as to any required substance or content of agreements. Our decision rests rather upon a consideration of the totality of Respondent's conduct." *Id.*

52. Instant case at 763. G.E. contended that it had made so many concessions in the course of negotiations which under § 8(d) it was not obligated to make that its good faith was conclusively proven. The court agreed that the making of concessions would support an inference of good faith, but found G.E.'s concessions to be insubstantial. The court made clear, however, that in accord with § 8(d) it did not consider the lack of concessions as evidence of bad faith. *Id.* at 758.

53. Aside from the Board's reliance on *Katz*, the creation of the per se rule seems to have been motivated by a desire to ensure that the Board's order would be enforceable. While the usual broad cease and desist from refusing to bargain in good faith is not conducive to response and carries only psychological force, by pinpointing the exact conduct proscribed it becomes very difficult for the violator not to respond under pain of being held in contempt. Judge Kaufman intimated this much by saying: "It is this specific

the Kaufman position, for it was found to result in a devitalization of negotiations and a derogation of the Union's bargaining status, indicia of subjective bad faith, as well as the company's deliberately becoming trapped in a bargaining stance from which it was unable to respond, the very substance of the refusal to bargain in fact.[54] This latter effect was isolated by the majority, and it was asserted that this "pattern of conduct by which one party makes it virtually impossible for him to respond to the other—knowing that he is doing so deliberately" is essentially indistinguishable from merely "going through the motions" with a " 'predetermined resolve not to budge from an initial position' " and is inconsistent with "a serious attempt to resolve differences and reach a common ground."[55] The Court concluded by proposing that if an employer's unilateral changes during bargaining were proscribed in *Katz* for placing a particular topic outside of the bargaining process, then surely an approach which admits of no response on all bargaining topics must be proscribed for the same reason.[56]

The concurring opinion of Judge Waterman in effect refined the majority approach set forth by Judge Kaufman. According to Judge Waterman, "[a] company may make a firm, fair offer to the union and may stand by that offer, but the company should not be permitted to advertise to its employees that it believes in the firmness of its offers for the sake of firmness."[57] This very narrow aspect of the communications program, the adver-

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conduct that G.E. must avoid in order to comply with the Board's order, and not a carbon copy of every underlying event relied upon by the Board to support its findings." *Id.* at 762. However, Judge Friendly in his dissenting opinion noted that since many of the principals of the 1960 negotiations are no longer at G.E., no contempt proceeding could be maintained. *Id.* at 774.

54. *Id.* at 759-60. G.E. argued that § 8(c) of the Act prohibited the use of the communications program as evidence of a § 8(a)(5) violation. Section 8(c) reads:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit. 29 U.S.C. § 158(c) (1964).

In response to G.E.'s contention, Judge Kaufman, citing a comment of Senator Taft, limited the prohibition of § 8(c) to expression not ordinarily "relevant" to the substance of the unfair labor practice. Instant case at 760. Judge Friendly's dissent went even further than the G.E. argument, and actually posited an affirmative § 8(c) right to communicate. *Id.* at 771-73. It seems somewhat strange that the § 8(c) argument gained such importance in the decision of the court. Under the majority position, it is less the expression itself than the overall tactical use of communications in a comprehensive plan that is evidence of the § 8(a)(5) violation.

55. Instant case at 762.

56. *Id.* The majority so emphasized its per se rule while paying only token tribute to subjective bad faith as to lead one to suspect that its adoption of the Board's basis of decision was only a formality taken in compliance with the doctrine of S.E.C. v. Chenery Corp., 318 U.S. 80, 95 (1943), that: "[a]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

57. Instant case at 763-64.

tising of a policy of firmness for firmness' sake, was focused on by Judge Waterman as the crux of the refusal to bargain in fact, as it specifically leads to two distinct evils – the inability to respond and the derogation of the Union's bargaining status.[58] Judge Waterman's position is really a logical extension of Judge Kaufman's – if there is both broad subjective bad faith and a per se rule, the per se rule necessarily tends to supercede the other because of its more concrete nature.

Judge Friendly dissented vigorously to the finding of an overall refusal to bargain in good faith. Objecting to the finding of bad faith based on the totality of G.E.'s conduct, he proposed that where a party entertains a desire to reach an agreement and actually does reach an agreement, he cannot be acting out of subjective bad faith.[59] To hold otherwise, stated the dissent, would lead into considerations of substance expressly forbidden by section 8 (d). Expressing a distaste for the "take-it-or-leave-it" label, the dissent charged that if the majority meant by this hard bargaining based on confidence in one's ability to have one's way, this, too, could be no violation of section 8(a)(5) without a clear conflict with section 8 (d).[60] Next, Judge Friendly attacked the very heart of the majority position, disputing factually that G.E. had gotten itself into a position admitting of no change by citing a number of changes and options offered to the Union.[61] Realizing how critical the communications program was in the decisions of both the Board and the majority of the court, the dissent focused on it, and maintained not only that section 8 (c) prevented the use of expression as evidence of bad faith, but also that it created an affirmative right of free speech harkening back to the First Amendment which would be compromised by any finding of a violation of section 8(a)(5).[62] Lastly, the dissent questioned the enforceability of the Board's order, because of both the "venerable age" of the case and the vagueness of the rule.[63]

Despite the lack of over-all clarity in the resolution offered by the court of appeals, it is in many respects quite perceptive. Clearly, the main thrust of the court's decision is away from subjective bad faith and towards the creation of a definite per se rule prohibiting an employer from so behaving as to limit severely his ability to respond to his bargaining partner. By identifying this specific conduct as a refusal to bargain in fact, the

58. *Id.* at 764.

59. *Id.* at 767. Judge Kaufman responded to Judge Friendly's position by arguing that a desire to reach an agreement or an actual agreement does not preclude a failure to satisfy the statutory obligation to make "a serious attempt to resolve differences and reach a common ground." *Id.* at 761-62.

60. *Id.* at 768.

61. *Id.* at 769-70.

62. *Id.* at 770-73. *See generally* authority cited note 54 *supra.*

63. *Id.* at 773-74.

court strikes at the very heart of the Boulware scheme, and at the same time evades the vagaries and difficulties implicit in the Board's subjective bad faith holding.[64] Most importantly, the per se rule eliminates any confusion that might arise out of the natural tension created between section 8(d)'s elucidation of the duty to bargain as requiring no concessions and the Board's broad proscription of Boulwarism's take-it-or-leave-it approach. Even if section 8(d) is read as fully protecting refusals to concede, the court's rule escapes any conflict by forbidding only tactics which would prevent the employer from making concessions even if he so desired. Although it is nowhere expressed in the opinions, the court seems to perceive quite clearly that the ability to respond in the heat of bargaining and an openness to compromise are essential to effective collective bargaining as contemplated by the Act.

Although the approach taken by the Board differs considerably in form from the court's per se holding, it is remarkable how similar the two are in substance. Whether G.E. violated section 8(a)(5) by engaging in negotiations with a bad faith state of mind as the Board proposed, or by refusing to bargain in combining a take-it-or-leave-it approach with a particular type of communication program, as the court suggests, precisely the same aspects of conduct are being condemned for precisely the same reasons. G.E.'s pervasive behavior, regardless of how it is characterized, was simply inconsistent with the section 8(a)(5) duty to recognize the statutory bargaining partner for the purpose of joint participation in the bargaining process. To say that G.E. had a bad faith state of mind is really no different from asserting that its objective conduct evidenced a refusal to bargain in fact. Finally, the difference in the two approaches is merely formalistic. At least within the peculiar context of the G.E. case, it is essentially irrelevant which is chosen, as the court seems to recognize in its findings of both subjective bad faith and a per se violation.

While the court spent its energy in digesting the complexity of the facts and strained to produce its per se rule, it may have failed to grasp the magnitude of the issue at hand. As the Board undoubtedly realized, the Boulware system challenges the very fabric of collective bargaining. In place of real bargaining characterized by equality at the negotiating table,

64. The court seems to have been motivated toward a per se approach by a concern for the vagueness of the subjective bad faith determination, and the enforceability of its remedy. In creating the per se rule, the court may very well have been influenced by the thesis of Gross, Cullen, and Hanslowe, *supra* note 3. In this 1968 study, the commentators asserted that: "[t]he NLRB and the courts should find bad faith only on the basis of offenses that can be identified precisely, and to which precise remedies can be applied." *Id.* at 1021. However, the court was forced to retain in its decision the Board's subjective bad faith grounds for decision in order to grant enforcement under S.E.C. v. Chenery Corp., 318 U.S. 80, 95 (1943), so finally the Board's broad order seems not to have gained in enforceability.

it essentially refuses to recognize the bargaining status of the lawful employee representative, and instead chooses to impose its settlement by the skillful and massive use of propaganda, the entire scheme bearing remarkable similarity to a corporate authoritarianism. Such an approach to collective bargaining runs head on into the general policy of the Act demanding that employees be free to participate in decision-making by exercising their right to bargain collectively over matters affecting the terms and conditions of their employment. More precisely, Boulwarism collides with the obligation implicit in both section 9(a) and section 8(a)(5) that the employer grant the lawful representative of his employees not merely formal recognition, but the "minimum recognition" necessary for meaningful, joint participation in the "shared process" of negotiations.[65] In sum, Boulwarism by its artful use of propaganda and tactics poses a serious threat to free employee participation in the fixing of the terms and conditions of employment, and thus is incompatible with the statutory duty to bargain and the tradition of collective bargaining itself.

SAMUEL PALISANO

CRIMINAL LAW—DUE PROCESS AND THE RIGHT TO TRIAL BY JURY IN STATE CRIMINAL PROCEDURE

Appellant, Robert Baldwin, was arrested in New York City on August 10, 1968, and charged with the crime of jostling,[1] a Class A misdemeanor punishable by a sentence of imprisonment of up to one year.[2] The appellant was brought to trial in the New York City Criminal Court. Inasmuch as the New York City Criminal Court Act, section 40, provides "[a]ll trials in the court shall be without a jury,"[3] his pretrial motion for a jury trial was denied. The trial resulted in a conviction and imposition of the maximum sentence. The judgment was affirmed by both the Appellate Division and

65. General Electric Co., 150 N.L.R.B. 192, 194 (1964).

1. N.Y. PENAL LAW § 165.25 (McKinney 1967) provides that:
A person is guilty of jostling when, in a public place, he intentionally and unnecessarily:
1. Places his hand in the proximity of a person's pocket or handbag; or
2. Jostles or crowds another person at a time when a third person's hand is in the proximity of such person's pocket or handbag.
Jostling is a class A misdemeanor.
2. N.Y. PENAL LAW § 70.15(1) (McKinney 1967).
3. N.Y.C. CRIM. CT. ACT § 40 provides that:
All trials in the court shall be without a jury. All trials in the court shall be held before a single judge; provided, however, that where the defendant has been charged with a misdemeanor . . . he shall be advised that he has the right to a trial in a part of the court held by a panel of three of the judges thereof. . . .