Michigan Law Review

Volume 59 | Issue 5

1961

Labor Law- Railway Labor Act-Union Referendum Provisions as an Indication of Failure to Bargain in Good Faith

Paul D. Borman
University of Michigan Law School

LABOR LAW—RAILWAY LABOR ACT—UNION REFERENDUM PROVISIONS AS AN INDICATION OF FAILURE TO BARGAIN IN GOOD FAITH—In negotiations arising out of a "major dispute"[1] under the Railway Labor Act,[2] defendant's union representatives were prohibited by a provision in the union constitution[3] from reaching any final agreement without the proposals having first been adopted by a majority vote of the union membership. At the bargaining table, the union representatives presented no specific proposals or counter-proposals; when a management offer was made and presented to the union membership, the representatives refused either to sign

1 "Major disputes" have been defined as disputes which "encompass those differences arising out of proposals for new contracts or of changes in existing contractual or legal obligations and relations." Norfolk & P.B.L.R.R. v. Brotherhood of R.R. Trainmen, 248 F.2d 34, 39 (4th Cir. 1957).

2 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-88 (1958).

3 Section 10 (f) of the constitution of the Switchmen's Union provides in part: "No authority shall exist to settle a general wage and/or rules movement arising from direct negotiations with a carrier or from mediation excepting only after approval by a majority vote of the membership. . . ." Quoted in principal case at 583 n.1.

it or to recommend its adoption. The management proposal was defeated at the union referendum, and a strike date was set. Plaintiff railroad sought a temporary injunction against the strike in the federal district court, contending that the union had not bargained in good faith. *Held,* temporary injunction granted.[4] The actions of the union representatives, coupled with the referendum requirement of the union constitution, frustrated the intent of the RLA to facilitate the expeditious settlement of labor-management disputes. *Chicago, R.I. & Pac. R.R. v. Switchmen's Union,* 187 F. Supp. 581 (W.D.N.Y. 1960).

Although there is no specific mention of "good faith" bargaining in the provisions of the RLA, such a requirement has been implied from the language of section 2 of that act,[5] interpreted in the light of the history of the "good faith" provisions of the National Labor Relations Act.[6] The history of the good faith bargaining concept has been traced[7] to section 301 of the Transportation Act of 1920,[8] which made it the duty of both labor and management to exert every reasonable effort to avoid interruptions in the operations of any carrier growing out of any dispute. This provision was carried forward, with slight changes in phraseology, into section 2 of the RLA.[9] Still later its philosophy was embodied in section 8 (5) of the NLRA,[10] which declared it to be an unfair labor practice for an employer to refuse to bargain collectively with the duly-constituted representative

[4] The court held that the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-10, 113-15 (1958), did not divest it of jurisdiction to grant the temporary injunction requested by the railroad. Citing American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777, 783-89 (S.D.N.Y. 1958), it reasoned that the act did not apply to situations where the "procedures preliminary to a legal strike [in this case, good-faith bargaining] have not been fully complied with. . . ." Principal case at 584.

[5] Railway Labor Act § 2, 44 Stat. 577 (1926), 45 U.S.C. § 152 (1958), provides: "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce. . . .

"Second. All disputes . . . shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers, and by the employees. . . ."

[6] Section 8 (d), added by Labor-Management Relations Act (Taft-Hartley Act) § 101, 61 Stat. 142 (1947), as amended, 29 U.S.C. § 158 (d) (1958), provides: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in *good faith* with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ." (Emphasis added.)

[7] Cox, *The Duty To Bargain in Good Faith,* 71 HARV. L. REV. 1401 (1958). See also Smith, *The Evolution of the "Duty To Bargain" Concept in American Law,* 39 MICH. L. REV. 1065 (1941).

[8] 41 Stat. 469 (1920).

[9] Railway Labor Act § 2, 44 Stat. 577 (1926), 45 U.S.C. § 152 (1958), quoted *supra* note 5.

[10] National Labor Relations Act (Wagner Act) § 8 (5), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 158 (a) (5) (1958).

of its employees. The National Labor Relations Board and the courts, in interpreting this latter provision, felt that the duty to bargain collectively was not discharged by a mere observance of such formalities as holding meetings. There was therefore developed a requirement that the bargainers approach the negotiations with a *state of mind* such as to evince a sincere desire to reach agreement.[11] This was the judicial gloss codified in the definition of good faith bargaining which was added to the NLRA by the Taft-Hartley amendments in 1947.[12]

Professor Cox has defined good faith bargaining under the NLRA as follows: "The employer (or union) must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach a common ground. . . ."[13] The recent interpretation of section 2 of the RLA in *American Airlines v. Air Lines Pilots Ass'n*[14] is to substantially the same effect. The case held that good faith compliance with the procedures set up in the act required that the union's representatives exhaust every reasonable possibility of reaching an agreement. Finding no helpful case precedent under the RLA, the court took its standards for good faith bargaining from the NLRB's interpretation of the good faith provisions of the NLRA.[15] Such analogous authority would also seem relevant in the present discussion. The NLRB's probable reaction to the facts of the principal case is unclear. On the one hand, an administrative ruling of the NLRB's general counsel holds that the vesting of an attorney with full authority to negotiate, subject, however, to final ratification by the employer, does not constitute an unlawful refusal to bargain.[16] On the other hand, several NLRB cases in this area hold that failure to invest a negotiator with real authority to arrive at a final agreement signifies that the employer has failed to bargain in good faith.[17] A closer look at the facts of these cases, however, seems to reconcile these divergent results. In each of the cases where a refusal to bargain was found, the lack of authority on the part of the management representative was only one of several factors which indicated bad faith on the employer's part. In one case, the representative had been instructed to reject every proposal submitted by the union, and to refrain from submitting any counter-proposals.[18] In another, the employer had discriminated against pro-union employees and threatened to repudiate a wage increase if an NLRB complaint was not

11 NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943). See generally Cox, *supra* note 7; Smith, *supra* note 7.

12 National Labor Relations Act § 8(d), added by Labor-Management Relations Act § 101, 61 Stat. 142 (1947), as amended, 29 U.S.C. § 158(d) (1958), quoted *supra* note 6.

13 Cox, *supra* note 7, at 1416.

14 169 F. Supp. 777 (S.D.N.Y. 1958).

15 *Id.* at 793-94.

16 Administrative Ruling of NLRB General Counsel, Case No. F-818, 43 L.R.R.M. 1457 (1958).

17 NLRB v. A. E. Nettleton Co., 241 F.2d 130 (2d Cir. 1957); Century Cement Co., 100 N.L.R.B. 1323 (1952); Standard Generator Serv. Co., 90 N.L.R.B. 790 (1950).

18 Century Cement Co., *supra* note 17.

withdrawn.[19] In general, the NLRB's attitude seems to be that the degree of authority with which a representative must be invested in order to make good faith bargaining possible is not susceptible of general definition.[20] It seems that each case must be considered in the context of its particular facts, and that insufficient authority is merely a factor to be weighed in determining the state of mind of the respective parties to the negotiations.

It is not entirely clear how the principal case fits into this background. It appears that plaintiff railroad and the National Mediation Board attempted to convince the court that the referendum provision, in itself, precluded good faith bargaining on the part of the union.[21] The court's opinion does not appear to go this far, however. It lists the effects of the referendum provision as only one of three factors which convince it that the union had not satisfied its duty under the act.[22] The relative weight assigned to each of these factors remains for subsequent clarification. If the union representatives had made proposals and counter-proposals at the bargaining table, and if they had subsequently recommended approval of the management offer when it came up for referendum vote, would the mere fact that the union constitution denied the labor negotiators authority to bind the membership be, in itself, sufficient to prove lack of good faith bargaining on the union's part? Of course, the question is probably academic, since in the situation hypothesized it is most likely that the union membership would accept the recommendation of its negotiators and adopt the management proposal, and no strike would follow. If the referendum were unfavorable, however, and a subsequent strike threat brought the situation before the courts, a holding that the union had not bargained in good faith would seem to be untenable on grounds of basic policy.

The requirement that management proposals must be voted on by union referendum before final acceptance means, at the very most, that the union negotiators cannot *immediately* bind the union to any agreement reached during bargaining. It may be admitted that under union constitutions like that in the present case, full *formal* authority for the union negotiators is lacking. Actual practice, however, indicates that this deficiency is no more than a formal one. As a practical matter union negotiators are the union leaders themselves, and ratification by the union membership of

[19] Standard Generator Serv. Co., *supra* note 17. A. E. Nettleton Co., *supra* note 17, also involved a powerless representative sent by the employer, coupled with a wage increase conditioned on dropping union membership.

[20] Fry Roofing Co. v. NLRB, 216 F.2d 273, 275 (9th Cir. 1954).

[21] Plaintiffs cited the union referendum provisions, quoted in part at note 3 *supra*, in support of their contention that the union negotiating committee performed no more than "messenger services." The National Mediation Board was given leave by the court to file a brief "supporting plaintiffs' contention that the provisions of Section 10 (f) of the Union constitution are violative of the Railway Labor Act." Principal case at 583.

[22] "[T]he court is satisfied that the duty is not performed by placing at the bargaining table persons who are divested of authority to decide, who in fact refrain from presenting specific proposals or counter-proposals on behalf of the union, and who, when an offer is made for presentation to the membership, refuse either to sign or to recommend its adoption by the membership." Principal case at 583-84.

agreements recommended by them comes, ordinarily, as a matter of course. Thus in most cases the net effect of a referendum provision seems to be no more than a slight delay in reaching a final agreement. Surely this experience warrants a finding that such a provision does not *per se* indicate bad faith on the part of the union.

A holding that union referendum provisions are conclusive indications of bad faith would force all unions having similar provisions in their constitutions to eliminate them.[23] An important democratic process giving union members a check on their officers would thus be destroyed. Such a result would seem to be in direct conflict with the intent of Congress, as evidenced by the Labor-Management Reporting and Disclosure Act of 1959,[24] to protect and increase democratic processes in the internal affairs of American labor unions.

Paul D. Borman

[23] An example of a similar provision can be found in art. 19, § 3 of the constitution of the International Union of the United Auto Workers.

[24] 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (Supp. I, 1959).