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AN EMPLOYER'S UNILATERAL ACTION—AN UNFAIR LABOR PRACTICE?*

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THE DUTY TO BARGAIN COLLECTIVELY

During the Industrial Revolution, the growth of enormous industrial establishments with a correspondingly large number of workers hired to perform increasingly simple tasks manifested the inability of an individual effectively to bargain with an employer concerning wages, hours, and other terms and conditions of the employment relationship. The resulting discontent among workers produced long and bitter, often bloody, outbreaks of economic warfare between employers and employees. In the abstract, freedom of contract was possible still, but as a practical matter employment benefits and obligations were largely established by managerial fiat. It was felt that if employees could effectively unite for bargaining, their collective power might balance that of the employer, thereby vitalizing the abstraction. The enactment in 1935 of the National Labor Relations Act,[1] the Wagner Act, represented, in essence, an attempt to strike that balance so as to reduce or eliminate industrial strife in interstate commerce.

Section 7 of the act declared the right of employees to select a collective representative to bargain for them about wages, hours, and other terms and conditions of employment.[2] Furthermore, statutory protection was accorded this right. The protection took the form of proscribing employer conduct described, in glittering generalities, as unfair labor practices.[3] The National Labor Relations Board, hereafter referred to as the Board, was established[4] to preserve and effectuate the rights of employees as set out in section 7. It might also be added that if employees were protected in organizing for bargaining purposes, they might thereby be encouraged to do so.

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1. 49 STAT. 449 (1935), 29 U.S.C.A. §§ 151-166 (1946).
2. "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3)." 61 STAT. 147 (1947), 29 U.S.C.A. § 157 (Supp. 1955).
3. 49 STAT. 452 (1935), as amended, 29 U.S.C.A. § 158 (Supp. 1955).
4. 49 STAT. 451 (1935), as amended, 29 U.S.C.A. § 153 (Supp. 1955).

By reason of the act, collective bargaining became mandatory when employees in an appropriate unit properly designated a bargaining representative, alternatively denominated a union, and collective bargaining had been requested.[5] No longer could employment conditions be established solely by employers. Attention herein will be directed toward an examination and evaluation of the limitations imposed by the act, as administered by the Board and the courts, on an employer's freedom to establish employment conditions on his own initiative, *i.e.*, by unilateral action, after his employees have selected a collective bargaining representative.

Before the Board determines whether an employer's unilateral action is an unfair labor practice, it must first decide whether the subject acted upon is a proper one for collective bargaining.[6] If bargaining on the subject is not required, it follows that the employer is free to act at will about the matter. The Board and the courts have demonstrated little, if any, hesitation in declaring what a party may be compelled to bargain about even though it has been argued that this was not a proper administrative or judicial function under the original legislation.[7] The guide for the determination of proper subjects for bargaining seems to be the intimacy of their relation to the items listed in section 9(a) of the act, *i.e.*, "rates of pay, wages, hours of employment, or other conditions of employment." If the necessary relationship can be found, then bargaining may be compelled.[8] Through an extended series of cases, the Board has been at pains to map out the subjects for bargaining.[9] The rationalization for this

5. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944); NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939); M. H. Ritzwoller Co. v. NLRB, 114 F.2d 432 (7th Cir. 1940); Long-Lewis Hardware Co., 90 N.L.R.B. 1403 (1950).

6. Note, *Proper Subjects for Collective Bargaining: Ad Hoc v. Predictive Definition,* 58 YALE L.J. 803 (1949). Not every item proposed for bargaining by an employer or a union must be discussed. American Radio, Ass'n., CIO, 82 N.L.R.B. 1344 (1949). On the other hand, it would seem that the parties could discuss anything, at their discretion, even though the topic had not been held to be within the terms of § 9 (a). Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board,* 63 HARV. L. REV. 389 (1950). However, adamant insistence on bargaining and agreement on an item outside the requirements of § 9(a) as a prerequisite to concluding a collective bargaining agreement has been held to be an unfair labor practice since this is said to evince a lack of good faith in bargaining. Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952), *enforcing* 87 N.L.R.B. 972 (1949) (demand by union of performance bond by employer); NLRB v. Dalton Tel Co., 187 F.2d 811 (5th Cir. 1951) (employer demand that union register under state statute); American Radio Ass'n, CIO, *supra* (union demand for union hiring hall); NLRB v. Aladdin Industries, Inc., 125 F.2d 377 (7th Cir.), *cert. denied,* 316 U.S. 706 (1942) (union demanded discharge of forewoman).

7. Cox and Dunlop, *supra* note 6. *But see* Findling and Colby, *Regulation of Collective Bargaining by the National Labor Relations Board—Another View,* 51 COLUM. L. REV. 170 (1951).

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

9. See, *e.g.*, John W. Bolton & Sons, Inc., 91 N.L.R.B. 989 (1950) (incentive wages); West Boylston Mfg. Co., 87 N.L.R.B. 808 (1949) (recall of employees);

seems to be that an employer, by section 8(a) (5) of the act, is under a duty to bargain about the subjects covered by section 9(a). Therefore, the Board has found it necessary and desirable, in order to determine in a specific case whether a refusal to bargain about a particular item is a breach of this duty, first to ascertain whether the subject is one properly cognizable under the terms of section 9(a). If it is, then the employer's unilateral action concerning this item and his duty to bargain will be considered in deciding whether an unfair labor practice has been committed.

It should be noted in passing that the disposition of the Board and the courts to delineate mandatory bargaining subjects perhaps tends to affect the substantive terms of collective bargaining agreements. Such a result may be anticipated when the employees' representative feels that its function has not been adequately executed unless there has in fact been discussion of all the mandatory subjects. The problems connected with an employer's unilateral action after a collective agreement has been signed are more likely to occur when the scope of the bargaining negotiations has not been encyclopedic. When the employment conditions have been fully considered during negotiations and functions delegated either to management exclusively, to joint determination by management and union, or to union control, the probability of unfair labor practice charges because of unilateral action is greatly reduced. However, such expansive negotiations are all too often either impractical or impracticable at the time, and so, like the poor, the problems are always with us.

If the premise that the act is designed to foster collective bargaining is accepted, the exercise of unilateral action might well be precluded by implication, for obviously the concepts of unilateral action and collective bargaining are fundamentally inconsistent.[10] Certainly it is not surprising that in an area where collective bargaining is thought to be the desideratum, unilateral action is regarded as somewhat suspect.[11] If the duty to bargain collectively were absolute, existing at all times in every employment situation where a union has been

Weyerhaeuser Timber Co., 87 N.L.R.B. 672 (1949) (board); Massey Gin & Mach. Works, Inc., 78 N.L.R.B. 189 (1948) (shift schedules); Southshore Packing Corp., 73 N.L.R.B. 1116 (1947) (piece rates); Woodside Cotton Mills Co., 21 N.L.R.B. 42 (1940) (work loads). Also see Note, *Proper Subjects for Collective Bargaining: Ad Hoc v. Predictive Definition,* 58 YALE L.J. 803 (1949).

10. "It has been shown that the effort to exclude portions of the incidents of business ownership from the regime of collective bargaining has been miscalculated. The reservation of unilateral rights by employers is unsuited to collective bargaining. Nor is it possible to define, with any degree of logic or any quality of permanence, areas in which collective bargaining shall or shall not be permitted to intrude. The question is one of allocation of functions in a management-union relationship, not one of reservation of rights." TELLER, MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING 383 (1947).

11. See Weyand, *Majority Rule in Collective Bargaining,* 45 COLUM. L. REV. 556 (1945).

designated by the employees to bargain for them, then unilateral action would indeed be eliminated as a lawful method of establishing wages, hours, and other terms and conditions of employment. However, the philosophical foundation of collective bargaining demonstrates that it is a means toward an end rather than an end per se. Collective bargaining, as has been indicated, developed as a method of counteracting an employer's almost complete control over employment conditions. Through it, bargaining power is conceivably equated.[12] With such power, the probability of establishing employment conditions through mutual agreement between labor and management is increased,[13] thereby giving employees a sense of real participation in creating the benefits and obligations constituting their employment. Thus, the unrest ensuing from an imbalance of bargaining power may be alleviated.

But the act is not designed as a panacea. It has merely indicated the procedure whereby, under certain circumstances—*i.e.*, when a collective bargaining representative has been designated in an appropriate bargaining unit—employers and employees are to decide on a contract of employment. The parties to the bargaining negotiations are encouraged, not required, to reach agreement.[14] They need not agree to a proposal or make a concession.[15] Strikes and other forms of concerted activity may result from a lack of agreement as a private method of exercising economic power to induce acquiescence on requested employment conditions.

The constitutionality of the act was upheld in *NLRB v. Jones & Laughlin Steel Corporation.*[16] The Supreme Court of the United States, speaking through Chief Justice Hughes, referred to its construction of the Railway Labor Act in expressing an opinion on the duty to bargain imposed by the National Labor Relations Act, and inferentially on the allowable scope for unilateral action, by saying:

> It [the Railway Labor Act] was taken "to prohibit the negotiation of labor contracts generally applicable to employees" in the described unit with any other representative than the one so chosen, "but not as precluding such individual contracts" as the Company might "elect to make directly with individual employees." We think this construction also applies to § 9(a) of the National Labor Relations Act.
>
> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine."[17]

12. *But see* Note, *Improvement in Terms of Employment as an unfair Labor Practice*, 54 HARV. L. REV. 1036 (1941).
13. Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1000 (1955).
14. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).
15. 61 STAT. 140 (1947), 29 U.S.C.A. § 158(d) (Supp. 1955).
16. 301 U.S. 1 (1937).
17. *Id.* at 45.

This language, if literally followed, could have caused a materially different evolution of the law with respect to the scope allowed by the act for collective bargaining and for unilateral action.[18] The trend was not in accordance with the view expressed, and this construction was rejected when the Court in a later case held that individual employment contracts must yield to collective agreements once a representative has been designated and bargaining requested.

The Court said in *J. I. Case*[19] that in *Jones & Laughlin* it had:

> recognized the existence of some scope for individual contracts, but it did not undertake to define it or to consider the relations between lawful individual and collective agreements, which is the problem now before us.
>
> Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment, because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue work after a collective agreement expires and, despite negotiation in good faith, the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern. The conditions for collective bargaining may not exist; thus a majority of the employees may refuse to join a union or to agree upon or designate bargaining representatives, or the majority may not be demonstrable by the means prescribed by the statute, or a previously existent majority may have been lost without unlawful interference by the employer and no new majority have been formed. As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts.[20]

This expression of opinion may be regarded as the foundation for many of the rules connected with strikes and impasses.

The attitude with which the Board approaches the problems connected with unilateral action after a union has been designated for collective bargaining may be gleaned from the following statements from its Annual Reports. In speaking of the applicability of section 8(a)(1), the Board said:

> Unilateral action by an employer when the employees have a bargaining representative is another form of unlawful interference with employees' collective bargaining activities which violates the section of the act.[21]

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18. See Ward, *The Mechanics of Collective Bargaining*, 53 HARV. L. REV. 754, 788 (1940), for a discussion of the proposition that individual employment contracts were an alternative to collective agreements and that any other result would be unconstitutional.

19. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

20. *Id.* at 336-37.

21. 16 NLRB ANN. REP. 149 (1951).

But in addition to being interference, restraint, or coercion, unilateral action may be illicit under the duty to bargain in good faith created in section 8(a) (5) of the act. The Board has proclaimed:

> If there is a duly designated bargaining representative of the employees, an employer also violates his obligation to bargain by unilaterally changing current terms and conditions of employment without prior consultation with that representative.[22]

Though ringing, these denunciations, like most general statements of law, seem to have exceptions and may not be literally applied to every factual situation. The cases indicate that variations have been played on the theme.[23]

Congress created the employer's duty to bargain with his employees when they so desire, but it left to the employees the choice of whether or not to organize for bargaining and therefore whether the duty would or would not initially be imposed. In a given case, there can be no breach of the duty unless the duty exists.[24] The Board has succinctly stated the prerequisites for the temporal genesis of the duty by saying:

> Whenever it is alleged that an employer has violated section 8(a)(5), the complaining union must show not only that it is the majority representative of the employees concerned but also that it has requested the employer to enter into bargaining negotiations. The request to bargain need not be formal, nor made in any particular manner. It is sufficient that the employer is clearly aware of the employees' desire to enter into negotiations through the designated bargaining agent.[25]

It is only necessary to add here that a good faith doubt as to the union's status as majority representative will postpone the duty to bargain until the question has been resolved.[26] This result is necessary because employees are free to organize for bargaining or not, as they choose; and the Board, not the employer, is authorized to determine the status of the union and the appropriateness of the unit.[27] Erroneous or premature recognition and bargaining are not tolerated because of sections 8(a) (1) and (2).[28]

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22. 14 NLRB ANN. REP. 75 (1949).
23. Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952) (no duty to bargain during a slowdown); United Elastic Corp., 84 N.L.R.B. 768 (1949) (strike in violation of contract); Montgomery Ward & Co., 39 N.L.R.B. 229 (1942) (bargaining negotiations in "suspension" so no duty to withhold normal action).
24. NLRB v. Reeder Motor Co., 202 F.2d 802 (6th Cir. 1953).
25. 15 NLRB ANN. REP. 119 (1949). Also see May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945); Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939).
26. Texarkana Bus Co. v. NLRB, 119 F.2d 480 (8th Cir. 1941).
27. 49 STAT. 453 (1935), as amended, 29 U.S.C.A. § 159 (Supp. 1955).
28. Mandel Bros. Inc., 72 N.L.R.B. 859 (1947); Brashear Freight Lines Inc., 13 N.L.R.B. 191 (1939).

UNILATERAL ACTION PRIOR TO A COLLECTIVE BARGAINING AGREEMENT

Once a union has been selected and has requested bargaining, unilateral action will occur, if at all, either before or after a collective agreement has been negotiated. The first group of problems to be considered will be those which may arise after a collective bargaining representative has been designated but before a collective agreement has been reached.

One group of cases seems to indicate that unilateral action is an unfair labor practice per se after the duty to bargain has been created but before a collective agreement has been concluded. Factually, these cases fall into three patterns: either the employer refused to recognize the union and to bargain at all; or he granted recognition to the union but refused to discuss particular subjects of bargaining and acted unilaterally on them; or, finally, recognition, bargaining, and unilateral action, too, were all present. Though the factual situations may vary, the Board's treatment does not when confronted by what it regards as per se violations. In *May Department Stores v. NLRB*,[29] a case coming within the first category factually and in which the employer refused to bargain in order to obtain judicial review of the appropriateness of the bargaining unit, the employer unilaterally requested permission from the War Labor Board to raise the wages of all its employees. The Supreme Court, in upholding the Board's finding of interference and a refusal to bargain, expressed the general philosophy concerning unilateral action under these circumstances by saying:

> Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities ... He ... proposed that he, as employer, would make the increase .... By going ahead with wage adjustments without negotiating with the bargaining agent, it took a step which justified the conclusion of the Board as to the violation of § 8(1). Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.[30]

The employer's motive in refusing to recognize the union is not always to contest the appropriateness of the bargaining unit.[31] In fact, that type of situation seems to be the exception rather than the rule. More often, the motive is found to be a desire to be free from the union and the restrictions imposed on the employer's conduct. Though unilateral action is condemned, it should also be perfectly plain that simply by refusing to recognize the union and to honor its request to bargain, the employer has violated sections 8(a) (1) and (5) if the

29. 326 U.S. 376 (1945).
30. *Id.* at 384-85.
31. See, *e.g.*, Star Beef Co., 92 N.L.R.B. 1018 (1950).

unit is appropriate and the union is majority representative.[32] Thus, his additional action with respect to bargainable subjects is merely a compounding of the original delict. The duty to bargain ordinarily does not arise until a request is made, and the Board has adopted a rather cavalier attitude in finding such requests once a union has obtained majority representation.[33] The request need not be formal or made in any particular way through any particular media.[34]

Cases involving the so-called per se violations during collective bargaining or when such negotiations are pending best illustrate the Board's attitude toward the *fait accompli*.[35] One employer committed per se 8(a) (1) and (5) violations during negotiations by raising the minimum wages of his employees in order to comply with federal law.[36] The union was not consulted about the matter, and the Board said, "it is not the granting of a wage increase, but the unilateral action which is violative of the National Labor Relations Act."[37] Before a collective agreement is signed, employer changes in employment conditions present a union with grievous problems at the bargaining table since they may be unexpected or difficult to change under the circumstances. Therefore, when the union requests bargaining, the employer's freedom to change employment conditions is virtually prohibited unless the union is first consulted.

Not only may unilateral action on topics about which bargaining is pending by unlawful per se, but also such action on topics under discussion during bargaining may be.[38] In addition, changes of conditions not discussed at bargaining conferences have been held to be unfair per se.[39] The effect of these rulings is to promote discussion of contemplated changes and to encourage collective agreements. On the other hand, these rules, by confusing negotiations, might hamper bargaining more than helping. If every proposal for a temporary change were discussed along with proposals for a written agreement to govern future conditions, negotiations could become so involved with current

32. Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944).
33. NLRB v. Burke Mach. Tool Co., 133 F.2d 618 (6th Cir. 1943); Burton-Dixie Corp., 103 N.L.R.B. 880 (1953); Lingerie, Inc., 101 N.L.R.B. 1374 (1952); Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949).
34. 15 NLRB ANN. REP. 119 (1949).
35. "One further requirement developed by the Board seems to partake more of the nature of a hard and fast rule of bargaining procedure than of a standard or of mere evidence of absence of good faith bargaining. . . . The rule against *fait accomplis* generally serves as the basis for a holding that an employer refused to bargain by adopting a wage-cut without notice to or discussion with the union during the course of negotiations which included the subject of wages, but has been applied also in the case of changes in hours of employment." Ward, *The Mechanics of Collective Bargaining*, 53 HARV. L. REV. 754, 769-70 (1940).
36. Union Mfg. Co., 95 N.L.R.B. 792 (1951).
37. *Id.* at 793 n.5.
38. Allen-Morrison Sign Co., 79 N.L.R.B. 904 (1948); Southshore Packing Corp., 73 N.L.R.B. 1116 (1947).
39. See, *e.g.*, I.B.S. Mfg. Co. 96 N.L.R.B. 1263 (1951).

adjustments that agreement on general terms for the future could be delayed for a considerable period. That the possible advantages are considered to outweigh possible disadvantages is demonstrated by the cases in which the problems are considered.

In another case deserving mention here,[40] the employer, a radio station, refused to recognize the union representing its transmission station operators because the bargaining unit was regarded as inappropriate. The union subsequently lost its majority status because of personnel changes resulting from normal business operations. Section 8(a) (1) charges were dismissed, but the Board ruled that the unilateral personnel changes violated section 8(a) (5) and, to effectuate the purposes of the act, ordered the employer to bargain with the union. The order would have been quite ordinary in the usual case, but enforcement was refused on the ground that the order to bargain would in no way effectuate the purposes of the act. The Board apparently had argued in part that the change in conditions resulted from the unfair practices connected with the unilateral action. The court rejected this argument in the following words:

> The changes might indeed have become the subject of collective bargaining but it cannot be said than an employer may not make any valid change in the working conditions or personnel of his employees without consulting the union selected by its employees to represent them. In this instance the changes were made in the normal course of business, gave rise to no dispute between the management and the men, and provoked no adverse criticism from the Board.[41]

There may or may not be a quarrel with the ultimate decision of the court in the case, but the court's view of what an employer can do is somewhat surprising since the Board had been adamantly maintaining more or less the opposite position. Quite recently the Board's order was enforced in a case in which an employer unilaterally abolished the customary rest periods of the employees.[42] The action was regarded as the equivalent of individual bargaining and hence unlawful under the circumstances.

In most cases where specific conduct was held to violate statutory duties per se, other manifestations of an intention to avoid collective bargaining if at all possible were present. These indicia of employer attitude ranged from the so-called per se violations to circulation of anti-union petitions, discharges, and other misguided measures calculated to defeat employee intent to bargain through a group representative.[43] If these cases represented the sole treatment of unilateral

40. NLRB v. Inter-City Advertising Co., 154 F.2d 244 (4th Cir. 1946).
41. *Id.* at 247.
42. Fry Roofing Co. v. NLRB, 216 F.2d 273 (9th Cir. 1954).
43. NLRB v. Harris, 200 F.2d 656 (5th Cir. 1953) (refusal to tell union whether employer would comply with federal minimum wage statute); Central Metallic Casket Co., 91 N.L.R.B. 572 (1950) (discharges for refusals

action during bargaining negotiations, the lesson to be learned would be short and simple: it is a breach of the duty to bargain collectively for an employer to make unilateral adjustments in employment conditions while bargaining negotiations with the designated representative of his employees are either pending or progressing.

However, not every instance of unilateral action in these circumstances has been condemned per se, at least, not in so many words. In a number of cases, the Board has, so to speak, thrown the unilateral action into a hopper along with a totality of conduct and announced that both interference with the exercise of section 7 rights and a failure to bargain in good faith had occurred.[44] These *might* be dubbed the "course-of-conduct" cases. The condemned action may have taken the form of a raise in wages,[45] a reduction in the length of the work week with an increase in production rates in piecework (in effect, giving the employees a raise),[46] or making usual and habitual semi-annual wage adjustments,[47] or meeting general wage increases in the area.[48] Though one might think this enough in itself to justify finding an 8(a) (5) violation, the unilateral action was considered in conjunction with other employer behavior as evidence of bad faith in bargaining, and hence, an unfair labor practice. Unilateral action was usually mentioned more or less in passing, while the other details of the cases were stressed at some length, both by the Board and by the courts. Such course-of-conduct consideration may be explained by considering an employer's defense to the charge of having violated section 8(a) (5). He would stoutly maintain that he had in fact been bargaining and that that would preclude a finding of a refusal to bargain. However, the test of collective bargaining has long been a standard of good faith, a test involving an employer's state of mind during negotiations. In connection with unilateral action, the Board has stated its conception of good faith bargaining by saying:

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to sign individual employment contracts); Long-Lewis Hardware Co., 90 N.L.R.B. 1403 (1950) (anti-union speech, interrogations concerning union membership, individual contracts demanded after union request for bargaining, and anti-union petitions); Montgomery Ward & Co., 90 N.L.R.B. 1244 (1950) (changes instituted without sufficient notice to union, information on merit increases withheld from union); West Fork Cut Glass Co., 90 N.L.R.B. 944 (1950) (unjustified assertion of doubt of union's majority status during certification year); Anchor Rome Mills, Inc., 86 N.L.R.B. 1120 (1949) (employer obtained pistol licenses for supervisors during strike); Mason & Hughes, Inc., 86 N.L.R.B. 848 (1949) (continued postponement of bargaining conferences); Allen-Morrison Sign Co., 79 N.L.R.B. 904 (1948) (no-solicitation rule announced, anti-union petition.)

44. See, *e.g.*, V-O Milling Co., 43 N.L.R.B. 348 (1942); George P. Pilling & Son Co., 16 N.L.R.B. 650 (1939), *enforcement granted*, 119 F.2d 32 (3d Cir. 1941.)

45. Standard Generator Serv. Co., 90 N.L.R.B. 790 (1950).

46. George P. Pilling & Son Co., 16 N.L.R.B. 650 (1939), *enforcement granted*, 119 F.2d (3d Cir. 1941).

47. V-O Milling Co., 43 N.L.R.B. 348 (1942).

48. Tower Hosiery Mills, Inc., 81 N.L.R.B. 658 (1949), *enforcement granted*, 180 F.2d 701 (4th Cir.), *cert. denied*, 340 U.S. 811 (1950).

> We have held that when an employer unilaterally grants concessions to his employees, at a time when their designated union is attempting to bargain concerning the same subject matter, such action constitutes a violation of the employer's duty to bargain with the accredited union . . . . It is clear that . . . [unilateral action], under such circumstances, would have the effect of indicating to employees that they could obtain better conditions directly from their employer without the aid of the union . . . .[49]

Thus does the Labor Board excoriate unilateral action. This then is why unilateral action is invidious, and therefore is the opprobrium attached. Unilateral action is insidious. It may tend to undermine the prestige of the union in the eyes of the employees. Conceivably, the disparagement may have one of two effects. First, the employees may lose interest in the union and withdraw their support. Then the employer would become omnipotent again. Second, the employees might be quite union-oriented and become so outraged as to interrupt the free flow of interstate commerce. Since the act is avowed to be for the purpose of encouraging the free flow of such commerce, either of the above possibilities would be inimical to this declaration of congressional intent. This, perhaps, explains the Board's suspicion of unilateral action. The employer's power to exercise unilateral action had largely contributed to the promulgation of the act. It was designed to protect and encourage organization for bargaining collectively and to establish the procedure of collective bargaining when employees desired it.[50] "Unilateral action" is simply a symbol meaning "individual bargaining between employer and employee" in this context. Thus, the concepts of collective bargaining and unilateral action are, in this sense, inconsistent.

It has been eloquently argued that the act was intended to protect organizational activity on the part of employees for the purpose of collective bargaining and that once organized, bargaining would take place as a matter of course.[51] If this were so, unilateral action would indeed be proscribed whenever and wherever it would frustrate organizational activity or undermine an established collective organization. If unilateral action would have neither effect in the circumstances of its exercise, then the reason for the proscription would be lacking. Thus, under accepted principles, if the reason for a rule does not exist, the rule is inapplicable.

However, through the administration of the act, the thesis was developed that collective bargaining itself was an objective of the act, perhaps even *the* objective.[52] Congress included the duty to

49. George P. Pilling & Son Co., 16 N.L.R.B. 650, 658-59 (1939), *enforcement granted,* 119 F.2d 32 (3d Cir. 1941).

50. *Developments in the Law—The Taft-Hartley Act,* 64 HARV. L. REV. 781 (1951).

51. Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board,* 63 HARV. L. REV. 389 (1950).

52. Note, *Improvement in Terms of Employment as an Unfair Labor Practice,* 54 HARV. L. REV. 1036 (1941).

bargain collectively in the duties imposed on an employer more or less as an afterthought.[53] The duty was added rather as a legal catalyst. If an employer were free, at his pleasure, to recognize or not his employees' designated bargaining agent, the exercise of the right to organize would be futile. The duty to bargain precludes such a result. Hence, organizational activities on the part of employees and the designation of a bargaining agent have been treated as but steps in a process leading to collective bargaining and the establishment of employment conditions through the mutual assent of the employer and his united employees.

Congress considered collective bargaining and found it good. Among its advantages are usefulness in making employees feel secure in their jobs and its possibilities for reducing the interruptions of commerce erupting from disputes over employment conditions. In order, then, to protect and promote commerce, the duty of an employer to bargain collectively was created by statute. As stated in section 1 of the act:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[54]

Since this is the policy of the nation, it should be considered in the interpretation and administration of the act lest the policy be thwarted.

Rational Application of the Duty to Bargain Collectively. Employment is created by, and the obligations of employer and employees rest upon, a contract; and bargaining is the essence of a contract. In creating employment contracts, two types of bargaining, individual and collective, have been utilized. The act is designed to promote the latter. However, if in the circumstances of a particular case, collective bargaining would not be necessary to "eliminate the causes of certain substantial obstructions to the free flow of commerce" or "to mitigate and eliminate these obstructions when they have occurred," it would appear that individual bargaining, *i.e.*, unilateral action, would be permissible provided further that it would not interfere with the protection of the rights of the employees to organize collectively. In summary, the duty to bargain collectively should be imposed in every case in which collective bargaining alone would tend to accomplish the public policy expressed by the act, but otherwise either type of bargaining should be permitted.

53. Smith, *Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941).
54. 61 STAT. 137, 29 U.S.C.A. § 151 (1947).

The danger created by unilateral action when there is a duty to bargain collectively, as the Board has indicated again and again, is that it will subvert the designated representative.[55] This being taken as true, unilateral action would not appear to be a breach of the duty if the danger did not or would not tend to come to pass. Thus, in the *Western Printing Company* case,[56] the Board refused to find interference and a failure to bargain in good faith when an employer unilaterally changed the length of the work week and granted a pay raise to all employees while negotiating with a union for a contract. On its face, this would appear to be per se an unfair practice. However, the union represented only a fraction of the employees involved, the prior negotiations had been in good faith, and bargaining about the changes was had when the union protested them. The Board found that neither union membership nor collective bargaining had been affected and that this did not indicate bad faith in bargaining under all the circumstances. Thus, the intent of the employer in acting and the effect of the action were considered. Generally, unilateral action would probably have some effect adverse to the union and to collective bargaining. It would seem then that if no effect could be demonstrated or inferred, no basis for finding an unfair labor practice would exist. The Board recognized this in the *Western Printing* case and therefore properly dismissed the charges.

A court applied the suggested line of reasoning when it denied enforcement of the Board's order in the *Bradley Washfountain* case.[57] The employer denied the union's requests for improved employment conditions and then unilaterally instituted almost everything the union had requested, but the union never protested the changes. A strike followed the changes; the strikers were replaced; and the company refused to recognize the union. The court was unable to agree with the Board that an unfair practice had caused the strike and that the employer should therefore bargain with the union. The union had not been disparaged and the improvements had resulted from its requests during bargaining negotiations. The past history of bargaining relations was considered as part of the context in which this unilateral action was taken. However, one may or may not agree with the extent of the court's review of the Board's order. The Board is supposed to be the expert body to weigh evidence and draw inferences, and its findings should be sustained if supported by substantial evidence on the record considered as a whole.[58]

55. See, *e.g.*, Reed & Prince Mfg. Co., 96 N.L.R.B. 850 (1951), *enforcement granted*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

56. Sam M. Jackson, 34 N.L.R.B. 194 (1941).

57. NLRB v. Bradley Washfountain Co., 192 F.2d 144 (7th Cir. 1951), 65 HARV. L. REV. 697 (1952).

58. 48 STAT. 926 (1934), as amended, 29 U.S.C.A. § 160(c) (1947), as amended, 29 U.S.C.A. § 160(c) (Supp. 1955); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

A suggestion has been made that in the *Bradley* case the Board was announcing a policy that unilateral action on a subject of collective bargaining, in the absence of an impasse, is presumptively a refusal to bargain and that the court should have considered this before reversing the Board's ruling.[59] The Board does, in fact, appear to have been espousing a concept of collective bargaining which requires at least notice to the union before a change is made in wages, hours or other terms and conditions of employment before a collective agreement has been signed. However, if after a reasonable period has elapsed, the union has expressed no interest in the matter, the employer should be able to institute the change.[60] This, it might be noted, would not be unilateral action in its usual sense because the union would have had a chance to challenge the change. By not doing so, it could be said to have lent its sanction to the change. Finally, by requiring consultation with the union before an employer acts on subjects or bargaining, the Board may indirectly be encouraging the parties to come to an agreement more rapidly than they otherwise might.

UNILATERAL ACTION AND AN IMPASSE IN BARGAINING

Bargaining negotiations may have been undertaken with the best possible intentions of reaching an agreement, but because of conflicting views between the employer and the union, the parties may reach a point where neither is willing to recede from a position. Since neither party need make any concessions, a stalemate is created. Even though this happens, the necessity for conducting the employer's business continues. If he could take no action at all without the consent of the union and this consent could not be obtained, the business would suffer. Too, continued conferences would be futile if both parties were honestly adamant. Time or subsequent events might serve to change the situation or the attitudes of those involved in the bargaining. Accordingly, the Board has held that when an impasse has been reached in negotiations, the employer may take unilateral action and institute the changes he proposed to the extent that they were offered to the union.[61] The necessity for the limitation is obvious. If the employer had offered the union more than he offered the employees after the impasse, the stalemate might not have occurred. Moreover, a direct offer to the employees of more than was offered to the union would indicate a lack of good faith in bargaining since he should have been as willing to give it through bargaining as through his own action in dealing directly with the employees.[62]

59. 65 HARV. L. REV. 697 (1952).
60. *Cf.* Montgomery Ward & Co., 90 N.L.R.B. 1244 (1950).
61. I.B.S. Mfg. Co., 96 N.L.R.B. 1263 (1951); W. W. Cross & Co., 77 N.L.R.B. 1162 (1948).
62. NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949).

The impasse must have resulted from good faith bargaining before unilateral action will be tolerated. If an impasse were created because of bad faith bargaining by the employer, his subsequent unilateral action would be a violation of the duty to bargain.[63] Otherwise, an employer could appear to be bargaining without in fact having a willingness to reach an agreement; an impasse could result; and he would be able to exercise unilateral action. Thus, the duty to bargain could be readily circumvented. An impasse is quite commonly pleaded when unilateral action has been exercised after bargaining, but the Board has been none too ready to find that one existed unless it is clear that the attitudes of the negotiators had hardened to the extent that further talks would have availed nothing. If either side indicates a willingness to alter its assumed position, then an impasse has not developed.

The duty to bargain exists during an impasse but is in abeyance and anything which indicates that further negotiations might result in an agreement will dissolve it. Thereupon the duty to bargain becomes operative again and the normal rules concerning unilateral action during negotiations apply. A strike is another way of breaking an impasse.[64] The economic pressure on both employer and employees during each day that a strike continues would tend to cause both to be more anxious to find a mutually agreeable ground for settlement of their dispute. However, if the strike results from a valid impasse, the employer is free to replace the strikers in order to carry on his business.[65] In doing so, he may offer the replacements permanent positions of employment and the same wages, hours, and other terms and conditions that he had previously offered the union.[66] The offer may not exceed the one made to the union though it need not be as generous.[67] The offer to the union sets the maximum. Presumably the employer could offer less than was suggested to the union though some difficulty may be encountered in determining whether what the employer offers as a result of the impasse is better than the offer to the union. This is a matter to be determined on the basis of the available evidence. That administrators and jurists might reach differing conclusions here is within the realm of possibility.[68] However, this is a problem connected with the scope of judicial review, not with the theory permitting unilateral action during a bargaining impasse. As a practical matter, except in an area where unemploy-

63. NLRB v. Andrew Jergens Co., 175 F.2d 130 (9th Cir.), *cert. denied,* 338 U.S. 827 (1949).

64. West Fork Cut Glass Co., 90 N.L.R.B. 944 (1950).

65. The Texas Co., 93 N.L.R.B. 1358 (1951); Augusta Bedding Co., 93 N.L.R.B. 211 (1951).

66. Pacific Gamble Robinson Co., v. NLRB, 186 F.2d 106 (6th Cir. 1950).

67. NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949).

68. Pacific Gamble Robinson Co. v. NLRB, 186 F.2d 106 (6th Cir. 1950).

ment is rampant, it is improbable that a full labor force to replace the strikers could be obtained, particularly if the latter would not work for what was offered.

An argument could be made that the fact that an impasse has been reached is all the more reason for the negotiators to cast about for possible ways of overcoming what appears to be an insuperable obstacle to agreement since experience has taught that solutions can be found. If the employer could not take unilateral action in such circumstances, the pressure to effect some change in employment conditions might be great enough to cause the parties to find a basis for agreement. This could take time. Meanwhile, the business could continue with the employees employed, thereby serving the interests of all.

The argument is not favored. The parties, by being able to withdraw from the negotiations, might be able to reappraise the situation so as to bargain in the future for a solution. Also, by allowing unilateral action, some change might be effected and allowed to operate. If it proved satisfactory despite prior opinions to the contrary, the problem would then have resolved itself. If it did not, a change of conditions might make later agreement possible. To preclude unilateral action after an impasse would virtually be to force either the union or the employer to agree to a proposal or to make a concession, a possibility expressly excluded by section 8(d) from the duty to bargain. As the rule stands, it at least allows immediate action if the employer desires it for the operation of the business. Certainly, if unilateral action were not permissible in these circumstances and because of that it became undesirable to continue the business, the interests of the employees would not be served by an operational cessation. This is not regarded as a probable result from a rule forbidding unilateral action after an impasse, but it is a possible one and should be considered. The rule as it presently exists is a practical solution to a practical problem.

The Duty to Bargain During an Impasse. To say that the duty to bargain is suspended during an impasse is to say too much, or too little. More precisely, the duty to bargain is suspended insofar as matters which caused the impasse are concerned. As indicated, the employer may change them unilaterally. The question arises as to the duty to bargain about other employment conditions during an impasse. The Board has answered that the duty is operative despite an impasse over other issues.[69] This, too, is meet. Simply because agreement cannot be achieved on some of the proposed terms of a collective bargaining agreement, the possibility of agreement over

69. I.B.S. Mfg. Co., 96 N.L.R.B. 1263 (1951); Central Metallic Casket Co., 91 N.L.R.B. 572 (1950).

other terms is not eliminated. To allow unrestricted unilateral action when an impasse occurs would not necessarily tend to promote bargaining. On the contrary, it could be argued that impasses would be encouraged as far as employers are concerned. Collective agreements are to be encouraged insofar as possible, and certainly this is an area in which they are possible despite an impasse as to some items of a suggested agreement. If the impasse were extended to the additional items, that would be unfortunate. However, the parties should attempt an agreement before loosing the employer from the bonds of the collective bargaining duty.

Strikes and Unilateral Action

When peaceful negotiations fail, employees often resort to a private form of economic warfare called "strike." The Board cannot compel either a union or an employer to make a concession or to agree to a proposed contractual term, but the private parties to the negotiations are not so restricted. Strikes are a time-tested and onerous method of compelling a reluctant employer to throw inhibition to the winds and sign on the dotted line. This variety of concerted activity comes in assorted types and sizes. A popular type is the plant-wide strike in which all the employees in a plant leave their jobs to stop the operation of the business. Another effective type is the departmental strike where employees in one or more key departments walk out in order to cripple or kill operations. There may also be "quickie" strikes on a plant-wide or departmental basis in which the employees involved stop working for a short period of time in protest over something which has aggrieved them. Another, an infamous, variation is the slowdown, which is concerted action with a minimum of activity involved. It is peculiarly designed to coerce management since the employees stay on the job but exhibit extreme inertia. Insofar as strikes affect the right to take unilateral action, the circumstances which cause the strike are usually as important as the type of strike itself.

Economic Strikes. An economic strike is designed to bring economic pressure to bear on an employer in order to force him to accede to the bargaining demands of a union, and the duty to bargain is operative throughout. The employer may not condition bargaining on a return of the employees to their jobs.[70] If strikes had to be abandoned before employers had to bargain, their power potential would be vitiated. Economic strikes are legitimate as concerted activity for bargaining purposes within the meaning and protection of section 7. Hence, to

70. West Coast Luggage Co., 105 N.L.R.B. 414 (1953).

require the forfeiture of section 7 rights as prerequisite to negotiations would constitute interference and a refusal to bargain.

Just as it is an overstatement to say that all's fair in love and war, so it is with unilateral action during an economic strike, a labor war. What has been said with respect to the scope of unilateral action after an impasse is equally applicable to economic strikes. An employer may attempt to replace the strikers in order to carry on his business and may offer the replacements permanent jobs, including the conditions offered the union, though the offer to the union must not be exceeded.[71] Also, employment conditions which the union has rejected must be offered to the general public rather than to the individual strikers.[72] The union represents the employees, and since there is no suspension of the bargaining duty, to by-pass the union and deal directly with the employees would interfere with concerted activity and also breach the duty to bargain.[73] Dealing with individual employees would subject them to the very pressures which the act is calculated to eliminate. Because a strike is war, in a sense, an employer is allowed to fight, too, though his methods, like the employee's, are limited. In the battle to test economic and bargaining strength, the employees gamble with their jobs. If replacements can be recruited in sufficient quantity to saturate the employer's requirements, the employees need not be replaced when the strike ends.[74] In fact, the employer may be able to assert in good faith a doubt as to the status of the union as majority representative of his employees. His duty to bargain is then suspended until the position of the union can be determined.[75] The result may be that the union no longer represents a majority of the present employees in the unit, and the employer will then be free to exercise unilateral action at his pleasure, subject, of course, to the restrictions of section 8(a)(1). This is true even if the union had been certified by the Board as bargaining representative for less than a year because an "exceptional circumstance" would be present.[76] As has been said before, for an employer to fill all the positions left by strikers would be exceptional unless the labor market contained an excess which could provide a sufficiently skilled group to meet the requirements of the business. Also, it is probable that the striking employees would make the necessary unconditional offer to return to work and thereby end the strike before all had been replaced. At the termination of the strike, the employer

71. NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949); Pacific Gamble Robinson Co. v. NLRB, 186 F.2d 106 (6th Cir. 1950).
72. Pacific Gamble Robinson Co. v. NLRB, 186 F.2d 106 (6th Cir. 1950).
73. National Gas Co., 99 N.L.R.B. 273 (1952).
74. Texas Foundries, Inc. v. NLRB, 211 F.2d 791 (5th Cir. 1954); Penokee Veneer Co., 74 N.L.R.B. 1683 (1947).
75. National Carbon Div., Union Carbide and Carbon Corp., 104 N.L.R.B. 416 (1953).
76. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939).

must offer the remaining jobs to the strikers as they do not lose their status as "employees" because of the strike. Discrimination in returning the strikers to the jobs would be an unfair practice under section 8(a) (3).[77]

"Unprotected" Strikes. The strike story is not yet complete. Not every strike or concerted activity is within the protection offered by section 7, with the resulting affects on the scope of unilateral action. Some types of employee activity are not considered justified or justifiable even though they may be both "concerted" and "activity." Therefore, when they occur, they are not treated as "concerted activity" within the meaning of section 7. Employees, for one reason or another, may be too impatient to await the results of bargaining negotiations; they have desires and want them sated *now*. Again, they may not wish to incur the inconveniences attendant on protracted strike activity of the usual sort. Hence, activities designed to bring an employer to heel more swiftly than might otherwise be the case may be utilized. Their demands may be within the compass of "wages, hours, and other terms and conditions of employment" but the means whereby the ends are sought may be outside the law and frowned on by society, as personified by the Board and the courts.

A sit-down strike is an unprotected means for gaining an end.[78] The employees take possession of the employer's physical premises and refuse to admit him or to allow work to continue until their demands are met. Slowdowns have already been mentioned and are included in this area of activity.[79] Strikes for short periods of time with threats of repetitions[80] and strikes in violation of no-strike clauses in collective agreements[81] have also been resorted to. These are not necessarily all the possible types of activity which will be accorded the same treatment by the Board. From time to time additional techniques which will be included may be developed through the ingenuity of man.

In another line of cases, the Board has developed the doctrine that even though the means employed to assert bargaining demands are legitimate in themselves, the ends may not be.[82] Thus, where em-

77. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).
78. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).
79. Valley City Furniture Co., 110 N.L.R.B. 1589 (1954) (partial strike by refusal to work overtime); Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952) (slowdown).
80. Valley City Furniture Co., 110 N.L.R.B. 1589 (1954) (one-hour strike with threats of repetition).
81. NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939); Dorsey Trailers, Inc., 80 N.L.R.B. 478 (1948), *enforced as modified,* 179 F.2d 589 (5th Cir. 1950).
82. See, *e.g.,* The American News Co., 55 N.L.R.B. 1302 (1944). Also see NLRB v. National Maritime Union of America, 175 F.2d 686 (2d Cir. 1949) (union advising strike to force employer to accept hiring hall); American Radio Ass'n, CIO, 82 N.L.R.B. 1344 (1949) (threat to strike to enforce demand for union hiring hall provision in contract held violation of sections 8(b) (2) and (3).

ployees strike to compel an employer to accede to demands which would cause him to violate national or state laws, the objectives of the strike are condemned. They are treated as if the means were unlawful, and the protection of section 7 is not considered applicable. It is unnecessary for present purposes to determine exactly when and under what circumstances employee objectives will be considered unprotected. Suffice it to say that when either the means or the ends of employee activities are proscribed, the effects on the allowable area for unilateral actions are the same.

It could be argued from the bald words of section 7 that all concerted employee activity is protected. The words alone certainly lend themselves to that interpretation since no exception to the general rule is indicated on the face of the statute. To say the same thing in a different way, the statute imposes a duty on employers to bargain with the representative of their employees. This is a public duty designed to benefit the general populace by reducing the possibilities for interruptions of interstate commerce because of labor disputes. When employees engage in concerted activities to gain their desired bargaining ends, an employer increases the possibility of continuing an interruption of interstate commerce by refusing to talk to the union unless the means and/or the ends are what are considered proper. It is when they are "improper" that bargaining is unusually necessary in order that the cause of the unrest may be eliminated and the employees satisfied. Through collective bargaining, mutually satisfactory agreements may be concluded. If bargaining is not required in these circumstances until the employees conduct themselves with more propriety, the very thing the act is intended to avoid will occur and the industrial turmoil will tend to be prolonged. Therefore, public policy demands that bargaining take place so as to restore commerce to its accustomed and uninterrupted flow.

However, the act has not been so interpreted. The Board and the courts have reasoned that means and ends which are not regarded as proper are outside the scope of "concerted activities" protected by the act.[83] If section 7 is not applicable, there is no occasion for determining whether an employer has committed an unfair labor practice as set forth in section 8(a). The explanation offered by the Board is that it is impossible to determine an employer's good faith when employees engage in improper activities.[84] The crucial step is the determination of the scope of section 7. With impunity, the employer may refuse to talk to the union, but the immunity lasts only for the duration of the

83. NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); NLRB v. Aladdin Industries, Inc., 125 F.2d 377 (7th Cir.), *cert. denied*, 316 U.S. 706 (1942).

84. Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952).

illicit behavior.[85] If the employees reform, section 7 is revived with a corresponding resurrection of section 8(a).

During the unprotected activity, an employer is allowed to deal directly with the employees. He may offer reinstatement with increased wages,[86] or he may employ replacements to fill the vacancies created by the strikers.[87] If the prohibitions of section 8(a) are inapplicable, it follows that unilateral action may be exercised at will. The position is not so extreme as it might at first appear. The employees are engaged in activities which are not regarded as wholesome or desirable. It is to the public interest that their conduct cease. Interference, restraint, and coercion by the employer may well be utilized to correct the situation. Little sympathy or protection is needed for employees who behave in an anti-social manner. Employers are required to reinstate with back pay employees who strike because of unfair labor practices,[88] except, of course, when the strike violates a no-strike agreement.[89] So, here, the employees may be forced to accept the consequences of their activities. They take their jobs in their hands when they behave in this fashion, and the power of the employer to act unilaterally or to discharge may have some deterrent force. Hence, perhaps reasoned collective bargaining will be more attractive than the possible consequences of unlawful activity which may be neither sure nor quick in forcing acquiescence to demands. Again, this is a practical solution to a practical problem.

Collective Bargaining Agreements and Unilateral Action

A collective bargaining agreement represents the fruition of the collective bargaining process and is the immediate goal to be sought. By the agreement, the parties, labor and management, establish the basis for their relationship for a future period. Their mutual obligations, to some extent at least, have been determined. The agreement has been likened to a constitution by which the basic principles governing their conduct are stated and by which their conduct should be measured.[90] The contract may be extremely complex, covering a multitude of subjects in great detail, or it may be relatively simple. This is not as important as the fact that the parties have agreed to abide by the conditions laid down in it.

85. Valley City Furniture Co., 110 N.L.R.B. 1589 (1954).
86. United Elastic Corp., 84 N.L.R.B. 768 (1949).
87. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939).
88. M. H. Ritzwoller Co. v. NLRB, 114 F.2d 432 (7th Cir. 1940).
89. *Compare* National Elec. Products Corp., 80 N.L.R.B. 995 (1948), *with* Mastro Products Corp., 103 N.L.R.B. 511 (1953), *enforcement granted,* 214 F.2d 462 (2d Cir. 1954), *and* NLRB v. Wagner Iron Works, 220 F.2d 126 (7th Cir. 1955).
90. Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement,* 63 Harv. L. Rev. 1097 (1950).

Before the contract is signed, the Board promotes what may be regarded as an ideal concept of bargaining. Stated simply, it is that before any change is made affecting wages, hours, or other terms and conditions of employment, bargaining should occur before the change rather than afterward.[91] As has been pointed out, the rule is not necessarily absolute in every situation.[92] However, the process favored by the Board might be termed "bargaining before the fact," the fact being the change. This is more or less a uniform system of bargaining applicable to all business and industry within the jurisdiction of the Board. American businesses and industries, on the other hand, are not uniform either in size, capacity, complexity, or nature. Though "businesses" and "industries" may seem in the abstract to be impersonal, they are in fact operated by people and for people And businesses, like people, differ. Therefore, arrangements between management and labor may be expected to differ, and this is as it shoud be so long as the arrangements are arrived at through bargaining.

What, one may ask, has this to do with unilateral action and law? The answer is that it has a great deal to do with it. A bargaining agreement represents the overt agreements between management on the one hand and a union on the other. It may represent more. The agreement may embody by implication the unincluded dispositions of problems which were discussed during bargaining negotiations.[93] Finally, it may even be regarded as including some understanding, usually implicit, about facets of the employment situation which were not mentioned or discussed at all.[94] Before collective bargaining was made mandatory in any business "affecting commerce," an employer was free to make employment contracts as he saw fit, and collective bargaining was permissive as distinguished from mandatory. Because of this, an employer might be deemed to be limited in his freedom of action only by the explicit terms of a collective agreement. Thus, unilateral action would not be even potentially unlawful or circumscribed except in the area carved out by the agreement. Such an argument has gained favor neither with the Board nor with the courts and, therefore, will be discarded for the present. If it had been adopted, the present section of this paper would be unnecessary, or at least greatly restricted.

A second view of the agreement is that the duty to bargain collectively, as conceived by the Board because of the act, continues with respect to all employment conditions which were unexplored during

91. Union Mfg. Co., 95 N.L.R.B. 792 (1951); Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949); Tomlinson of High Point, Inc., 74 N.L.R.B. 681 (1947); General Motors Corp., 59 N.L.R.B. 1143 (1944).

92. Western Printing Co., 34 N.L.R.B. 194 (1941).

93. Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), *enforcement granted*, 196 F.2d 680 (2d Cir. 1952).

94. Sullivan Dry Dock & Repair Corp., 67 N.L.R.B. 627 (1946).

the negotiations culminating in the agreement.[95] Taking this view, any change which either party might wish to make in any employment condition not contained in the agreement or discussed during negotiations would be subject to bargaining before the fact. This is said to be the view which the Board and the courts have adopted, promoted, and enforced.[96] To a large extent, this is true. However, it may be worthwhile to examine the law as it has developed and is developing to see to what, if any, extent a third possible concept of collective bargaining agreements has been accomodated to the second view.

A collective agreement may be conceived as not simply constituting the terms included and the terms excluded but considered during negotiations. It may be said to include the entire working relationship as it existed at the time the agreement was reached and, probably, signed.[97] The primary problem connected with this view is a determination of what is included. Does it mean the actual conditions at the time? This would freeze the relationship and make it static. Human beings are alive and active, not static. Their relationships are also subject to change, sometimes without notice. If this be true, then may the third, all-inclusive view mean that only the procedures by by which the undefined employment relations are determined are adopted? This would allow the fiuidity which normally accompanies human relationships. After all, collective agreements are to govern the employment situation for a period of time. The second alternative, then, would seem highly desirable. However, one must recall that before the advent of a union, the employer himself had established employment conditions, and the latter concept would necessarily imply that this procedure was to continue during the life of the contract. It is virtually the same as the first over-all view of collective agreements discussed above. But another alternative is possible, and that is that substantive conditions are implicitly approved as to some subjects about which the parties could have bargained and that the procedural methods of establishing others have been condoned. The complexity of this alternative is such as to make one hestitate to examine, much less apply, it. However, it may be seriously considered.

To say that employment conditions not discussed during bargaining negotiations are automatically continued during the term of a contract is to say too much—or not enough. Immediately one asks, "Precisely what is 'automatically continued'?" Suppose plant rules were the issue. Three possibilities appear. First, the exact conditions previously prevailing, that is, the substantive rules in force at the

95. Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), *enforcement granted,* 196 F.2d 680 (2d Cir. 1952); John W. Bolton & Sons, Inc., 91 N.L.R.B. 989 (1950).

96. Note, *Employer Unilateral Action,* 35 CORNELL L.Q. 192 (1949).

97. Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement,* 63 HARV. L. REV. 1097 (1950).

time the contract was signed. Second, the same method of making the rules would be retained, *i.e.*, the employer could unilaterally alter the rules as necessity demanded, thereby allowing a needed flexibility to accommodate changes in conditions. Third, the employer would have to bargain with the union each time a rule needed to be changed, or bargaining would be required to establish a method of changing the rules. The Board might well prefer the latter. The union would then receive affirmative credit for the change rather than a type of negative credit resulting from the maintenance of the established system. It is suggested that again the context in which the rules had been created should be considered. That plant rules are used for purposes of illustration is unimportant. The same result should follow whether the conditions under consideration be job classifications, overtime procedures, or what have you. The conditions may vary with the cases; the method of analysis should not. The one deciding the case should consider whether the conditions, plant rules, had been altered often in the past or were relatively stable. If the former, then the system by which they were promulgated might well be considered to have remained in *status quo*. If the latter, then the rules themselves would likely be considered to have been adopted, and the employer would violate the duty to bargain by unilaterally changing them.

Unilateral Action, Character and Form. In order to examine the problems concerning unilateral action after a bargaining agreement has been signed, a distinction must be drawn between action which is unilateral in form and action unilateral in character. The context in which the action takes place is the categorical determinative.

Action unilateral in character is that taken by an employer without the agreement of the union, express or implied. It is uniformly an unfair labor practice because it is entirely inimical to the concept of collective bargaining contained in the National Labor Relations Act. Acts unilateral in character tend to undermine a union, and their acervation could, and probably would, cause the unrest, discontent, and operational interruptions which the act is calculated to reduce.

Action unilateral in form, but not in character, is that affecting wages, hours, or other terms and conditions of employment which an employer takes without consulting the union because prior union consent has been given to the type of action involved. Thus, an employer could raise wages without consulting the union if this power were given in a management functions clause, or otherwise.[98] Ordinarily, wage increases without prior union consultation would be highly suspect. However, the danger that they would tend to destroy the union's influence is absent if it has consented in advance or has

98. California Portland Cement Co., 101 N.L.R.B. 1436 (1952).

indicated by its conduct that this was the manner in which action was to be taken. If the action is unilateral in form only, then it would not be an unfair labor practice. The Board may promote a "bargaining before the fact" philosophy, but the cases in which the duty to bargain has been applied indicate that the parties may agree on their own peculiar procedures for bargaining once a collective agreement has been signed. So long as they abide by their established bargaining methods, the Board will not interfere.

> We are of the opinion . . . that it will not effectuate the statutory policy of "encouraging the practice and procedure of collective bargaining" for the Board to assume the job of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board.[99]

The fact that a particular bargainable subject is acted on unilaterally is immaterial, by and large, in determining whether or not the action is an unfair labor practice after an agreement is signed. The "by and large" is necessary because the subject itself may be of some weight in deciding a specific case. Changes in wage rates would likely seem to be more suspect as unilateral action under a contract than a change, say, in production schedules or plant rules. Initiating an incentive plan may be an unfair practice in one case[100] and a fair one in another.[101] The fact that an act is unilateral is not enough alone to support a conclusion that it is unlawful. The collective bargaining agreement and/or the relations of the parties must be examined in order to ascertain the lawfulness of a particular act affecting a particular employment condition.[102]

The distinction between the form and the character of unilateral action has not been enunciated by the Board. One may suggest that, in the reported cases, the writers have been verbose without being articulate. However, on no other basis can the results of the cases be said to constitute a logical development of the law. Otherwise, the Board would appear to have jumped on its horse and ridden off in all directions at once. When dismissing a charge that section 8(a) (5) has been violated, the usual conclusion is that the action was not part of a campaign to undermine the union or to avoid the duty

99 Consolidated Aircraft Corp., 47 N.L.R.B. 694, 706 (1943), *enforced as Modified*, 141 F.2d 785 (9th Cir. 1944).
100. John W. Bolton & Sons, Inc., 91 N.L.R.B. 989 (1950).
101. Libby, McNeill & Libby, 65 N.L.R.B. 873 (1946).
102. NLRB v. Nash-Finch Co., 211 F.2d 622 (8th Cir. 1954).

to bargain[103]—or, even more simply, that under the circumstances,[104] there has been no unfair labor practice. These vague statements may suffice in cases involving unilateral action before a collective agreement has been signed, but they are not satisfactory in cases involving a contract. In the latter, the basis for the relationship between the parties is different. It is not, therefore, illogical that unilateral action should be treated on a different basis. To use the same conclusions in both situations is to obscure the issue. It indicates that the analysis of the cases is the same, whereas it is not, or should not be. The contract makes the difference. When action is unilateral in character, it may have a tendency to subvert a union, whether or not a collective agreement exists; but to verbalize the case decisions in the same way regardless of the existence of a contract befogs the necessary distinction between the form and the character of unilateral acts. The denotation of "unilateral action" is the same regardless of the existence of a contract. The connotation differs, and this connotative difference is, has been, and should be decisive.

It is submitted that, properly analyzed, these cases lend further, if not overwhelming, support to the Cox-Dunlop concept of collective bargaining agreements.[105] These professors have argued that the Board misconceives a collective agreement when it holds that subjects not expressly covered in the agreement or considered during precontract negotiations must be bargained about later if either party desires. Rather, they regard a collective agreement as including not only these subjects but all the subjects of bargaining, actual or potential. This, of course, is an oversimplification of their philosophy. However, rules governing unilateral action become almost elementary when their view is adopted. Like other legal concepts such as consideration and negligence, the difficulty is not in the theory but in the application of the theory to specific factual situations. Perhaps, more than has been realized, their idea has been incorporated into the techniques used by the Board in solving problems in the area of unilateral action after a contract has been signed.

Management Functions and Collective Bargaining. With great glee, the announcement was made, with appropriate citations, that the day of unilateral action was gone forever from the American labor scene; henceforth, employers would have to bargain about every employment condition right down to the last detail.[106] Scholars entered the lists to argue that such a concept of collective bargaining would be both

103. Massey Gin & Mach. Works, Inc., 78 N.L.R.B. 189 (1948); W. W. Cross & Co., 77 N.L.R.B. 1162 (1948), *enforcement granted,* 174 F.2d 875 (1st Cir. 1949).

104. Libby, McNeill & Libby, 65 N.L.R.B. 873 (1946).

105. Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement,* 63 HARV. L. REV. 1097 (1950).

106. Weyand, *Majority Rule in Collective Bargaining,* 45 COLUM. L. REV. 556 (1945).

futile and foolish.[107] "Management prerogatives," a concept analagous to the divine right of kings, was quietly renamed "management functions," an innocuous label designed to give less offense to employees, unions, the Labor Board, and the courts. One recent pronouncement is of interest and will serve superbly to state succinctly the relevant considerations in connection with management functions clauses.

> The questions of what the parties should bargain about and what they should leave to unilateral rather than joint determination could, of course, be left to the parties themselves. They could decide whether to bargain about pensions or the number of shifts in the same way that they decide whether to have a wage increase or how much of an increase. That would involve the possibility of a cessation of production because of stalemate on these issues; but such an interruption is an integral part of collective bargaining. The results might then differ from one enterprise to another; one might bargain about pensions, the other might not; one might place a matter under unilateral control, the other might make it a matter of joint determination. But such differences would be quite in accord with the postulate of autonomous determination through collective bargaining.
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> In an enterprise in which collective bargaining is just making its appearance, if the law in its administration surveys the course of the apparent bargaining and determines that it is apparent rather than real, because of the scope of the demands for unilateral discretion, the law may well be merely enforcing the duty to bargain rather than shaping the content of the bargain. But in an enterprise in which collective bargaining is an accepted and going institution, if the law commands that some particular item must be made the subject of bargaining and may not be the object of a firm demand for unilateral control, then to that extent the law interferes with the parties' autonomy and shapes the content of their bargain. Such decisions tend to become not only definitions of the legal duty to bargain but also statements of the maximum that the parties may in practice seek from one another.[108]

Entrusting to management the power to establish certain conditions of employment does not necessarily involve the danger which is thought to inhere in unilateral action.[109] Prior agreement on the way

107. TELLER, MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING 91 (1947); Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board,* 63 HARV. L. REV. 389 (1950); Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement,* 63 HARV. L. REV. 1097 (1950).

108. Shulman, *Reason, Contract, and Law in Labor Relations,* 68 HARV. L. REV. 999, 1000-01 (1955).

109. But the Board adopted an attitude unfavorable to bargaining for broad management functions clauses by which an employer was given exclusive control of one or more employment conditions. Singer Mfg. Co. v. NLRB, 119 F.2d 131 (7th Cir.), *cert. denied,* 313 U.S. 595 (1941); Register Publishing Co., 44 N.L.R.B. 834 (1942). Admittedly, an employer would be hard pressed to justify an insistence that wages must be left to his determination, though one did persuade a court, but not the Board, that such a position was reasonable. NLRB v. Norfolk Shipbuilding & Drydock Corp., 195 F.2d 632 (4th Cir. 1952). Justification for establishing exclusive management control over items like merit increases, incentive systems, shift schedules, etc., would not be as

in which employment conditions are to be determined precludes any undermining of the bargaining agent or disparagement of the bargaining process. The use of management functions clauses accomodates management functions to collective bargaining. They become a mutually agreed upon procedure and the mutuality of the agreement dissolves the basis for fears that an employer's unilateral acts will insidiously affect the union by indicating to employees that they do not need to organize in order to obtain satisfactory employment terms. Thus, an employer's action pursuant to such an agreement is perhaps the best possible illustration of action unilateral in form only.

The Thesis and the Cases. The cases which may be said to support the outlined theory are few. This is not unexpected and for at least two reasons. A union would have little reason to complain about

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hard to find. Nonetheless, the Board has found that insistence by an employer on leaving a bargaining item as a management function is evidence of bad faith bargaining. Gay Paree Undergarment Co., 91 N.L.R.B. 1363 (1950).

A sharp rebuke for its attitude toward bargaining for management functions clauses was handed the Board by the United States Supreme Court. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). The employer had insisted on a clause leaving management free to hire, promote, discharge, discipline for cause, and schedule working hours. The Board assumed the position that insisting on the clause was a *per se* violation of § 8(a) (5) because it effectively removed from the area of bargaining the subjects included in it. In an opinion by the late Chief Justice Vinson, the Court indicated that a more moderate attitude would be necessary and that the Board was to apply the test of good faith to the negotiations. Not all management functions clauses were to be condemned. In a dissent which was not unexpected, Justices Minton, Black, and Douglas maintained that the employer was in effect demanding that the union waive bargaining on the subjects covered by the clause, *Id.* at 410. They would have required bargaining on each and every subject involved.

With some semblance of good grace, the Board bowed to the will of the Court in a case the next year and held that an employer's insistence on the right to control all the "important" terms and conditions of employment coupled with a demand that the union give up the right to strike was evidence that negotiations were not being conducted in good faith. It did not bow low enough, and its order to bargain was refused enforcement. United Clay Mines Corp., 102 N.L.R.B. 1368 (1953), *enforcement denied,* 219 F.2d 120 (6th Cir. 1955).

Prior to the *American National Insurance* decision in the Supreme Court, the Board had indicated that management functions clauses could be discussed in bargaining. Alabama Marble Co., 83 N.L.R.B. 1047 (1949); Standard Generator Serv. Co., 90 N.L.R.B. 790 (1950). To insist on them to the point of an impasse would be an unfair labor practice. Dixie Culvert Mfg. Co., 87 N.L.R.B. 554 (1949); Franklin Hosiery Mills, 83 N.L.R.B. 276 (1949). The case would seem to have changed that process of thinking. If an employer may bargain for such a clause in good faith, then it would seem to follow that he could bargain for it even to the extent of reaching an impasse, with the conventional results on the scope of lawful unilateral action. If a management functions clause is proper for bargaining purposes, no good reason appears for treating it differently from any other subject, assuming, of course, that the bargaining was in good faith. If it were not, then any impasse would have been brought about by the employer's unfair labor practice and, according to the usual rule in such cases, he would not be allowed to exercise unilateral action to implement the proposed contractual term after the impasse. Reed & Prince Mfg. Co., 96 N.L.R.B. 850 (1951), *enforcement granted,* 205 F.2d 131 (1st Cir.), *cert. denied,* 346 U.S. 887 (1953); NLRB v. Andrew Jergens Co., 175 F.2d 130, (9th Cir.), *cert. denied,* 338 U.S. 827 (1949).

action unilateral in form and therefore the Board would not often have to face the issue. Second, proof that the action is unilateral in form rather than character may be difficult to come by. Also, the Board may draw inferences from the facts,[110] and since collective bargaining is the fashion, it may tend to draw inferences unfavorable to unilateral action in whatever form. However, when squarely confronted by the problem, both before and after the Taft-Hartley amendments, it has conformed to the suggested distinction.[111] In the cases in which unilateral action was held to be unlawful, either another ground was available for the decision[112] or the evidence indicated that the action was unilateral in character.[113] Consequently, some employers have acted without impunity in unilaterally changing wages, hours, and other terms and conditions of employment.[114] That the changes were held to be unfair does not detract from the proposed analysis of the problem.

In *Crown Zellerbach Corporation*,[115] the employer decided to experiment with a new type of machine and, deeming the contractual wage rate inapplicable, bargained directly with the individual employee selected to work with the new machine. He agreed to work for a wage below the level set by contract. Later, the union protested and insisted on the contractual rate even though the company explained its position. Unfair labor practice charges were filed after the employer refused the union's demands. The charges were dismissed. During a long, amicable collective bargaining relationship, the company had made several similar changes in the past and had reached an agreement with the union after its unilateral action. The Board indicated that the instance was an isolated one and not part of a conscious campaign to undermine the union. Further, it considered the contractual grievance procedure adequate to settle any dispute over the matter.

Here is a case in which the bargaining power of a large company was pitted against that of a single employee. He agreed to work for a wage lower than that established by a collective agreement and there was no bargaining before the fact with the union, his selected bargaining representative. If ever, it would appear that the Board

110. NLRB v. Nevada Consol. Copper Corp., 316 U.S. 105 (1942).

111. Borden Co., 110 N.L.R.B. 802 (1954); Massey Gin & Mach. Works, Inc., 78 N.L.R.B. 189 (1948); W. W. Cross & Co., 77 N.L.R.B. 1162 (1948), *enforcement granted*, 174 F.2d 875 (1st Cir. 1949); Libby, McNeill & Libby, 65 N.L.R.B. 873 (1946).

112. Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949); Allied Mills, Inc. 82 N.L.R.B. 854 (1949); Carroll's Transfer Co., 56 N.L.R.B. 935 (1944).

113. John W. Bolton & Sons, Inc., 91 N.L.R.B. 989 (1950); United States Automatic Corp., 57 N.L.R.B. 124 (1944).

114. NLRB v. Highland Shoe, Inc., 119 F.2d 218 (1st Cir. 1941); General Motors Corp., 81 N.L.R.B. 779 (1949), *enforcement granted*, 179 F.2d 221 (2d Cir. 1950); Inland Steel Co., 77 N.L.R.B. 1, *enforcement granted*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

115. 95 N.L.R.B. 753 (1951).

should, in righteous indignation, apply the full sanctions of the act. However, it merely dismissed the charges. The past conduct of the parties indicated that this was their accepted bargaining procedure, *i.e.*, they had been in the habit of allowing the company to act first and then discuss its action with the union. If this inference is drawn from the facts and if the parties are to be allowed to handle their own problems, the Board's decision was inevitable, and irreproachable. One might possibly disagree with the evidentiary inference, but it is more difficult to disagree with the theory underlying the result unless a pat pattern of bargaining is to be enforced in every type of union-management relationship. *Quaere* whether either unions or employers would submit to such a standard.

Massey Gin and Machine Works, Inc.,[116] involved a decision by the Board as to whether an employer had violated the duty to bargain by changing the hours when shifts began. The subject apparently had not been considered during negotiations nor expressly included in the agreement in force when the changes were made. After the changes, the union protested, and the parties bargained about the matter and came to an agreement. Previously, a similar change had been made without either union protest or prior bargaining. The contract was held to be ambiguous on the question of the employer's right or power to effect the change, and the charges were dismissed. The Board added that the employer should have notified the union in advance of the change, an indication that it would intrude its bargaining before the fact concept into the relationship. One would venture that the Board's suggestion was a superfluous gratuity. The prior conduct of the parties was a sufficient ground for finding that the change of shift hours was made in accordance with their usual practice and was consistent with their contractual relationship. The employer's action would be characterized as unilateral in form and therefore permissible.

Finally, the case of *California Portland Cement Company*[117] may be mentioned. An existing agreement gave the employer the right to raise "wages" unilaterally, and the compensation of salaried employees was unilaterally increased without protest from the union. The Board, while it found other unfair practices in the case, held that this particular action was not unlawful. The trial examiner had regarded the raise as unfair, taking the contractual language literally. The Board, on the contrary, decided that the behavior of the parties, and that of the union in particular, clarified any ambiguity in the contract. Acquiescence in the unilateral action by the union was sufficient to show that the parties, when they said "wages," meant both wages and salaries. Therefore, the action was unilateral in form only.

116. 78 N.L.R.B. 189 (1948).
117. 101 N.L.R.B. 1436 (1952).

The Board has been a bit wary of concluding that by signing a collective bargaining agreement either an employer or a union has waived the right to bargain about employment conditions which were not discussed during negotiations leading to the agreement. The right to future bargaining may be expressly reserved in the contract,[118] or a refusal to recognize an established condition as bargainable may be the ground for forcing bargaining even after an agreement has been signed.[119] An employer's unilateral action on the subject after a contract had been signed would be an unfair labor practice because the union could not be considered to have agreed to it in advance.

Unilateral Action and the Interpretation of Collective Bargaining Agreements. If the express terms of a collective bargaining agreement constituted the total relationship between employer and union, then nothing outside the contract would be of any interest to the union during the term of the contract. However, this is not always the way contracts have been treated. In *Nash-Finch Company,*[120] the individual contracts with many of the employees before the union was designated to represent a part of them had called for annual Christmas bonuses along with hospitalization and group life insurance. The employees were told that these benefits would probably be elimimated if a union came. During negotiations with the union for a contract, the union proposed the following clause:

> The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this agreement.[121]

This was rejected by the employer, and the following clause was used in its place:

> Maintenance of Standards. The Employer agrees that wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest minimum standard specified in this agreement and the conditions of the employment shall be improved wherever specific provisions for improvement are made elsewhere in this agreement.[122]

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118. Allied Mills, Inc., 82 N.L.R.B. 854 (1949). See NLRB v. Black-Clawson Co., 210 F.2d 523 (6th Cir. 1954) (right to bargain about pension plan reserved by union in signing collective agreement, but union held to have acquiesced in its later unilateral initiation by employer).

119. NLRB v. General Motors Corp., 179 F.2d 221 (2d Cir. 1950); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949); NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir.), *cert. denied,* 335 U.S. 814 (1948).

120. 103 N.L.R.B. 1695 (1953), *enforcement denied,* 211 F.2d 622 (8th Cir. 1954).

121. NLRB v. Nash-Finch Co., 211 F.2d 622, 624 (8th Cir. 1954).

122. *Id.* at 625.

The Christmas bonuses and other benefits apparently were not discussed, but a wage raise was agreed upon. After the agreement was signed, the employer unilaterally withdrew the benefits from the employees covered by the collective agreement but retained them for the other employees. However, the latter did not receive the wage increase given the employees represented by the union. The Board applied its usual line of reasoning in considering the case. The benefits had not been consciously explored or discussed during negotiations; and, therefore, before the employer could make any valid change in them, the union had to be consulted. After ruling that section 8(a) (5) had been violated, the Board indicated that the union might be willing to forego these conditions but that it should not be considered to have waived the right to bargain about them because of the words of the contract.

The Board's order to bargain was not enforced by a court of appeals.[123] It looked at the words of the contract and construed them literally in determining what the employer had bound himself to do. The union members knew that the employer did not intend to maintain the benefits unless required specifically to do so, the change in the contract further indicated this, and the fact that employees not covered by the contract retained the benefits was also given weight. Because of this, the court reasoned that the union had made its bargain and would have to keep it for the duration of the agreement since it should have known the effect of the words it had used in creating the contract. Thus, the employer was relieved of any duty to maintain the benefits or to bargain about abolishing them. The employment conditions not considered during negotiations were not carried over in *status quo* because a bargain had been struck on money items and no other provision of the contract could be construed as indicating that prior conditions not covered by the contract would be continued.

The court's opinion represents a strict attitude in construing contracts with labor organizations and a tendency to hold the union and the employer to the meaning of the words used. Both the union and the employer appear to have been gambling on a later determination for both as to the meaning of the agreement, and the union lost in the end. Here, because of the terms of the contract, the unilateral elimination of the prior benefits was considered unilateral in form since the union was held to have waived their maintenance. The context in which the action took place governed the result. The judicial attitude represents something of a departure from the free-wheeling days of yore when a union was always given the benefit of any doubt. Here the court felt that there was no doubt about the result which should have been reached and accordingly rendered its decision.

123. NLRB v. Nash-Finch Co., 211 F.2d 622 (8th Cir. 1954).

In a prior case on somewhat similar facts,[124] the Board had reached the same conclusion before the Taft-Hartley amendments, and they appear not to have had any effect on the decision by the court in the *Nash-Finch* case, which is distinguishable on two grounds from the usual line of decisions. First, the benefits in question were money items, and money items had been consciously explored during negotiations.[125] Second, by reading the contract literally, the employer appeared bound only to maintain the employment conditions provided for by contract, not both conditions established by contract and conditions otherwise prevailing at the time.

Perhaps it would be wise to recall here that neither the union nor the employer considered it desirable to mention the employment conditions in question during pre-contract negotiations. Whatever their reasons, the fact remains that a condition of employment persisting at the time of bargaining conferences was not overtly considered. This would lend credence to an argument that an employer's continuation of the established condition after signing the agreement would not be an unfair labor practice. A decision would have to be made as to whether the exact condition prevailing when the contract was signed was to be continued or whether the procedure by which it was established was continued. The decision would necessarily rest on the particular facts of the case. If the *condition* were continued, any change would be unfair. If the employer's procedure had been retained, a finding that his subsequent unilateral changes were unlawful would be inconsistent with the proposed analysis. Moreover, if Board precedent is entitled to any respect, it would be inconsistent with prior treatment of the problem.[126] However, any change in the procedure itself would be illicit because the union could not be said to have assented thereto.

If unilateral changes in employment conditions not included in the contract would be an unfair labor practice, then certainly unilateral changes in the express terms of the agreement would be unfair, too, in the absence of peculiar circumstances. Otherwise, the contract would not limit or confine the employer's power to exercise unilateral action, and the situation would be the same as if a union had not been designated as collective bargaining agent. Because grievance procedures are becoming more prevalent and because any changes in the contract by the employer might possibly be settled by utilizing them, the problem should not arise too often. An employer's refusal to

124. Sullivan Dry Dock & Repair Corp., 67 N.L.R.B. 627 (1946).
125. *But see* NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952) (employer required to bargain about pensions when wages re-opened under contract because pensions had not been discussed in previous bargaining).
126. Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951); Massey Gin & Mach. Works, Inc., 78 N.L.R.B. 189 (1948); Libby, McNeill & Libby, 65 N.L.R.B. 873 (1946).

follow a contractual grievance procedure, however, would be treated as violative of sections 8(a)(1) and (5) because it is through the grievance procedure that the contracting parties have agreed to conduct their bargaining during the term of the contract.[127] Whether a contractual grievance procedure should first be exhausted before a complaining union should be able to appeal to the Board is beyond the scope of this paper.[128]

The terms of a collective agreement may be affected in three ways by an employer's conduct. First, the provisions contained therein may not be followed. Second, new conditions may be introduced which were not provided for by contract. Third, the employer may both ignore the contract and introduce new conditions. Only the latter two variances need be considered here. If the employer simply failed to comply with his contractual obligations, there might be a private action for damages, but the Board would not become involved unless there appeared to be a conscious campaign to undermine the union.[129]

In the days when a closed shop was lawful, an employer was held to have violated the duty to bargain and to have interfered with the exercise of his employees' section 7 rights by hiring new employees independently of the union even though the contract contained a closed shop clause.[130] Another employer violated the same sections of the act by establishing a separate grievance procedure for employees who were not members of the union though the agreement contained a grievance procedure applicable to all the employees in the unit.[131] Their grievances were settled without allowing the union to be present, and it was simply notified of the settlements. In both cases, the Board found that by ignoring the contracts and by acting in derogation of them, the employers had effectively changed the terms of the contracts and had made new ones directly with the employees involved.[132] This type of behavior, of course, is the sort which will not be tolerated by the Board.

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127. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denicd,* 336 U.S. 960 (1949).

128. See Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement,* 63 HARV. L. REV. 1097 (1950).

129. Consolidated Aircraft Corp., 47 N.L.R.B. 694, 706 (1943), *enforced as modified,* 141 F.2d 785 (9th Cir. 1944).

130. Carrol's Transfer Co., 56 N.L.R.B. 935 (1944).

131. United States Automatic Corp., 57 N.L.R.B. 124 (1944).

132. In both cases, the employers had refused to follow the grievance machinery established by contract after the union protested the companies' actions. Therefore, it was actually unnecessary for the Board to decide whether the acts in question were in derogation of the contracts. By refusing to bargain about the changes in the way they had agreed to do, the employers had furnished the Board with ample grounds for holding that the statute had been violated. However, the latter point was not relied on when the specific changes involved were held to be unfair labor practices. This begins to look like "policing collective contracts" which, the year before these cases were decided, the Board had declared it would not engage in. Consolidated Aircraft

A totally new employment condition may be added unilaterally while a collective agreement is in force, though the addition would probably be a violation of the duty to bargain unless some provision in the contract allowed the employer to exercise such control over the employment situation. Usually the Board has not had to rely on the addition itself in finding a violation of section 8(a) (5) since often the employer either had refused to submit to the grievance machinery[133] or had maintained that the subject was not one about which bargaining could be required.[134] It may also rely on the provisions of section 8(d) in finding that the action was unlawful because a violation of section 8(d) would be a violation of the duty to bargain contained in section 8(a) (5).[135]

In one rather interesting case, there was much disagreement as to the facts on which a decision should be based and what the legal effect of the facts was.[136] An employer unilaterally introduced a pension plan during the term of an agreement which made no provision for such a plan. He maintained both that the plan was not subject to mandatory bargaining and that he had complied with any duty to bargain about it. The Board and the court agreed that the plan was subject to bargaining. The plan had been announced unilaterally during the life of one collective agreement, but it applied to all the employees and not just to those represented by the union. During negotiations for a new agreement, the union reserved the right to bargain during the term of the new agreement about any pension plan. The contract was later opened to negotiate a wage raise, but the plan was not discussed. At that time the employer was negotiating directly with the employees about the plan, and the union objected to the

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Corp., 47 N.L.R.B. 694, 706 (1943), *enforced as modified,* 141 F.2d 785 (9th Cir. 1944). If the grievance procedures were adequate to handle the problems involved, the disputes might have been settled privately by an order from the Board to the employers to subject the disputes to the grievance machinery. The Board's finding that a company had refused to bargain when it insisted that the contractual grievance procedure be followed for bargaining about a dispute concerning the contract was not sustained by a court which determined that the grievance machinery was adequate for resolving the conflict. Timken Roller Bearing Co. v. NLRB, 161 F.2d 949 (6th Cir. 1947). If the disputes were not cognizable under the grievance procedure, then the Board would have had to resolve the conflict. The resolution would necessarily depend on an interpretation of the contract, and the Board should avoid this sort of thing as often as possible, as it appears to have done at times in the past. California Portland Cement Co., 101 N.L.R.B. 1436 (1952); Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943), *enforced as modified,* 141 F.2d 785 (9th Cir. 1944). It seems to have enough difficulty in interpreting the National Labor Relations Act and the facts of the cases presented to it. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); Nash-Finch Co. v. NLRB, 211 F.2d 622 (8th Cir. 1954); NLRB v. Black-Clawson Co., 210 F.2d 523 (6th Cir. 1954).

133. Inland Steel Co., 77 N.L.R.B. 1, *enforcement granted,* 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949).

134. NLRB v. General Motors Corp., 179 F.2d 221 (2d Cir. 1950).

135. John W. Bolton & Sons, Inc., 91 N.L.R.B. 989 (1950).

136. Black-Clawson Co., 103 N.L.R.B. 928 (1953), *enforcement denied,* 210 F.2d 523 (6th Cir. 1954).

direct negotiations with employees. Then the plan was adopted. The trial examiner held that the union had never requested to bargain about the plan and that therefore no unfair labor practice had been committed. The Board refused to follow this and held that bargaining had been specifically requested. It also stated that a union which has a contract with an employer need not request bargaining on any change the employer wishes to make but that rather the employer is obliged to go to the union. The Board's order to bargain was denied enforcement because the court ruled that the union must be held to have acquiesced in the establishment of the plan even though it objected to the employer's method of direct dealing with the employees. The union had been notified of the employer's intention to introduce the plan and had been consulted about it. Therefore, though the action was unilateral in form, it was not unilateral in character and no unfair labor practice was involved.

The various opinions in the case demonstrate how suitable facts may be selected from the evidence to support a conclusion and a result. The Board relied on one set of findings, not those used by the trial examiner, and reached its usual result when that particular set of facts is present. The court, relying on a different interpretation of the facts, reached the opposite result. The union seemed to have been more concerned with the form or ritual to be indulged in bargaining than with the substance of the pension plan itself, and the same court has indicated some impatience with the Board's emphasis on form in these matters.[137]

Employment conditions considered during pre-contract negotiations but not included in the contract remain to be considered. Whether or not unilateral action affecting them would be an unfair labor practice would seem to depend on the disposition made during bargaining. There is no further duty to bargain about them for the life of the contract.[138] Virtually no cases exist in this area, probably because any disputes are settled through a grievance procedure in the contract or through private and voluntary negotiations between the employer and the union.

In a recent case,[139] a union proposed that the contract include a provision stating that milk deliveries would be continued to be made seven days a week. There was already a provision that the workweek would be five days. The proposal about deliveries was rejected, and the contract did not contain any mention of deliveries other than that they could not be scheduled for hours earlier than seven in the

137. NLRB v. Reeder Motor Car Co., 202 F.2d 802 (6th Cir. 1953) (employees may repudiate a union without formality).

138. Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), *enforcement granted*, 196 F.2d 680 (2d Cir. 1952).

139. Borden Co., 110 N.L.R.B. 802 (1954).

morning. After signing the contract, the employer unilaterally scheduled deliveries for only six days a week rather than seven. The union complained, but the employer refused to discuss the matter. The union's appeal to the Board was unsuccessful. Consideration had been given to the workweek and to the number of delivery days. By rejecting the union's request for seven days of deliveries and by not making any other provision about them, the employer became entitled to establish them as he saw fit, subject only to the limitation that they could not be scheduled before the hour designated by contract. Section 8(d) was held to foreclose further discussion during the life of the contract.

Suppose an employer suggests during bargaining negotiations that a new condition be implemented, for instance, that a system of merit increases be established. If the union rejects the proposal, then the employer should be held guilty of an unfair labor practice if he later institutes such a system during the life of the contract. If the union had indicated indifference to the proposal, it is suggested that an employer's unilateral institution of the condition during the period covered by the contract would not be an unfair practice. The union would have indicated that whether or not the condition should prevail would be a matter for the employer to decide. If the employer then acts, the union should not be heard to complain.

If the employer's proposal relates to a change in an existing condition and the union rejects the proposed change but not the condition itself, though it is not provided for in the contract, the condition should be maintained in *status quo*, and any unilateral change would be unlawful. By way of illustration, suppose a company had been consulting the union before making merit increases and proposed that it be given that function exclusively. The company could not lawfully grant merit increases unilaterally during the contract if the union rejected the proposal. Rather, prior consultation with the union before giving any increases should be continued. However, had the union expressed itself as indifferent to the change, it cared neither one way nor the other, then the employer presumably would not be guilty of an unfair labor practice if a unilateral change were made. A union's rejection of the proposed change of condition and a rejection of the continuance of the condition itself would mean that the employer could not continue the condition after the contract had been signed.

A union may also make demands and drop them without their being included in the contract. The technique in dealing with such suggestions should be the same, though the results, as far as the scope of unilateral action is concerned, might differ. A union's suggestion of changing an established condition could be answered in two ways. The employer might reject the proposed change, and the

condition should be carried forward in *status quo*. Also, the employer might reject both the suggested change and the condition itself. Then it would be an unfair practice to continue the condition after signing the contract. For instance, if the union demanded that the employer consult it prior to granting merit increases when this had not been the custom in the past, if the employer rejected the demand, the system of unilaterally granting merit increases should be continued under the new agreement as it had been in the past. A unilateral change in the procedure of granting the increases would be an unfair practice. If during bargaining, the employer refused to continue granting merit increases, they would then be eliminated for the duration of the contract and granting them would be illegal. The Board essentially followed this line of reasoning in the case involving milk deliveries.[140] The union proposed a change in the method whereby the number of deliveries was determined. The employer had had freedom of action previously. When the change was rejected, then the condition, the employer's freedom of action, was carried forward during the new contract. An assumption that the employer would reject any system of deliveries would be absurd for presumably that would put the company out of business.

A union might also demand the institution of a new employment condition. If the employer rejected the demand, any unilateral initiation of the condition after signing the contract would be unlawful. If the union requested that a system of merit increases be created and the employer refused, they could not be given unilaterally during the life of the contract without violating section 8(a)(5).

These problems should not often arise for the Board's consideration since a collective bargaining agreement would usually care for them. When they do, the evidence may be quite conflicting, particularly if the Board continues to regard as evidence of bad faith an insistence that a stenographer be present during negotiations.[141] The fact that similar problems have in fact come before the Board and the possibility that they may do so again in the future has made their consideration necessary.

CONCLUSION

In treating the problems discussed above, the Board has demonstrated a feeling of distrust for unilateral acts by employers. Unilateral action before a collective agreement has been signed will almost inevitably be a breach of the duty to bargain collectively so long as the concept of bargaining before the fact prevails. Difficult problems

140. *Ibid.*
141. Reed & Prince Mfg. Co., 96 N.L.R.B. 850 (1951), *enforcement granted*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

will therefore confront both unions and management if unfair labor practice charges are to be avoided. Day-to-day changes necessitated by business conditions may involve the negotiating parties in trivial debates over the necessity or appropriateness of proposed changes. However, sensible arrangements may be derived for conducting the business during the interim between the request for bargaining and the signing of the agreement.

Strikes and impasses have presented the Board with a variety of problems which it has treated with a sense of reality. Though individual bargaining may be undesirable when a union has been designated as the collective bargaining agent, when faced with an impasse in negotiations or certain types of strikes, an employer would often be virtually helpless if individual bargaining were not permitted. The Board's realization of this appears to have guided it when presented with these problems.

After a collective bargaining agreement has been signed, unilateral action may or may not have the vice which inheres in it in other circumstances. The distinction between the form and the character of unilateral conduct is therefore necessary for a consideration of unilateral acts during the life of a collective agreement. Despite the fact that the Board has not articulated the distinction in so many words, an examination of the cases seems to indicate that it has been followed. When it is, a rational result should be reached.

Recent cases indicate judicial and administrative tendencies to hold both labor and management to their agreements and to construe those agreements strictly. The benefits of this may redound to either the union or the employer in each case. Though this may not be the best labor policy possible, in the long run unions and unionization should survive if their attractiveness to employees and their functions in serving the interests of employees have validity.