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Labor Law - Collective Bargaining - Union's Unprotected Harassing Activites as a Refusal to Bargain in Good Faith

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LABOR LAW—COLLECTIVE BARGAINING—UNION'S UNPROTECTED HARASSING ACTIVITIES AS A REFUSAL TO BARGAIN IN GOOD FAITH—While bargaining for a new contract, the union announced that it would engage in a "work-without-contract" program designed to harass the insurance company employer into accepting its demands, in the event that no agreement was reached prior to the expiration of the existing contract. When that contingency occurred, the program was instituted consisting of such activities as refusing to write new business for a period, refusing to do customary duties, engaging in "sit-in mornings," soliciting policyholder support against the company, and mass demonstrations at the company's home office.[1] The

[1] Other harassing activities were refusal, after writing of new business was resumed, to comply with company reporting procedures; refusal to participate in sales campaigns; reporting late to the office; "doing what comes naturally"; not attending special business conferences; picketing and distributing leaflets; soliciting signed policyholders' petitions.

union continued to attend bargaining sessions, but it informed its members in a directive that ". . . a satisfactory contract will be won in the field and not at the bargaining table."[2] The company thereupon charged the union with a refusal to bargain in good faith in violation of section 8 (b) (3) of the Taft-Hartley amendment.[3] The National Labor Relations Board rejected the Trial Examiner's recommendation to dismiss and entered a cease and desist order against the union.[4] The Court of Appeals for the District of Columbia unanimously refused to enforce the order.[5] On certiorari to the Supreme Court, *held,* affirmed, three justices dissenting.[6] Where a union's conduct at the bargaining table is in apparent good faith, its concurrent use of extrinsic economic weapons to force acceptance of its demands is not inconsistent with good faith bargaining. *NLRB v. Insurance Agents' International Union, AFL-CIO,* (U.S. 1960) 80 S.Ct. 419.

The Wagner Act[7] imposed upon employers the duty to bargain collectively with the representatives of their employees over all labor disputes between them regarding wages, hours, and other conditions of employment.[8] While the act was silent as to the substance or scope of this duty, a clear dichotomy of desiderata soon appeared. On the one hand, the Board and the courts early read into the duty a standard of good faith.[9] The conventional statement of this standard required the employer to ". . . enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement. . . ."[10] Section 8 (d) of the Taft-Hartley amendment to the act incorporated this judicially-created standard into an explicit statutory command.[11] Section 8 (b) (3)[12] extended the duty so defined to cover unions, the principal motivation being to prevent unions from adopting, as it was felt they had often done in the past, a "take-it-or-leave-it attitude" at the bargaining table.[13] Judged solely by the good faith standard, the union's actions in the principal case may not have met the statutory requirement. As the quoted directive to its members clearly shows, the union took

2 Insurance Agents' International Union, AFL-CIO, 119 N.L.R.B. 768 at 771, n. 7 (1957).

3 61 Stat. 141 (1947), 29 U.S.C. (1958) §158 (b) (3).

4 Insurance Agents' International Union, AFL-CIO, note 2 supra.

5 Insurance Agents' International Union, AFL-CIO v. NLRB, (D. C. Cir. 1958) 260 F. (2d) 736, cert. granted 358 U.S. 944 (1959). The court of appeals, in a one-sentence opinion, unanimously adhered to its holding in Textile Workers Union v. NLRB, (D.C. Cir. 1955) 227 F. (2d) 409, cert. dismissed 352 U.S. 864 (1956), which refused enforcement to a Board order, Textile Workers Union, 108 N.L.R.B. 743 (1954), based on facts virtually identical with those in the principal case.

6 The dissenting justices (Frankfurter, Harlan and Whittaker) would have remanded the case and required the Board to consider unprotected harassing activities as evidence of bad faith.

7 The National Labor Relations Act, 49 Stat. 449 (1935).

8 49 Stat. 453 (1935) §8 (5). Now, 61 Stat. 141 (1947), 29 U.S.C. (1958) §158 (a) (5).

9 See note, 61 HARV. L. REV. 1224 (1948). See also Smith, "The Evolution of the 'Duty to Bargain' Concept in American Law," 39 MICH. L. REV. 1065 (1941).

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

11 The Labor-Management Relations Act, 61 Stat. 142 (1947), 29 U.S.C. (1958) §158 (d).

12 Note 3 supra.

13 See 93 CONG. REC. 4135 (1947) and 93 CONG. REC. 5005 (1947).

an adamant position[14] and then sought to win its acceptance, not at the bargaining table, but rather by a campaign of unprotected,[15] outside harassing activities. The fact that the union continued to go through the motions of bargaining is not controlling, for the very purpose of the good faith standard is to distinguish between a sincere desire to bargain and a mere sham.[16] In short, it could have been held here that the union openly adopted the very "take-it-or-leave-it attitude" that the good faith requirement was enacted to prevent.

The other branch of the dichotomy is implicit in the fact that Congress, in imposing the duty to bargain collectively, did not intend to dictate the means by which it was to be carried out or to permit any governmental intervention as to the substance of the ultimate agreement.[17] As one draftsman put it, the act led the parties to the door of the bargaining room but did not enter with them.[18] This legislative philosophy was made explicit in section 8 (d) of the Taft-Hartley Act, which qualified the duty to bargain in good faith by stating, ". . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."[19] Measured solely by this standard, the Court's holding that the union's harassing activities were not inconsistent with the duty to bargain is quite correct. Ultimately, any collective bargaining situation is resolved on the basis of the relative positions of economic power of the combatants. The union's ability to subject its opponent to economic harassment is a lawful (albeit unprotected) and valuable addition to its bargaining arsenal. Inherent in the power that the Board felt it had, under the act, to deprive a party of a lawful bargaining weapon is the power to dictate the course or manner of the negotiations. This power could also include the compelling of a concession or agreement which the party might not have had to make if its bargaining position had not been weakened by governmental intervention.[20]

The principal case thus presents an anomalous situation in which the Board and the Court reach diametrically opposed results on the same facts, each result being fully consistent with one of two congressional commands

14 See note 21 infra.

15 Section 7 of the Wagner Act declares the right of employees to engage in certain "concerted activities." Section 8 of the same act protects this right by making it an unfair labor practice for an employer to interfere with these concerted activities in certain ways. Thus an "unprotected" activity is one with which an employer may interfere without committing an unfair labor practice. If the union's actions here were held to be "protected," a cease-and-desist order could probably not have issued notwithstanding any finding of a refusal to bargain. However, the Court conceded, *arguendo*, that the actions were not so "protected," citing Automobile Workers v. Wisconsin Board, 336 U.S. 245 (1949).

16 E.g., NLRB v. Montgomery Ward & Co., (9th Cir. 1943) 133 F. (2d) 676. See also Cox, "The Duty to Bargain in Good Faith," 71 HARV. L. REV. 1401 at 1413 (1958).

17 See S. Rep. 573, 74th Cong., 1st sess., p. 24 (1947). See also Senator Wagner's remarks at 79 CONG. REC. 7660 (1935).

18 Senator Walsh, at 79 CONG. REC. 7660 (1935).

19 61 Stat. 142 (1947), 29 U.S.C. (1958) §158 (d).

20 See Cox, "The Duty to Bargain in Good Faith," 71 HARV. L. REV. 1401 at 1530 (1958).

contained in the same section of the same act. The Court sought to avoid the self-contradiction of section 8 (d) by reading the limiting language as an express modification of the earlier command. Superficially, the section is so written. The difficulty is that the act's legislative history shows that Congress simply saw no inconsistency between the limitations of section 8 (d) and the judicially-formulated good faith standard which they also enacted.[21] If the duty to bargain in good faith is to have any meaning, it must require that agreement be reached through an orderly bargaining process between two parties having a sincere desire to reach an agreement in this manner rather than by the more primitive means of trial by combat which the act purports to supplant. Yet the limitations in section 8 (d), as illustrated in the majority opinion, indicate that the agreement can be effected through these primitive means so long as the parties effect the facade of sitting across a bargaining table while the battle rages elsewhere. The Court, faced with a case requiring decision, was forced to choose between the conflicting desiderata. In so doing, it has qualified one part of the act to conform to another, with the effect of stripping the process of collective bargaining, which the act made the fundamental element of our labor relations law, of much of its substance. This result is, of course, not effected merely by authorizing harassing tactics during bargaining, but rather by the logical results of a conclusion that the act requires no more than the formality of going through the prescribed ritual at a bargaining table. The Court's choice, however, appears to have been correct. For the alternative is to hold that the government has the power, under the act, to regulate the bargaining process and indirectly to affect the substance of the ensuing agreement, which would be an even more drastic result than the emasculation of the duty to bargain. It is apparent that the ultimate choice between these two far-reaching alternatives is a basic congressional policy decision which goes to the heart of our whole statutory labor relations scheme. As Congress is seemingly unaware that a choice need be made, it is regrettable that the Court treated the act's fundamental inconsistency as merely a resolvable "tension."[22] Until Congress is made aware of the fact that it has enacted two entirely inconsistent commands, it can hardly make the urgently needed decision as to which of these our labor law is to follow.

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[21] Senator Pepper's statement at 93 CONG. REC. 4363 (1947) illustrates this unawareness: ". . . I think we are coming to an awareness of the fact that when a party to a dispute merely takes an adamant position, . . . and says 'take it or leave it', that is not collective bargaining. . . ." After this endorsement of the traditional good faith standard, he continued, ". . . labor organizations [have] the right . . . to use the economic power that they have . . . to better themselves in their relations with their employer. . . ." This statement thus seems to foreshadow the limitations implicit in §8 (d) as the majority interpreted that section in the principal case. Congress did feel that the Board had gone "very far" into substantive matters through the good faith concept, but this was seen as a misapplication of the standard. H. Rep. 245, 80th Cong., 1st sess., pp. 19, 20 (1947).

[22] See principal case at 425.