Michigan Law Review

Volume 39 | Issue 7

1941

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MICHIGAN LAW REVIEW

VOL. 39 MAY, 1941 No. 7

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WHEN the bill which later became the National Labor Relations Act was being debated in the House of Representatives, Chairman Connery of the House Committee on Labor participated in an interesting colloquy concerning the meaning of section 8(5), which imposes upon the employer the duty to bargain collectively. Putting hypothetically a situation involving himself as employee representative and Congressman Mitchell as "boss," he said:[1]

> "The gentleman may say: 'I will not give you the 10 cents an hour increase you ask.' There is nothing they can do then. Nobody asks that you be made to give them the 10 cents an hour. This bill just compels you to deal with the men collectively. You must sit across the table and talk things over with them."

That is, meeting and conferring, without conceding or (probably) even explaining, would discharge the legal obligation. As a corollary, forcing reasonable proposals, concessions and agreements from the employer would depend entirely, as before, upon the bargaining strength of the union.

Despite this disarming statement and others of its kind, certain writers early predicted that section 8(5) would in effect mean "compulsory arbitration of a unilateral character." Dean William H. Spencer of the University of Chicago School of Business made the best statement of this proposition:[2]

> "Under the Wagner Labor Act, assuming that it is consti-

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[1] 79 CONG. REC. 9685 (1935).

[2] Spencer, "THE NATIONAL LABOR RELATIONS ACT 24 (1935) (Univ. Chicago, Studies in Business Administration, Vol. 6, No. 1). Cf. the recent expression of opinion by an official of the Ford Motor Company, as repored by an Associated Press news item appearing in the ANN ARBOR NEWS for March 14, 1941, in connection with the

tutional, it may safely be predicted that employers generally, particularly the larger ones, will attempt to defeat collective bargaining by temporizing with the representatives of their employees. They will receive the representatives of their employees, and courteously discuss their demands. They will meet the demands by proposing as the basis of an agreement, 'existing rates of pay, wages and hours of employment,' or will propose an actual reduction in wages. If the employer stands on such a proposal, insisting that collective bargaining requires no more than this, what can the Board do? The Board can, as it undoubtedly will, rule that the employer must not only bargain, but that he must bargain in good faith. The Board will then in individual cases proceed to pass judgment upon the good faith of the employer. In so doing the Board will certainly and inevitably, directly or indirectly, indicate what it thinks the employer should offer by way of counter-proposal in order to escape its wrath. Undoubtedly in many such cases the employer will to some extent succumb to the pressure, not because he has been persuaded of the justness of the demands of his employees and not because of their collective strength, but because of the fear of incurring a penalty, or to avoid the wear and tear of endless wrangling and the losses incident to litigation and bad morale.

"If the Act has this practical operation, it not only means compulsory arbitration, but it means compulsory arbitration of a unilateral character."

setting of a date for an N. L. R. B. election in a Ford plant, that if the union in question should be certified as the bargaining agent, "we'll bargain 'till hell freezes over, but bargaining doesn't mean you have to say yes." See also Latham, "Legislative Purpose and Administrative Policy under the National Labor Relations Act," 4 GEO. WASH. L. REV. 433 at 465-468 (1936); Latham, "Federal Regulation of Collective Bargaining," 6 GEO. WASH. L. REV. 1 at 7 (1937); 4 UNIV. CHI. L. REV. 109 at 112 (1936); 17 N. C. L. REV. 173 at 176 (1938); and Handler, "Written Contracts under the National Labor Relations Act," C. C. H. LABOR LAW COMMENTS, No. 4 (1938). Cf. Larson, "The Labor Relations Acts—Their Effect on Industrial Warfare," 36 MICH. L. REV. 1237 at 1248 (1936). Rheinstein, "Methods of Wage Policy," 6 UNIV. CHI. L. REV. 552 at 576 (1938), refers to the Wagner Act as embodying "a unique method of active wage policy," as "tending to fix minimum wages at the level obtainable by genuine collective bargaining" achieved by compelling employers to bargain "where in the free interplay of economic forces labor would not be strong enough to achieve such a result, and where, consequently, without government interference, wages would be at the presumably lower level of individual bargaining." This seems to express the view that section 8(5) is designed to effectuate the results which genuine bargaining by strong unions would normally achieve, i.e., employer concessions. But this could not be the case unless some coercive force were used upon the employer other than that possessed by the union itself, and such force must be that supplied by administrative and judicial interpretations of section 8(5).

Only recently, moreover, the House committee created to investigate the National Labor Relations Board charged that the board, contrary to Congressional intent, has converted the statutory mandate into a duty to make an agreement rather than simply "to bargain collectively."[3]

If there is any justification for such apprehensions, it would appear that the bargaining formula has become the most interesting and significant aspect of the National Labor Relations Act and other similar legislation. The following inquiries are therefore suggested: Has administrative interpretation progressed as far as predicted or as thought by the House committee? Has it gone beyond original Congressional intent? Does it have judicial support? Have there been sown the seeds of a system of administrative determination of wage-hour, etc., issues? What, in short, has been the evolution of the "duty to bargain" concept in American law and what of its future?

I

EVOLUTION PRIOR TO 1933

Promotion of collective bargaining appears to be a governmental policy borne of the travails of economic emergency during World War I, though it was somewhat foreshadowed by the earlier attempt in the Erdman Act of 1898[4] to outlaw the "yellow-dog" contract. It first gained recognition by certain of the individual branches of the administration[5] and was subsequently suggested as an over-all policy,

[3] Final Report of the House Investigating Committee, 7 L. R. R. (Spec. Supp.), No. 18 (1940). It is interesting to note that the Smith Bill, passed by the House at the last session of Congress, and approved by the investigating committee, would have amended section 2 of the act by adding the following definition, 6 L. R. R. 47 (1940): "The terms 'collective bargaining' and 'bargain collectively' shall be deemed to include the requirement that an employer or his representatives meet and confer with his employees or their representatives, listen to their complaints, discuss differences, and make every reasonable effort to compose such differences, but shall not be construed as compelling or coercing either party to reach an agreement or to submit counter-proposals."

[4] 30 Stat. L. 424 at 428 (1898). The attempt was nullified by the Supreme Court in Adair v. United States, 208 U. S. 161, 28 S. Ct. 277 (1908).

[5] The Secretary of War incorporated guarantees of the right of collective bargaining in government contracts for the manufacture of army clothing. The United States Shipping Board established a Labor Adjustment Board which, in its decisions affecting labor conditions in private shipbuilding plants on work financed by the government, provided for the organization of grievance adjustment through shop committees. See WATKINS, LABOR PROBLEMS AND LABOR ADMINISTRATION IN THE UNITED STATES DURING THE WORLD WAR 137-143 (1919) (University of Illinois Studies in the

along with recognition of the right of self-organization and other principles, by the War Labor Conference Board.[6] This board was appointed in January, 1918, by the Secretary of Labor and consisted of nominees of the National Industrial Conference Board and the American Federation of Labor, the public being represented by two joint chairmen.[7] It in turn recommended the creation, in the same manner, of a War Labor Board to effectuate by mediation and, if necessary, adjudication, the policies promulgated. Such a board was created, and invested with the recommended powers and duties by Presidential

Social Sciences, vol. VIII, nos. 3 and 4) (hereinafter cited as LABOR PROBLEMS). The Director General of the Railroads by example gave content to recognition of the right of collective bargaining by entering into collective agreements with the railroad unions and affirming to employees the right of self-organization. See NATIONAL MEDIATION BOARD, FIRST ANNUAL REPORT, Appendix B, p. 63 (1935), and TWENTIETH CENTURY FUND, LABOR AND THE GOVERNMENT 176-177 (1935).

[6] Among the "principles and policies to govern relations between workers and employers in war industries for the duration of the war" were the following (SECRETARY OF LABOR, ANNUAL REPORT FOR 1918, p. 102):

"The right of workers to organize in trade-unions and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever. . . .

"Employers should not discharge workers for membership in trade-unions, nor for legitimate trade-union activities.

"The workers, in the exercise of their right to organize, shall not use coercive measures of any kind to induce persons to join their organizations nor to induce employers to bargain or deal therewith."

This policy undoubtedly was based on the fact that employer interferences with workers' attempts at self-organization, and refusals to deal collectively with labor, were recognized as two of the major causes of industrial strife. That such was the fact was expressly found by the Mediation Commission appointed by President Wilson in September, 1917, to investigate industrial unrest in the western states. WATKINS, LABOR PROBLEMS 152-153 (1919).

[7] SECRETARY OF LABOR, ANNUAL REPORT FOR 1918, p. 99. The joint chairmen were Hon. William Howard Taft and Hon. Frank P. Walsh. The philosophy underlying recourse to an agency of this kind to promulgate labor policy was thus expressed by the Secretary of Labor (id. 101):

"The principles adopted by the War Labor Conference Board are in a peculiar sense the principles of the United States Government. They represent a new departure even among democratic nations. It is worthy of a self-governing Nation that this industrial constitution has behind it none of the repressive force of law. It rests wholly upon the free suffrage of those whom it governs. There were within the Department many persons who could have given excellent advice with regard to the basic principles which should guide the Department. More than a mere code of principles was desired, however. It was highly essential that such a code receive the sanction of those who must abide by it. Hence the necessity for employers and employees to agree upon their own law and their own judges. What was desired was not an order imposed from above or without, but a solemn contract by both parties voluntarily entered into."

proclamation, in April, 1918.[8] Its ultimate authority rested not upon any statutory grant of power but upon the complete and very adequate support of the President.[9]

While official policy during this period thus favored the collective bargaining process, and looked upon bargaining through chosen representatives as a "right" of labor, little if any attempt seems to have been made to define the extent of any implicit reciprocal duty in employers to bargain with such representatives. Many of the War Labor Board's "findings" contained the following, or a similar, formula:[10]

"As the right of the workers to bargain collectively through

[8] Id. 99. The board was directed to use mediation and conciliation in the first instance in an attempt to settle disputes. Failing in this, it was "to summon the parties to controversies for hearing and action," thus constituting itself a deciding tribunal. If unable to agree unanimously upon a decision, it was to choose an umpire by unanimous vote or by lot from a list of persons nominated by the President, and such umpire was to decide the controversy on its merits. The system thus, in effect, employed both the techniques of mediation and compulsory arbitration.

[9] On three occasions only during the seven months of its war period operation were its awards not willingly accepted and applied. In two of these the recalcitrance of the employer resulted in government operation of their respective properties. In one, in which a minority of employees struck because of dissatisfaction with an award, their obedience was coerced by threat of governmental interference which would result in withdrawal of draft exemptions based on industrial grounds, and by threat of denial of opportunity for employment in any war industry. SECRETARY OF LABOR, ANNUAL REPORT FOR 1918, pp. 107-108. See also WATKINS, LABOR PROBLEMS 163-170 (1919). From this it should not be inferred that the system was successful in eliminating strikes. While the awards themselves were acceded to, except in the cases noted, many strikes occurred with respect to situations which were not arbitrated under the aegis of the board. See WATKINS, LABOR PROBLEMS 78-86 (1919), for statistics. Many of these strikes undoubtedly occurred in industries not subject to the jurisdiction of the board (see note 10, infra), and in other cases the board's jurisdiction undoubtedly was not invoked at all or was refused.

[10] In re Amalgamated Meat Cutters and Butcher Workmen of America v. Western Cold Storage Co., National War Labor Board Docket No. 80 (1919). It is interesting to note that while the right to self-organization and collective bargaining was recognized, the board did not force the employer to deal with the union unless he had done so prior to the war. In every case, however, bargaining was to be carried on either through unions or shop committees. WATKINS, LABOR PROBLEMS 171 (1919).

The machinery employed for the election of shop committees affords an interesting contrast to the procedure followed under the National Labor Relations Act. Under rules of procedure promulgated by the War Labor Board each "department or section" of a shop was entitled to select one committeeman for each one hundred employees. Nominations of candidates were made either at a meeting of the employees or any part of them, or by petition signed by not less than 10 per cent of those qualified to vote. Elections were held under the supervision of an examiner of the board. NATIONAL WAR LABOR BOARD BULLETIN ON PROCEDURE, approved Oct. 4, 1918.

The board had no jurisdiction of controversies in fields of industrial activity where by agreement or federal law there was a means of settlement which had not

> their chosen representatives is recognized by this board, the company should recognize and deal with such committees of their employees after they have been constituted by the employees.
>
> "We recommend that when such shop committees are elected that the company representatives meet with them at an early date to take up differences that still exist in an earnest endeavor to reach an agreement on all points at issue. . . ."

But the extent of the duty thus sought to be placed upon employers was not, so far as the records of the board's "findings" reveal, presented to the board for decision. One reason for this, perhaps, is the fact that the basic wage, hour and other issues could be, and frequently were, decided on the merits summarily by the board or its agents, so there was little use in consuming precious time with the more cumbersome bargaining process itself. Another reason undoubtedly is that mediation was regarded as the basically desirable official approach, upon which primary emphasis was placed. The prevailing philosophy underlying the board's own arbitral awards, however, appears to have been centered in the theme that wages should be kept in line with rising costs of living.[11] Possibly, then, if an attempt had been made to enforce an imposed obligation to bargain, criteria for testing performance of the duty would have been developed designed to facilitate the same end, and reasonable employer concessions would in effect have been required.

In the postwar period, the railroad industry seems to have been the chief experimental laboratory for federal labor legislation, and the duty to bargain first took statutory form in the Transportation Act of 1920. Prior to that time Congress had been content to utilize the principles of mediation and voluntary arbitration in its railroad labor legis-

been invoked. Thus the Fuel Administration, for example, set up its own bureau of labor and adopted policies similar to those of the War Labor Board. WATKINS, LABOR PROBLEMS 148 (1919).

[11] With respect to "the living wage" the principles to be followed by the board, as outlined by the War Labor Conference Board, were as follows (SECRETARY OF LABOR, ANNUAL REPORT FOR 1918, p. 103):

"1. The right of all workers, including common laborers, to a living wage is hereby declared.

"2. In fixing wages, minimum rates of pay shall be established which will insure the subsistence of the worker and his family in health and reasonable comfort."

The board "conceived it to be its duty to protect the worker in his right to a living wage, regardless of the financial condition of the employing corporations." Id. 111.

lation, but in section 301 of the 1920 (Esch-Cummins) law it provided as follows:[12]

> "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

What sort of obligation Congress thus sought to impose is unclear. One might suppose the provision was inspired by the policies of the War Labor Board, but neither the hearings conducted by the House Committee on Interstate and Foreign Commerce on the act in bill form,[13] nor the committee or conference reports on it[14] reveal any real consideration of section 301. If the framers of the bill intended to require collective bargaining, they obviously did not understand the subject, for they failed altogether to provide any means for settling employee representation questions (or even to indicate clearly that bargaining was to be with the employees' collective representative), and they did not in terms impose any restrictions on the employers' common-law freedom to obstruct unionism. Under the formula proposed and enacted in section 301 an interparty attempt to settle disputes was evidently intended to be merely a preliminary condition to the invocation of the adjudicative services of the Railroad Labor Board, created by the act, or of "adjustment" boards which, under the act,

[12] 41 Stat. L. 456 at 469 (1920).

[13] HEARINGS ON H. R. 4378, 66th Cong., 1st sess. (1919).

[14] H. R. 10453, reported to the House in November, 1919, by the Committee on Interstate and Foreign Commerce, contained no bargaining provision at all, but rather proposed what amounted to a system of compulsory arbitration. H. REP. 456, 66th Cong., 1st sess. (1919). This feature was abandoned by the conference committee of the two houses and the conference report, H. REP. 650, 66th Cong., 2d sess. (1920), p. 14, merely stated: "The House bill made it the duty of carriers and their employees to take all possible means to adjust their differences in the first instance before referring the dispute to any adjustment board. The Senate amendment had no provision upon this subject. The conference bill contains a declaration, similar to that in the House bill. . . ." No other mention was made of the duty to bargain or confer.

could be created by agreement to handle the less basic disputes.[15] Adjudication by these agencies received primary emphasis, and the duty to bargain was merely an appendage.

The Railroad Labor Board, which was given arbitral powers similar to those exercised by the War Labor Board, did, however, make a contribution to the meaning of section 301 which is interesting and significant. Refusing to be halted by the ambiguity of the act, it found in the provision an intention to create a genuine obligation of collective bargaining. By way of determining whether the parties to a dispute before it had standing, it undertook to some extent to delineate the obligation which it felt was imposed. The following is illustrative:[16]

> "The duty imposed by section 301 on all carriers and their officers, employees, and agents . . . has not been performed by the parties hereto either with regard to the wage or the working conditions portion of this dispute. The record shows that the representatives of the carriers were unwilling to assume the responsibility of agreeing to substantial wage increases. Hence, the conference of March 10 to April 1, 1920, on the side of the carriers was merely a perfunctory performance of the statute. Nor was the action of the organizations with regard to the individual carriers more than perfunctory. Naked presentation as irreducible demands of elaborate wage scales carrying substantial increases, or voluminous forms of contract regulating working conditions, with instructions to sign on the dotted line, is not a performance of the obligation to decide disputes in conference if possible. The statute requires an honest effort by the parties to decide in conference. If they can not decide all matters in dispute in conference, it is their duty to there decide all that is possible and refer only the portion impossible of decision to this Board."

The board also, as a corollary, found in section 301 an implication that

[15] Under the act bipartisan regional boards of adjustment could be voluntarily established by agreement between the roads and the unions, and if so established, were to consider all disputes concerning "grievances, rules or working conditions" not settled in conference. Any such disputes not so decided and all disputes over "wages and salaries" were to be decided by the Railroad Labor Board, which was to be guided by certain criteria set out in section 307 (d) of the act. 41 Stat. L. 471 (1920). See generally WITTE, THE GOVERNMENT IN LABOR DISPUTES 241 (1932).

[16] In re International Association of Machinists, 2 R. L. B. 87, at 89 (1921). See also, on the presentation of "irreducible demands," Pullman Co. v. Railway Employees' Dept., 2 R. L. B. 173 (1921). In American Train Dispatchers Assn. v. Baltimore & O. R. R., 4 R. L. B. 787 (1923), the board mentioned "good faith" as an essential to the preliminary negotiations.

employers were to refrain from interfering with the process of self-organization of their employees.[17]

Except for contributions of this kind made by the Railroad Labor Board, the era of the Transportation Act saw little development of the "duty to bargain" concept as an instrument of national policy. A major reason for this undoubtedly lies in the fact that the labor provisions of the act were held to impose no legally enforceable obligations on the employer, and the board decisions were held to rest only on the sanction of publicity and public opinion.[18] The courts thus had no opportunity to define the obligations stated in the statute.

The labor provisions of the Transportation Act of 1920 were sup-

[17] In an "Exhibit B" appended to its opinion in the Machinists case, supra, the board outlined a set of "principles" to govern the parties in performing their duties under the act. Included was to be recognition of the right of self-organization of employees without discrimination and of the principle of majority rule in determining employee representatives—harbingers of principles now accepted as fundamental.

In Railway Employees' Dept. v. New York Central R. R., 4 R.L.B. 236 at 238 (1923), the board said: "The method set out in the transportation act, 1920, for the negotiation of agreements affecting wages and working conditions is analogous to the the representative method that prevails in our governmental system in this country. The employees must be left free to select their representatives and these representatives are charged with the duty of negotiating and agreeing for the employees. Whenever this method is departed from it results in trouble and confusion. If the carrier is permitted by the process of petition or even by open mass meeting of large numbers of men to set up agreements, all the opportunities for careful, deliberate and discriminating negotiation are destroyed and every opportunity is given to the carrier to coerce the individual employee. The statute contemplates that the representatives of both parties sit down together at a conference table, with the fullest opportunity to consider all the detail of such a complex question as piecework, and then if they can not agree, their points of disagreement will be presented to the Railroad Labor Board for adjudication."

[18] Pennsylvania R. R. v. United States Railway Labor Board, 261 U. S. 72, 43 S. Ct. 278 (1923). While the act, as the Court said, imposed no legal obligation on employers and employees to bargain or to give effect to an award made by the board, the board did, under this decision, have a legal right to resort to the sanction of publicity; i.e., the board was a duly constituted agency. For some interesting observations concerning the functions of the board, see the remarks of Judge Dickinson in Pennsylvania System Board of Adjustment v. Pennsylvania R. R., (D. C. Pa. 1923) 294 F. 556 at 558-559.

In at least one instance an indirect legal sanction was placed behind a decision of the board. On June 6, 1922, the board handed down a decision reducing the wages of railway shopmen throughout the country. Refusing to accept the reduction, the union conducted the celebrated "Shopmen's Strike," which resulted in federal intervention under the Sherman Act. In making permanent an injunction against the union's activities, Judge Wilkerson held the purpose of the strike unlawful, since it was "to cripple and destroy interstate commerce, and to create by this assault a public opinion hostile to the decision of the board." United States v. Railway Employees' Dept., (D. C. Ill. 1923) 290 F. 978 at 982.

planted by the Railway Labor Act of 1926,[19] which was said to have been the product of an accord between a large majority of the Class I railroads and the "standard recognized labor organizations," and to have arisen largely out of their mutual dissatisfaction with the adjudicative features of the Transportation Act.[20] The emphasis was on the desirability of returning to the principles of voluntary arbitration and of mediation of basic disputes which had characterized railroad labor legislation before 1920. However, the act retained, in substance, the bargaining formula of the 1920 act—by making it the duty of the parties to confer and endeavor to make agreements[21]—and it detached the tail from the kite by discarding the Railroad Labor Board and its powers of adjudication. It also took a practical step ahead by enjoining "interference, influence, or coercion by either party over the self-organization or designation of representatives by the other."[22] Though the result was thus to give greater statutory prominence than before to the duty to bargain, this aspect was altogether neglected at the time by the Congressional committees which reported on the proposed legislation.[23] It may be suspected that one reason for this inattention to

[19] 44 Stat. L. 577 (1926).

[20] The bill was the product of negotiation between the railroads and the unions (who were represented by Mr. Donald R. Richberg), and was presented to Congress as more or less a *fait accompli*. See S. REP. 606, H. REP. 328, the Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7180, and 67 CONG. REC. 4522 (1926) (all of the 69th Cong., 1st sess.). See generally WITTE, THE GOVERNMENT IN LABOR DISPUTES 243 (1932).

[21] Section 2, First, provided as follows [44 Stat. L. 577 (1926)]: "It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second, added: "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute."

[22] Section 2, Third, of the act, 44 Stat. L. 578 (1926).

[23] See S. REP. 606 and 222 and H. REP. 328, 69th Cong., 1st sess. (1926). In the Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7180, 69th Cong., 1st sess. (1926), pp. 84-85, the question arose whether section 301 would impose a legal duty upon the parties. Mr. Richberg thought the answer was "yes" in so far as "there was any action which a court could take consistent with the judicial powers and its limitations" and he added that "how far the court, for example, can compel the parties to exert every reasonable effort, what that means, may be a question."

the subject was that by this time the railroads were fairly well organized, and that bargaining was probably the accepted practice where unions had a substantial membership.[24] This explanation gains some confirmation from the fact that from 1926 to 1934 and the era of the "New Deal," when Congress again dealt with the subject, the courts had no occasion to construe this portion of the act.

The Norris-La Guardia Act,[25] enacted in 1932 just prior to the advent of the "New Deal," should be mentioned in passing, though, unlike the railroad legislation just discussed, it dealt with the subject of collective bargaining only indirectly. Framed to deal primarily with the much-bruited problem of the labor injunction in the federal courts, it imposed important procedural safeguards and substantive limitations, most of which are irrelevant in the present connection. The declaration of policy contained in section 2, however, postulated the desirability of the process of collective bargaining through freely and independently chosen representatives as the basic motif of the statute. Moreover, section 8, in providing that "No restraining order or injunctive relief shall be granted to any complainant . . . who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration" was apparently designed to induce bargaining. One gets the impression, however, that so far the courts have not given it a very literal reading.[26]

[24] Information concerning the extent of organization is obtainable in the following sources: HANDBOOK OF AMERICAN TRADE UNIONS, U. S. Bureau of Labor Statistics, Bulletin No. 420 (1926); WOLMAN, EBB AND FLOW IN TRADE UNIONISM (1936) (see especially p. 230, where he estimates that about 43% of the railroad employees of the more important classes were union members in 1926); DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY (1938); and 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 692 (1940). These sources, however, do not indicate the extent to which bargaining was the accepted practice. Some facts concerning the extent of bargaining during the year following passage of the Act of 1926 are to be found in the ANNUAL REPORT OF THE BOARD OF MEDIATION FOR 1927. Evidently the major problem of this period was the efforts of some of the carriers to install "company" unions. See DUNN, COMPANY UNIONS (1927).

[25] 47 Stat. L. 70 (1932), 29 U. S. C. (1934), § 101 et seq.

[26] See United Electric Coal Companies v. Rice, (C. C. A. 7th, 1935) 80 F. (2d) 1; Cater Construction Co. v. Nischwitz, (C. C. A. 7th, 1940) 2 C. C. H. LABOR CASES, ¶ 18,639; Mayo v. Dean, (C. C. A. 5th, 1936) 82 F. (2d) 554; Newton v. Laclede Steel Co., (C. C. A. 7th, 1935) 80 F. (2d) 636. In the current notorious Ford case growing out of the strike at the River Rouge plant, District Judge Tuttle issued a temporary restraining order despite the fact that no evidence was introduced by the company at the ex parte hearing showing compliance with section 8. The court's finding under section 8 relied wholly on allegations contained in the com-

From this brief account it would seem clear that, while the policy of promoting collective bargaining had been established, at least for some situations and under some conditions, prior to the current Roosevelt administration, the nature of collective bargaining as a species of legal obligation was largely unsettled. Certainly Congress gave little or no heed to the question, and such development as the concept had was almost exclusively the work of certain administrative agencies.

II

EVOLUTION SINCE 1933

1. *Early Legislation*

The first important New Deal attack upon the problems of labor came in the enactment of section 7a of the much maligned National Industrial Recovery Act.[27] Widely heralded as the "Magna Charta" of labor this section provided that every code of fair competition should contain among other things the provision "That employees shall have the right to organize and bargain collectively through representatives of their own choosing," language definitely reminiscent of the principles announced by the War Labor Conference Board of World War days.

The sweep of this legislation, applicable as it was to many industries which had hitherto either refused or not been called upon to deal with organized labor, made inevitable some official attempt to define the "right" thus conferred. Such attempt was first made by the National Labor Board, an agency without portfolio which was created by the President in August, 1933, to compose differences that might

pany's bill of complaint. (See DETROIT FREE PRESS, April 4, 1941, p. 17.) Cf. Cinderella Theater Co. v. Sign Writers' Local Union No. 591, (D. C. Mich. 1934) 6 F. Supp. 164, in which the same judge, on an application for a temporary injunction following the issuance of a temporary restraining order, held for defendants on the ground, among others, that plaintiffs had not shown compliance with section 8. The position thus taken, which in effect defers the introduction of evidence on compliance with section 8 until the application for the temporary injunction, may as a practical matter be necessary if section 7, which allows 5-day restraining orders, is to be given effect. The burden of an erroneous issuance of such an order is alleviated in part by the requirement that plaintiff furnish a bond. For other cases under section 8, see Houston & North Texas Motor Freight Lines v. Local No. 745, (D. C. Tex. 1939) 27 F. Supp. 262; Stanley v. Peabody Coal Co., (D. C. Ill. 1933) 5 F. Supp. 612; Donnelly Garment Co. v. International Ladies' Garment Workers' Union, (D. C. Mo. 1938) 23 F. Supp. 998; Grace Co. v. Williams, (C. C. A. 8th, 1938) 96 F. (2d) 478.

[27] 48 Stat. L. 198 (1933).

arise under the section 7a labor provisions of the President's Reemployment Agreement, which later assumed jurisdiction also of labor disputes arising under the codes of fair competition.[28]

The contributions made by this agency on the subject of bargaining will be discussed shortly. Before they were made to any considerable extent Congress again had an opportunity to consider the subject in connection with amendments to the Railway Labor Act of 1926 which were enacted in June, 1934.[29] Included among the new provisions was one making it the duty of railroad employers to "treat with" duly certified employee representatives.[30] Thus the provision already in the act requiring carriers and their employees to endeavor "to make and maintain agreements" was reinforced by a further and at least nominally different obligation. However, Congress passed by the opportunity thus afforded to inquire into these provisions and to indicate to some extent their meaning. No mention was made of the matter in the Senate or House committee reports, nor was it considered in the hearings or debate on the bill.[31]

2. *The National Labor Board*

Meanwhile the National Labor Board was functioning, and during the two years or so of its existence it contrived to create, at least for its own purposes, some meaning for the "right" created in employees by section 7a of the NIRA. It took the first and basic step by deciding that this right involved an implicit reciprocal duty in employers to bargain.[32] It then held that such duty involved something more than

[28] For a discussion of the creation of the board and its subsidiary agencies, see TWENTIETH CENTURY FUND, LABOR AND THE GOVERNMENT 195-198 (1935), and H. REP. 1147, 74th Cong., 1st sess. (1935).

[29] 48 Stat. L. 1185 (1934), 45 U. S. C. (1934), c. 8.

[30] Section 2, Ninth, of the act created this obligation, and also invested the National Mediation Board with the authority to resolve representation disputes and to certify the names of representatives.

[31] See S. REP. 1065, H. REP. 1944, the HEARINGS ON H. R. 7650 BEFORE THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, AND HEARINGS ON S. 3266 BEFORE THE SENATE COMMITTEE ON INTERSTATE COMMERCE, all of the 73d Cong., 2d sess. (1934). Emphasis was placed on the need for revising the adjustment board system set up by the Act of 1926, on the desirability of outlawing employer interference with self-organization through the promotion of company unions and on the need for writing into the law the principle of "majority rule" in the selection of employee representatives.

[32] National Lock Co., 1 N.L.B 15 (1934); Hall Baking Co., 1 N.L.B. 83 (1934). For a vigorous presentation of the opposing view, see SPENCER, COLLECTIVE BARGAINING UNDER SECTION 7a OF THE NATIONAL INDUSTRIAL RECOVERY ACT 29-34

the bare requirement that the employer meet and confer with employee representatives. Peremptory rejection of employee proposals was held improper,[33] as was unwillingness to reduce agreements reached to written form.[34] Affirmatively, the employer was said to be obliged to be open-minded and to make *reasonable* efforts to come to agreement.

The board did not, however, indicate clearly on what basis the reasonableness of the employer's bargaining effort was to be judged. In one case, where the employer had amicably met and conferred with union representatives, but had flatly refused to accept any of their proposals or to make counterproposals, the board said:[35]

> "The company has taken the position that it is obligated merely to meet and confer with the representatives of its employees. . . .
>
> "True collective bargaining involves more than the holding of conferences and the exchange of pleasantries. It is not limited to the settlement of specific grievances. . . . While the law does not compel the parties to reach agreement, it does contemplate that both parties will approach the negotiations with an open mind and will make a reasonable effort to reach a common ground of agreement."

In view of the circumstances the employer might well have concluded

(1935) (Univ. Chicago Studies in Business Administration, Vol. 5, No. 3). According to this view, held by many employers, the "right" of collective bargaining consists of freedom in employees to organize into unions and of their ability to secure such concessions as they can from employers by force of their arguments or by force of their collective strength; or, to put it somewhat differently, it means "the right to make proposals which the offeree can turn down for any reason or for no reason if he feels that in the competitive situation he can afford to do so." Id. 31. Dean Spencer apparently doubted the feasibility of attempting by "forced marriages" to coerce the parties into the requisite mental states suggested by the board's interpretation of section 7a.

[33] "The record reveals a deplorable misconception by the company of the nature and meaning of collective bargaining. Peaceful relations between management and labor can only result from a display of mutual trust and confidence. Agreement is possible wherever the will to agree is present. The peremptory rejection of the employees' proposal and the refusal to enter into negotiations with the representatives of the employees are repugnant to the very concept of collective bargaining." S. Dresner & Son, 1 N.L.B. 26 at 26-27 (1934).

"The summary rejection by an employer of the demands of a committee of workers and the immediate cessation of work by employees do not constitute collective bargaining." Edward G. Budd Mfg. Co., 1 N.L.B. 58 at 60 (1933).

[34] Pierson Mfg. Co., 1 N.L.B. 53 (1933); Harriman Hosiery Mills, 1 N.L.B. 68 (1934).

[35] Connecticut Coke Co., 2 N.L.B. 88 at 88, 89 (1934). See also National Aniline & Chemical Co., 2 N.L.B. 38 (1934).

that only by accepting the union proposals or advancing some *reasonable* proposals of his own, thus actually being prepared to *make an agreement*, could he meet the board's requirements—this on the theory that unreasonable (from the board's point of view) counterproposals would indicate lack of an "open mind" and "a reasonable effort." If the board did not mean this, how much less did it mean? Unfortunately, the board ceased to exist before it had further occasion to clarify its position.

Despite these inadequacies, the board did make the first substantial attempt to define the bargaining duty concept. That it adopted a construction placing some serious, affirmative responsibilities upon the employer over and above the mere duty to meet and confer is especially significant in the light of the fact that its membership was distinguished and bipartisan[86] and that its views on the subject were rendered without recorded dissent.

3. *The (Old) National Labor Relations Board*

The National Labor Board was superseded, on July 9, 1934, by the first National Labor Relations Board (the "old board"), which was likewise charged with advisory adjudicative responsibility with reference to section 7a.[87] Because the cases which came before it on the question of bargaining were frequently not so easy of solution as were most of the cases decided by its predecessor, the old board had a somewhat greater opportunity to elucidate concerning the bargaining obligation which, it agreed, was implicit in section 7a. Its opinion in the much cited *Houde Engineering Corp.* case[88] indicates that it interpreted the decisions of the National Labor Board as having established the "incontestably sound principle that the employer is obligated by the statute to negotiate in good faith with his employees' representatives;

[86] The board's members were Senator Robert F. Wagner, chairman, Clay Williams, Henry S. Dennison, Ernest Draper, Pierre S. du Pont, Louis E. Kirstein, Walter C. Teagle, Dr. L. C. Marshall, George L. Berry, William Green, Dr. Francis J. Hass, John L. Lewis and Dr. Leo Wolman.

[87] The board was established pursuant to Joint Resolution, Pub. Res. No. 44 of the 73d Congress, 48 Stat. L. 1183 (1934). See H. REP. 1147, 74th Cong., 1st sess. (1935), p. 31, and TWENTIETH CENTURY FUND, LABOR AND THE GOVERNMENT, c. 9 (1935). The board, it should be noted, had a small, nonpartisan (in theory) membership, in contrast with that of the National Labor Board. Its members were Dean Lloyd K. Garrison, chairman (later succeeded by present Solicitor General Francis Biddle), and H. A. Millis and Edwin S. Smith, members of the present National Labor Relations Board.

[88] 1 N.L.R.B. (old) 35 (1934).

to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement." Section 7a, it said, was not enacted for the "anaemic purpose" of promoting discussions, but rather "to promote the making of collective agreements. . . ."[39] This, it felt, followed not merely from the language of section 7a but from the fact that the achievement of the general objective of the Recovery Act—restoration of prosperity by increasing purchasing power—made "collective bargaining and the collective agreements resulting therefrom" essential. In its view this was to be the method whereby "hours were to be reduced, wages increased, and reemployment effected on the largest possible scale."[40] Under this theory the general aims of the NIRA required the board to find in section 7a a duty to bargain with the aim of actually reaching agreement, which agreement, it could be said, should normally embody concessions made by the employer.

How to determine whether the employer in a given case possessed the required state of mind remained a practical and obviously all-important question. From some kinds of action, such as a flat refusal to negotiate with accredited representatives of labor, the conclusion was easily inferable. Other employer tactics, such as the refusal to make counterproposals, raised more question, but not much more, since the test was whether the employer really wanted to come to agreement.[41] The next step, logically, would have been for the board to judge objectively of the *reasonableness* of the employer's contentions and proposals, on the theory that the refusal to accept reasonable proposals and the making of unreasonable counterproposals (at least where not made simply for "trading" purposes) is evidence at least of lack of intent to make an agreement, if not of lack of good faith.

But the board stopped short of this, somewhat. It stated that "the statute does not require an employer to acquiesce in particular demands,"[42] and it gave effect to this pronouncement in at least three

[39] Id. 39.

[40] Id. 36. See the view taken by SPENCER, COLLECTIVE BARGAINING UNDER SECTION 7a OF THE NATIONAL RECOVERY ACT 29-34 (1935), who felt that the board's interpretation of section 7a may have been justified by the economic emergency, but believed it to be of doubtful wisdom as a permanent social policy. See note 32, supra.

[41] Houde Engineering Corp., 1 N.L.R.B. (old) 35 (1934); Eagle Rubber Co., 1 N.L.R.B. (old) 155 (1934); Colt's Patent Fire Arms Mfg. Co., 2 N.L.R.B. (old) 155 (1935); Atlanta Hosiery Mills, 1 N.L.R.B. (old) 144 (1934).

[42] Atlanta Hosiery Mills, 1 N.L.R.B. (old) 144 at 146 (1934).

cases where the parties had met and conferred at length. In the *Consolidated Film Industries*[43] case the company had presented to the union a plea of financial inability to meet the latter's demands, and had offered to allow the union access to the company's books and records for the purpose of verification. The board, without itself looking into the company's financial condition, refused to find that the company had failed to bargain collectively. In the *Boston Mattress Companies*[44] case there was prolonged negotiation and again the board held for the company. While the board stated that "objections and counter-proposals, most of them sincere on their face, were made on behalf of the companies," the opinion wholly fails to indicate the basis for the parenthetical judgment as to sincerity, for the employer's objections and proposals are neither stated nor discussed. It is certainly far from clear that such judgment was based on an objective appraisal of the reasonableness of the company's position. In the *Clifton Wright Hat Company*[45] case the board flatly held that, even though a union demand that the company loan an employee the money necessary to pay a union fine was a proper subject of bargaining, the company was not required to yield to the demand. There was no attempt at all by the board to consider the reasonableness of the employer's refusal to grant the request.[46]

It would thus appear that while the basic objective of section 7a, as stated in the *Houde* opinion, was the promotion of collective agreements, and while a willingness and desire to come to agreement were said to be required, a failure to agree did not necessarily indicate absence of the legally required state of mind. This somewhat belies the propo-

[43] 2 N.L.R.B. (old) 20 (1935).

[44] 2 N.L.R.B. (old) 51 (1934).

[45] 2 N.L.R.B. (old) 452 (1935).

[46] The board said, id. 453: "We may assume that the issue was a proper subject for collective bargaining, especially in view of the long continued arrangement between the company and the union. But the required process of collective bargaining under Section 7(a) varies with the nature of the issue. If a very intricate wage scale is involved, a considerable time may be consumed in negotiation, with a consideration of proposals and counter-proposals before the process of collective bargaining is exhausted. In the present case, however, the issue was narrow and simple. Wright discussed it with the union representative, and after an exchange of views made it perfectly clear that he would have nothing to do with advancing money for Schmeltz's fine, which, he said, was a matter between Schmeltz and the union. The position thus assumed by the company was not a violation of Section 7(a). The duty of the company to bargain collectively did not require it to yield to the insistent proposal of the union that it help Schmeltz with his fine; the process of collective bargaining had thus been carried to a point where an irreconcilable difference created an impasse."

sition advanced by the predecessor board that "Agreement is possible wherever the will to agree is present."[47] Nor, apparently, did the old board consider it to be its function, at least in all cases, to pass on the reasonableness of the employer's position with respect to specific issues. Yet the employer faced this question: In a case where the board had held against him for failure to meet and confer, or, having met and conferred, for failure to make counterproposals, what future pattern of action was required of him in order to be absolved of further charges? Could he safely proceed with the formalities of further negotiation, making certain of their futility by resorting to unreasonable responses to union demands or unacceptable counterproposals? Could he safely make a response or a counterproposal regarded as reasonable by himself (and perhaps other employers) but not by the union or by the board? Could he, as a practical matter, gain immunity only by making an agreement with the union? These fundamental questions remained largely unanswered by the old board, though it did make some significant contributions to the bargaining concept and without doubt gave the principle some positive content.

In any case it is clear that the experience and opinions of the old board provided an excellent background for legislative reconsideration of the problem in connection with the new labor relations legislation proposed by Senator Wagner in 1934 and 1935. The "duty to bargain" in administrative thinking had come to mean a good deal more than a mere duty to meet and confer. But was this proper? If so, how much more should it mean? Moreover, to some extent the underlying policies of the NIRA were thought to contribute to the meaning of the concept. Did the somewhat different policies espoused by the proposed legislation call for a shift in emphasis from that of reaching agreements to that of mere union recognition? These were questions obviously present. It remains to be seen whether they were considered.

4. *The Seventy-third Congress*

The Seventy-third Congress not only amended the Railway Labor Act as previously noted, but also laid the groundwork for the final legislative effort of the Seventy-fourth Congress, the enactment of the National Labor Relations Act. S. 2926, introduced in the Senate on March 1, 1934, by Senator Wagner, contained the following provision:

"It shall be an unfair labor practice . . . to refuse to recognize

[47] S. Dresner & Son, 1 N.L.B. 26 (1934).

> and/or deal with representatives of his [the employer's] employees, or to fail to exert every reasonable effort to make and maintain agreements with such representatives concerning wages, hours, and other conditions of employment."

This language is suggestive of the interpretative pronouncements of the old Labor Board under section 7a, but most of these came too late to be the inspiration for the provision in S. 2926. Instead, as suggested by Dr. Leiserson in his testimony before the Senate Committee on Education and Labor, the formula was probably borrowed from the Railway Labor Act.[48]

There is little evidence to indicate that the proponents of S. 2926, the members of the Senate committee, or Congress itself either were concerned with, or had any adequate comprehension of, the problems involved in such a provision. The committee hearings reveal very little consideration of it, and the report of the committee did not touch it at all.[49] Dr. Summer Slichter, in his appearance before the committee, advocated the deletion of the latter half of the provision on the ground that it was "merely the expression of a pious wish."[50] This was opposed by Dr. Leiserson, then Chairman of the Petroleum Labor Policy Board, who evidently thought the provision would have a de-

[48] HEARINGS ON S. 2926, 73d Cong., 2d sess. (1934).

[49] S. REP. 1184, 73d Cong., 2d sess. (1934). The "company union" issue seems to have been predominant.

[50] HEARINGS ON S. 2926 BEFORE SENATE COMMITTEE OF EDUCATION AND LABOR, 73d Cong., 2d sess. (1934), pp. 59, 60. He said:

"The first part of that section does not seem to me to be open to exception, but if the entire section were enacted, it would probably result in a rush on the part of the employers to enter into agreements with existing company unions.

"I do not like the latter part of that section anyway, because it seems to me to be merely the expression of a pious wish and I do not like the notion of merely putting pious wishes into statutes. It says, 'to fail to exert every reasonable effort to make and maintain agreements.'

"You cannot make it a definite duty of a man to try to agree. He can always say he tried to agree. The words are rather meaningless. You might almost enact that the lions and lambs shall not fail to exert every reasonable effort to lie down together.

"I drop those words altogether, not merely because they are meaningless, but because I feel quite certain that they would precipitate a vast number of agreements between employers on the one hand and organizations on the other, which, in fact, are really not independent, and yet which no one can prove by objective evidence are dominated by employers.

"I would simply curtail the paragraph (2), retain the words 'to refuse to recognize and/or deal with representatives of his employees,' and leave it there."

Dr. Slichter's statement to the effect that "no one can prove by objective evidence" that organizations are dominated by employers is interesting in the light of the many decisions of the present board dealing with "company" unions!

sirable practical effect even though it was not strictly enforceable.[51] Evidently the committee was persuaded of the disutility or impracticability of attempting to impose a legal duty to bargain in this form, for it amended the bill and reported it to the Senate without any bargaining provision at all.[52] Congressional debate stayed clear of the question.

5. *The Seventy-fourth Congress*

By the time the subject of labor relations legislation came up for consideration in the Seventy-fourth Congress, sufficient time had passed for the old Labor Board to acquire considerable experience with the bargaining provision of section 7a. The opportunity was ripe for a genuine effort to come to grips with the problems presented in any attempt to formulate and make effective a statutory duty of the kind which the old board had found to be implicit in section 7a, and which had already been enacted in the 1934 amendments to the Railway Labor Act. At the very least it is reasonable to suppose that Congress through its committees would have sought out the views of the old board in extenso, even if it may not be assumed that these views were subjected to critical examination.

The legislative records on the subject, however, are disappointing. Not only was singularly scant attention given to the matter, but such consideration as it did receive reveals anything but diaphanous clarity of thought. In one respect the very inclusion of section 8(5) was fortuitous, for it was not contained in the bill as originally introduced by Senator Wagner.[53] And while the senator testified to the House committee that the bill did not specifically set forth the duty to bargain "because of the difficulty of setting forth this matter precisely in statutory language" (a point upon which we can now agree), he was sure that such a duty was "clearly implicit in the bill." He was sure be-

[51] Id. 234. Dr. Leiserson said, in part "Now, I think it is exceedingly important that it should stay in the bill. It should not be thrown out on the theory, 'Well, you cannot enforce that anyway.' If we can say, if the administrators of the law can say to an employer, 'Now, you really haven't tried to agree with them, so that we will avoid a strike. They have elected their representatives. Now sit down and make an earnest effort, the way the law says.' You will avoid many disputes in that way."

[52] See text of bill, as reported out by the committee, in NEW YORK TIMES, May 27, 1934, § 1, p. 24. As a matter of fact, section 3 (4) of the bill provided that "Nothing in this proviso shall be construed by the board to indicate that any employer is bound to enter into an agreement. . . ."

[53] See HEARINGS ON H. R. 6288, House Committee on Labor, 74th Cong., 1st sess. (1935); also 79 CONG. REC. 7650 (1935).

cause "unification will prove of little value if it is to be used solely for Saturday-night dances and Sunday-afternoon picnics," and because "To attempt to deal with his men otherwise than through representatives they have named for such purposes would be the clearest interference with the right to bargain collectively."[54] He then quoted from the opinion in the *Houde Engineering Corp.* case on the meaning of the duty to bargain, so it can be said that both he and the committee were on notice that the problem had been arrestingly considered by the old board. The anomaly is that the Wagner Bill left to implication a legal obligation the importance of which had been demonstrated by the old board. In any event there was little discussion of the bargaining concept at the committee hearings. Even the suggestion of Chairman Biddle of the old board that an express duty to bargain be inserted in the bill[55] failed to stimulate discussion, though the suggestion was adopted.

As for the committee reports, the House committee had merely this to say:[56]

> "The fifth unfair labor practice, regarding the refusal to bargain collectively, rounds out the essential purpose of the bill to encourage collective bargaining and the making of agreements."

A somewhat greater contribution was made by the Senate committee:[57]

> "The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.
>
> "... It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees

[54] HEARINGS ON H. R. 6288, 74th Cong., 1st sess. (1935), p. 16.

[55] Id. 175.

[56] H. REP. 1147, 74th Cong., 1st sess. (1935), p. 20.

[57] S. REP. 573, 74th Cong., 1st sess. (1935), p. 12.

> becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to the law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace."

No reference was made to the experience of the old Labor Board unless the last two quoted sentences embody such reference. The Senate committee's observations are clearly authority for the contention that employer good faith was to be required, but there was a total failure to indicate the content of such a standard. In fact, the first paragraph quoted, in stressing the complete freedom of the employer to reject proposals, might well be taken to negate any intention that the criterion of good faith should be used as an indirect means of coercing acceptance of employee proposals, however unreasonable the employer's position might be. At most the committee statement indicates an intention to impose an indefinitely greater duty on the employer than that of simply meeting with employee representatives.

If confusion, or at least lack of comprehension, characterized the committee reports, such discussion as there was on the floor of Congress indicates confusion worse confounded. In the Senate, Senator Wagner, after quoting approvingly from the opinion in the *Houde Engineering* case to the effect that the employer is obligated "to negotiate in good faith," to match employee proposals, if unacceptable, with counter-proposals and "to make every reasonable effort to reach an agreement," added the following statement:[58]

> "Most emphatically this provision does not imply governmental supervision of wage or hour agreements. It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met."

To the same effect Senator Walsh, Chairman of the Committee on Education and Labor, which had in its report specified a bargaining standard of good faith, said:[59]

> "Nothing in this bill allows the Federal Government or any agency to fix wages, to regulate rates of pay, to limit hours of

[58] 79 CONG. REC. 7571 (1935).
[59] 79 CONG. REC. 7659 (1935).

work, or to effect or govern any working condition in any establishment or place of employment.

". . . There is nothing in this bill that compels any employer to make any agreement about wages, hours of employment, or working conditions with his employees.

" . . . The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded."

In a similar vein were speeches made in the House in explanation of section 8 (5) by members of the Committee on Labor. Representative Connery, who introduced the bill in the House and who was chairman of the House committee, made the statement quoted in the introductory paragraph of this paper to the effect that the employer would not be required to grant any specific demand for a wage increase and that he would simply be compelled to "sit across the table and talk things over." And, said Representative Griswold:[60]

"There is nothing in the bill that says you shall reach an agreement—nothing of the sort. It simply provides that labor may bargain collectively. The bill does not fix hours, wages, or working conditions nor does it allow any Government agency to do so."

To the same effect were the remarks of Representative Welch:[61]

"It does not require an employer to sign any contract to make any agreement, to reach any understanding with any employee or group of employees. . . . nothing in the bill allows the Federal Government or any agency to fix wages, regulate rates of pay, limit hours of work, or to effect or govern any working condition in any establishment or place of employment."

These remarks in the House, and those of Senators Wagner and Walsh in the Senate, were not substantially challenged, nor were the

[60] 79 CONG. REC. 9682 (1935).
[61] 79 CONG. REC. 9711 (1935).

pertinent portions of the committee reports. Yet as a whole they involved some patently inconsistent concepts, though this was apparently not realized. A general, undefined standard of good faith was proposed by the Senate committee's report. The committees and members of Congress listened without criticism to quotation of the old board's views concerning the duty of the employer to make counterproposals and to make every reasonable effort to come to agreement. Such a duty obviously means a duty to make an agreement, upon acceptance of such counterproposals. Yet Congressmen Walsh, Griswold and Welch were emphatic that the bill would impose no duty to make an agreement of any kind. Moreover a duty "to make every reasonable effort" to reach agreement could be said to imply the objective testing of the employer's arguments and proposals. Yet Representative Connery was clear that a union's demand for a ten-cent wage increase could be legally met by a flat and unequivocal rejection by the employer. And Senators Wagner and Walsh and Representatives Griswold and Welch stated flatly that the act would not involve any governmental supervision or regulation of the terms of the collective agreement. Moreover, there was a total failure to consider whether the policy underlying the Wagner Act of freeing interstate commerce from obstructions resulting from a denial of the rights given by the act[62] called for the same kind of bargaining performance as indicated by the NIRA policy of stimulating the flow of interstate commerce by increasing purchasing power. The logic is almost equally compelling in both cases.[63]

[62] See the "Findings and Declaration of Policy" set out in section 1 of the act, 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1939), § 151.

[63] I recognize, of course, that the framers of the act sought to distinguish between refusals to bargain and refusals to yield on specific wage, hour and other issues, as causes of strikes. This is apparent not only from the language used in section 1, but also from the legislative history of the act. The former, along with employer interferences with freedom of organization, were thought to be capable of segregation "into a single category susceptible to legislative treatment," whereas "disputes abut wages, hours of work, and other working conditions should continue to be resolved by the play of competitive force." S. REP. 573, 74th Cong., 1st sess. (1935), p. 2. Yet there was a very definite feeling that the process of collective bargaining would result in a larger measure of industrial tranquility though improvement in the workers' lot. Id. 3-4, and see remarks of Senator Wagner in the Senate, 79 CONG. REC. 2371 et seq. (1935). The absence of strikes on the railroads was cited as the consequence of "protection of collective bargaining." S. REP. 573, p. 2. The thought may have been that the act, in its protection of the right of self-organization, would promote wide-spread unionization with resulting increased bargaining strength which would be likely to force concessions from employers, and/or that the observance of bargaining procedure

If any conclusion may safely be drawn from these bits of "evidence" left by the Seventy-fourth Congress, it is that while a standard of employer good faith was advanced by the authoritative report of the Senate committee, the major emphasis in Congress itself was of a delimiting character. There was the most complete agreement on what the bargaining provision would *not* do rather than on what it would do. The reference to the views of the old Labor Board was much too casual to indicate that section 8(5) was intended to embody such views in toto. In short, the Congress which made the duty to bargain explicit for most employers did not make a substantial contribution to its meaning. That task was left to the new Labor Board and to the courts.

6. *The National Labor Relations Board*

In the five years of its existence the National Labor Relations Board has dealt with section 8(5) sufficiently to enable Professor Ward recently to outline in detail "the mechanics" of collective bargaining.[64] This treatment, in the words of the author, "deals only with what an employer must do to conform to the *procedure* of collective bargaining."[65] "Unconsidered are the problems of when an employer must bargain or when he may stop, or whether he had a bona fide intent to reach an agreement."[66] There is no intention herein to duplicate the very useful work of Professor Ward, but rather to take an over-all view of the board's construction of section 8(5) and particularly to attempt to determine the extent to which the criterion of good faith, which the board uses, approaches something in the nature of an obligation to make an agreement or of "unilateral compulsory arbitration." Most of the elements of "negotiation procedure" summarized by Professor Ward will not be of assistance in making this inquiry, for they

would in and of itself yield tangible results for labor. The latter would lead to the same conclusions as were suggested for section 7a concerning the nature of the duty to bargain. In any event it may be argued that the policy, clearly present, of eliminating strikes emanating from refusals to bargain requires that section 8 (5) be construed to demand considerably more than mere union recognition. If an employer recognizes, meets and confers with the union, but remains adamant, unyielding and unreasonable in his attitude and proposals, and the union should strike in consequence, could not the union with some reason insist that it had struck because of the employer's failure to engage in genuine bargaining?

[64] Ward, "The Mechanics of Collective Bargaining," 53 HARV. L. REV. 754 (1940).

[65] Id. 755 (italics added).

[66] Id.

are as consistent with a duty to meet and confer as with a duty to bargain in good faith with the intent to reach an agreement.[67]

To begin with, it may be stated quite categorically that the board has gone just as far as, if not farther than, the old board in its statements of general principle, and, in general, has built upon the decisions of the old board as precedents. It must therefore be in basic disagreement with Dean Spencer's views that the old board's position can only be justified upon the theory that the NIRA was emergency legislation and called for unusual concessions on the part of the employer and that "as a permanent social policy, it is of doubtful wisdom."[68] The following quotations will serve to illustrate the attitude of the board:

> "... Collective bargaining means more than the discussion of individual problems and grievances with employees or groups of employees. It means that the employer is obligated to negotiate in good faith with his employees as a group, through their representatives, on matters of wages, hours and basic working conditions and to endeavor to reach an agreement for a fixed period of time." (*Atlantic Refining Co.*[69])
>
> "The term collective bargaining denotes in common usage, as well as in legal terminology, negotiations looking toward a collective agreement. If the employer adheres to a preconceived determination not to enter into any agreement with the representatives of his employees, as we have found here, then his meeting and discussing the issues with them, however frequently, does not fulfill his obligations under the Act." (*Globe Cotton Mills.*[70])
>
> ". . . if the obligation of the Act is to produce more than a series of empty discussions, bargaining must mean more than mere negotiation. It must mean negotiation with a *bona fide* intent to reach an agreement if agreement is possible." (*Atlas Mills.*[71])
>
> "It is hardly necessary to state that from the duty of the em-

[67] Such elements are stated to be the following: (1) "duty to answer demand for conferences"; (2) "duty to cooperate in proving union's majority"; (3) "duty to grant exclusive recognition"; (4) "duty to grant personal conferences at situs of unit"; (5) "duty to confer with any persons representing majority of employees"; (6) "duty to present no faits accomplis"; (7) "duty to negotiate regarding particular demands: e.g., closed shop"; and (8) "duty regarding counterproposals." Id.

[68] SPENCER, COLLECTIVE BARGAINING UNDER SECTION 7a OF THE NATIONAL INDUSTRIAL RECOVERY ACT 29-34 (1935).

[69] 1 N.L.R.B. 359 at 368 (1936).

[70] 6 N.L.R.B. 461 at 467 (1938).

[71] 3 N.L.R.B. 10 at 21 (1937).

ployer to bargain collectively with his employees there does not flow any duty on the part of the employer to accede to demands of the employees. However, before the obligation to bargain collectively is fulfilled, a forthright, candid effort must be made by the employer to reach a settlement of the dispute with his employees. Every avenue and possibility of negotiation must be exhausted before it should be admitted that an irreconcilable difference creating an impasse has been reached." (*Sands Mfg. Co.*[72])

". . . the respondent's tactics in repeatedly participating in discussions in which its agents carefully avoided any definite commitment on proposed terms and offered no suggestions of changes acceptable to them convinces us that the respondent only sought to give the appearance of obedience to the Act without ever entering into genuine collective bargaining, looking toward the consummation of a collective agreement." (*Bethlehem Shipbuilding Corp.*[73])

". . . The duty to bargain collectively, which the Act imposes upon employers, has as its objective the establishment of . . . a contractual relationship. We have held that this duty is not limited to recognition of the employees' representatives *qua* representatives, or to a meeting and discussion of terms with them. The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issues presented, to make contractually binding the understanding upon terms that are reached, and, under ordinary circumstances, to reduce that obligation to the form of a signed written agreement if requested to do so by the employees' representatives." (*Highland Park Mfg. Co.*[74])

". . . The respondent contends that the Act does not compel an employer to reach an agreement, and urges this in support of its contention that it has complied with the law. It is, of course, true that the Act does not require an employer to agree to any particular terms. If honest and sincere bargaining efforts fail to produce an understanding on terms, nothing in the Act makes illegal the employer's refusal to accept the particular terms submitted to him." (*Inland Steel Co.*[75])

These statements of principle obviously resemble those of the old

[72] 1 N.L.R.B. 546 at 557 (1936).
[73] 11 N.L.R.B. 105 at 146 (1939).
[74] 12 N.L.R.B. 1238 at 1248-1249 (1939).
[75] 9 N.L.R.B. 783 at 797 (1938).

board, and involve the same degree of inconsistency and ambiguity. One thing patently clear about them is that they depart altogether from the views expressed in Congress by Chairman Connery of the House Committee on Labor that section 8(5) "just compels [the employer] to deal with the men collectively" and merely requires him "to sit across the table and talk things over with them."[76] It is equally clear that they depart from the views similarly expressed by Chairman Walsh of the Senate Committee on Education and Labor to the effect that section 8(5) merely indicates the "method and manner" of establishing employee representatives, leads them to the employer's "office door" and leaves their discussion with the employer "voluntary and and with that sacredness and solemnity . . . with which both parties to an agreement should be enshrouded."[77] In fact, the employer is to approach the bargaining conference with "an open and fair mind and with a sincere purpose to find a basis of agreement," yet "the Act does not require an employer to agree to particular terms." On the other hand, counterproposals are usually necessary to indicate good faith.

The problem thus presented is exemplified by the *Bethlehem Shipbuilding Corporation* case.[78] There the board concluded that the company had refused to bargain collectively because it refused to accord the union exclusive recognition and to agree that any understanding reached would be reduced to agreement form, and because its bargaining tactics consisted of repeatedly participating in discussions while carefully avoiding any commitment and offering no proposals of its own. A cease and desist order followed. Assuming a desire to obey the mandate, what course of action was the company to follow thereafter? The first two grounds of the decision would present no difficulty, for the company could easily grant recognition to the union and withdraw from its position on the question of the form of agreement. But what would have to be done to meet the third finding? As a practical matter, make an agreement with the union, even though unwillingly? Or would it be enough to present reasonable arguments in answer to specific union demands? Reasonable to whom? Questions of this kind necessarily face every employer against whom a cease and desist order has issued after he has in fact been engaged in negotiations with the union and has followed the "negotiation procedure" which must be

[76] Supra, note 1.
[77] Supra, note 59.
[78] 11 N.L.R.B. 105 (1939).

accepted as a minimal requirement. For such an employer the practical problem is no doubt complicated by the fact that he may be suspect in the eyes of the board or court in his future dealings with the union.

The employer about to engage in bargaining, and against whom a cease and desist order is not outstanding, faces a somewhat less acute, but none the less real, problem. It may fairly be assumed, no doubt, that if he really wants to make an agreement with the union, he will usually come through with an agreement, and hence avoid Labor Board intervention. In some cases, however, even such an employer will fail to reach agreement unless he sacrifices to the demands of an uncompromising union a position reasonable in his own view. And there is, perhaps all too frequently, the case of the employer who does not desire to reach agreement at all and whose state of mind cannot readily be changed by legislative fiat. In the latter two cases what, as a practical matter, must the employer do in order to avoid a cease and desist order? Assuming no direct evidence of the employer's actual mental state, the problem for each is the same. Will "going through the paces" of bargaining and engaging in a respectable quantity of higgling and haggling suffice? Or must the employer's arguments, proposals, etc., be objectively reasonable? Do the board decisions yield any clear answer to these questions?

The commonest of union demands (after recognition) are, of course, those relating to wages and hours, and the closed shop. These or other demands the employer might in a given case either flatly reject or reject with supporting reasons. Adamant rejection without any attempt to give reasons or to meet union argument with counter argument has in general been condemned by the board as indicating lack of good faith so far as wage and hour demands are concerned,[79] but not on the

[79] In Harbor Boat Building Co., 1 N.L.R.B. 349 (1936), the company's negotiator stated that it would not enter into an agreement with the union unless its competitors did likewise. As to the union's wage demands, he stated that the company was paying all it could afford to pay, "and when pressed as to what that was, replied, 'Well, I am paying them all they are worth.' " Held, a refusal to bargain. In Knoxville Publishing Co., 12 N.L.R.B. 1209 (1939), the company, at its first conference with the union, alleged financial inability to comply with union demands, but denied the union's request that it be allowed to audit the company's books. At an ensuing conference the company agreed to come to a further meeting supplied with data as to alleged increase in costs which would result from an adoption of the proposed wage scale. At the final conference such data were not submitted, the company lawyer stating, "You know it would be more expensive." On the issue of the work week the union indicated its willingness to compromise, as on other issues. But the company's general response was that it would improve the working conditions of its employees "as soon as it could and as soon as conditions warranted." Held, a refusal to bargain. See also

issue of the closed shop,[80] a distinction logically untenable. If the employer essays to advance reasons for his rejection, such as financial inability to grant wage increases, the decisions indicate fairly clearly that he must state his case in some detail and not merely generalize.[81] The case of *Pioneer Pearl Button Company*[82] is illustrative of this. The union demanded a forty-hour week and a minimum weekly wage of $12. In an opinion holding the company guilty of a refusal to bargain, the board said:[83]

> ". . . He [the company's president] did no more than assert that the reason for the respondent's refusal to increase wage rates or reduce the number of hours was because of its poor financial condition. The [Union] committee doubted this statement, and one of its members asked that the respondent show its books to the committee, or agree to have them audited. [The president] refused, and did not offer to prove his contention that poor business conditions prevented a revision of the new scale."

The board's position in such a case can be accounted for, of course, without ascribing to it any intention to convert section 8(5) into a requirement of "unilateral compulsory arbitration." It is reasonable to infer that an employer argument advanced without supporting data and not self-evident is mere sham and subterfuge, and indicates lack of good faith. And this is true whether the argument is financial inability or "general reasons of business policy." So the moral for the employer in any case is to approach the conference "with both barrels loaded." The really important question, however, in appraising the evolution of the bargaining concept at the hands of the board is whether

Newark Rivet Works, 9 N.L.R.B. 498 (1938). Cf. John Minder & Son, 6 N.L.R.B. 764 (1938); Mexia Textile Mills, 11 N.L.R.B. 1167 (1939); Bennett-Hubbard Candy Co., 11 N.L.R.B. 1090 (1939); Talladega Cotton Factory, 9 N.L.R.B. 207 (1938); and Julius Breckwoldt & Son, 9 N.L.R.B. 94 (1938). See also Pioneer Pearl Button Co., 1 N.L.R.B. 837 (1936).

[80] In Adams Brothers Manifold Printing Co., 17 N.L.R.B. 974 (1939), the parties engaged in a series of conferences and the company offered counterproposals. Eventually agreement was reached on all points except the union's demands for a closed shop, on which the company was adamant. The board, without enumerating or attempting to appraise the contentions pro and con on that issue, held that there was no refusal to bargain. To the same effect, see Purity Biscuit Co., 13 N.L.R.B. 917 (1939), and Cullom & Ghertner Co., 14 N.L.R.B. 270 (1939). Cf. Mexia Textile Mills, 11 N.L.R.B. 1167 (1939), and Scandore Paper Box Co., 4 N.L.R.B. 910 (1938).

[81] See cases cited in note 79, supra.

[82] 1 N.L.R.B. 837 (1936).

[83] Id. 842.

the board will undertake to pass on the "inherent" reasonableness of the employer's arguments and proposals ostensibly to determine whether the employer is acting in good faith and desires to come to agreement. Unless it will, the compulsory arbitration and compulsory agreement charges are scarcely sustainable.

On this question a survey of the board decisions yields some rather curious results. The cases dealing with wage-hour issues in which the employer failed to support his arguments with pertinent data, are, as above stated, inconclusive on the point in hand.[84] In at least four cases, where the employer made an effort to support his arguments as to wages, the board concluded, without purporting to pass on the merits of the contentions, that there was no refusal to bargain.[85] In three cases, however, the board could be said to have exhibited concern over the reasonableness of the employer's arguments, though their authority is somewhat doubtful.[86]

[84] See cases cited in note 79, supra.

[85] In Mexia Textile Mills, 11 N.L.R.B. 1167 (1939), the company based its refusal to grant a closed shop, wage increases, etc., on its competitive and financial position, going so far as to offer its books to the board's regional director for audit. It stated that it had paid only one dividend since its establishment and that the labor item was its largest cost factor. In Bennett-Hubbard Candy Co., 11 N. L. R. B. 1090 (1939), the company prepared and produced figures designed to support its contention that increased labor costs which would result from accepting a wage increase would not be offset by increased business. In Talladega Cotton Factory, 9 N.L.R.B. 207 (1938), the company argued against increasing wages on the ground that business was poor. In Julius Breckwoldt & Son, 9 N.L.R.B. 94 (1938), the company argued its financial inability to grant wage increases, and offered to submit its books.

[86] John Minder & Son, 6 N.L.R.B. 764 (1938). The company stated that it was unable to meet the union's wage and hour proposals because of business competition. The board said that the company was a relatively small concern and that it appeared from the record (though the facts so adduced were not recited in the opinion) that it was "sincere in its belief that it could not conform to the Union scale of wages and hours and continue to operate successfully on a competitive basis in the industry." Id. 767.

In Agwilines, Inc., 2 N.L.R.B. 1 at 17 (1937), the board said: "At the hearing before the Trial Examiner much was said as to the effect of an increase in cost of operation on respondent's competitive position; and the same point was argued by respondent's counsel before this Board. But in the record nothing appears as to the point at which higher operating costs would necessitate a change in freight rates. Prior to an increase in freight rates, competition would not be affected. Furthermore, so far as concerns the Union's proposals at the April 8 conference—merely for recognition and preference, without change in hours, without increase in wages, without written agreement—respondent's witnesses were silent. There is no conclusion to be reached from the above facts except that respondent's collective bargaining negotiations were sham."

In Aronsson Printing Co., 13 N.L.R.B. 799 at 816 (1939), the board, in passing on certain preliminary refusals of the company to sign proposed agreements until its principal competitors did so also, said: "this was in effect a refusal based on the ground that the respondent could not meet the proposed terms owing to the existing

On the issue of the closed shop the board in at least five instances decided the case without inquiring into the merits.[87] In some of these the decision was for the employer despite the fact that he apparently failed even to adduce reasons for his rejection.[88] On the other hand the board has repeatedly held in effect that most, if not all, employer objections, including alleged "union irresponsibility," to the signing of an agreement, once accord has been reached, are unreasonable, and thus, in effect, that the point is not a proper bargaining issue.[89]

The board has in one case termed "specious" certain arguments advanced by an employer for refusing to agree to an arbitration provision in a collective agreement.[90] In another case, involving a dispute over the meaning of a provision in an existing agreement, the board found an "honest difference of opinion."[91] In several cases the board has rejected summarily the employer's refusal to agree to union proposals unless competitors did so also,[92] but in other cases has left its

competitive conditions. The evidence shows that under the proposed contracts the respondent's operating costs would have been substantially increased."

[87] Scandore Paper Box Co., 4 N.L.R.B. 910 (1938); Mexia Textile Mills, 11 N. L. R. B. 1167 (1939), discussed supra, note 85; Purity Biscuit Co., 13 N.L.R.B. 917 (1939); Cullom & Ghertner Co., 14 N.L.R.B. 270 (1939); Adams Brothers Manifold Printing Co., 17 N.L.R.B. 974 (1939).

[88] Supra, note 80.

[89] Globe Cotton Mills, 6 N.L.R.B. 461 (1938); Harnischfeger Corp., 9 N.L.R.B. 676 (1938); Inland Steel Co., 9 N.L.R.B. 783 (1938) (the employer argued that a signed agreement would coerce employees into joining the union, would lead to the closed shop and checkoff, would undermine morale and efficiency in the plant, would not bring industrial peace, is not necessary to prevent misunderstanding, is not required by the act, and is not required to be made with an "irresponsible" union); H. J. Heinz Co., 10 N.L.R.B. 963 (1939); Bethlehem Shipbuilding Corp., 11 N.L.R.B. 105 (1939); Highland Park Mfg. Co., 12 N.L.R.B. 1238 (1939); Gulf Public Service Co., 18 N.L.R.B., No. 74 (1939); Theurer Wagon Works, 18 N. L. R. B., No. 97 (1939); Jasper Blackburn Products Corp., 21 N.L.R.B., No. 124 (1940) (where the employer required a surety bond as a prerequisite to signing on the ground that the union was not suable and as protection against a shift in allegiance of the union's members); Inland Lime & Stone Co., 24 N.L.R.B., No. 79 (1940) (the employer refused to enter into any formal agreement with respect to those duties placed upon it by law because it did not care to be subjected to "two standards" or "two tribunals," or with respect to matters which coincided with its existing practice because it wanted to be at liberty to change its practice at any time). See also St. Joseph Stock Yards Co., 2 N.L.R.B. 39 (1936), and Ward, "The Mechanics of Collective Bargaining," 53 HARV. L. REV. 754 at 776-785 (1940).

[90] Dallas Cartage Co., 14 N.L.R.B. 411 (1939) See infra, note 94.

[91] Sands Mfg. Co., 1 N.L.R.B. 546 (1936).

[92] In Harbor Boat Building Co., 1 N.L.R.B. 349 at 355 (1936), the board said:

position somewhat in doubt by appearing to consider on the merits the employer's arguments based on his competitive position.[93]

The conclusion must be that there is so far but a slight scattering of cases, aside from those involving the necessity of a written agreement, in which the board may be said to have passed on the merits of the arguments in determining whether the employer had performed his duties under section 8(5). Certainly it cannot be safely stated that the board has expressly adopted any such procedure as a general policy, and the board would undoubtedly deny that it has done so. It would say that it has simply been concerned with the bargaining attitude of the employer and the general tone and color of the bargaining performance, all as bearing upon the employer's good faith. Yet one who reads the board's opinions, especially some of those to which reference has just been made, cannot escape the feeling that the dividing line between these criteria and those of reasonableness has often been obscure in the board's reaction to the evidence, and that there may eventually emerge a clearly defined policy of utilizing both standards in judging the employer's conduct under section 8(5).[94] If this occurs, it will be incum-

"It is clear that an employer cannot refuse to bargain collectively on the ground that his competitors have not entered into negotiations or made agreements with their employees." A similar position was taken in Harry Schwartz Yarn Co., 12 N.L.R.B. 1139 at 1158 (1939), Nathan Chesler, 13 N.L.R.B. 1 at 10 (1939), American Range Lines, 13 N.L.R.B. 139 (1939), and Samuel Youlin, 22 N.L.R.B., No. 65 (1940).

[93] See note 86, supra.

[94] This feeling arises particularly from a consideration of cases like that of Dallas Cartage Co., 14 N.L.R.B. 411 (1939). There the union presented a form of contract, which was rejected, with reasons stated, by the company. Lengthy conferences followed with no essential retraction of position by either side. On the issue of wages the company submitted financial statements showing decreases in its business and offered to throw open its books for inspection. The company refused to agree to an arbitration provision on the ground that it would be void under local law, would result in cumbersome delays and would wrest from it the control of its business. The company made counterproposals, though in a form which really granted no concession except recognition to the union. In holding that the company had not fulfilled its obligations under section 8(5) the board said (pp. 426, 429):

". . . They met each and every consequential demand of the Union with captious criticism or blunt refusal. The full correspondence written by their attorneys is richly interlarded with legalistic and *sometimes specious arguments. No concession or modification offered by the Union to meet the respondent's objections served to provide a common basis of understanding*, for new grounds of criticism were offered on each occasion. . . .

"As we regard the entire record, the conclusion is inescapable that the respondents neither bargained nor intended to bargain collectively with the Union. They shrewdly recognized the Union for what it claimed to be and accorded it the courtesy of interviews. They listened with respectful attention to the Union's demands and pretended to weigh and trade advantages against disadvantages, as might be expected

bent upon the employer either to make an agreement or to make reasonable proposals, provided the courts go along with the board. As will presently be shown, the courts have agreed with the board that section 8(5) demands employer good faith. Under this definition, and in view of the limitation which the act places upon judicial review of fact findings,[95] the way would seem to be open for the board, if it should so desire, to use a test of reasonableness, for it can scarcely be contended that there is no relationship between reasonableness and good faith. On the other hand, were the board to attempt to redefine section 8(5) to mean a duty to make reasonable proposals, it might find its efforts nullified by judicial disagreement on the question of statutory construction.

7. *The Courts and the Duty to Bargain*

The first opportunity for judicial construction of the duty to bargain arose under the Railway Labor Act in the *Virginian Railway* case, decided by the district court in July, 1935,[96] and by the Supreme Court in March, 1937.[97] System Federation No. 40 had been duly certified as bargaining representative by the National Mediation Board, following which the company, instead of granting recognition to and negotiating with the federation, continued to attempt to promote a "company union." The district court entered a decree directing the company to "treat with" the federation, as required by section 2, ninth, of the statute, and to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise. . . ." The decision was in turn affirmed by the circuit court of appeals[98] and by the Supreme Court.

of persons genuinely engaged in a bargaining effort. They affected some semblance of an endeavor to reach a mutual understanding, but on scrutinizing the verbiage to which they resorted we find that this effort was palpably insincere." (Italics added.)

It is quite possible that the Dallas Company was actually insincere, but the opinion rendered in the case, coupled with the facts detailed concerning the negotiations, present some possibiliies for interesting speculation as to the future content of the bargaining concept. See also Express Publishing Co., 13 N.L.R.B. 1213 (1939).

[95] Section 10 (e) of the act: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." 49 Stat. L. 453, 29 U. S. C. (Supp. 1939), § 160 (e).

[96] System Federation No. 40 v. Virginian Ry., (D. C. Va. 1935) 11 F. Supp. 621.

[97] Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592 (1937).

[98] Virginian Ry. v. System Federation No. 40, (C. C. A. 4th, 1936) 84 F. (2d) 641.

On its facts the case is not enlightening concerning the nature of the duty to bargain, for the company did not meet and confer and thus did not even comply with the minimum requirements. Question was raised before the Supreme Court, however, concerning the nature of the obligation imposed by the decree, in answer to which the Court did make an important contribution when it said, in an unanimous opinion by Mr. Justice Stone:[99]

> "Petitioner argues that the phrase 'treat with' must be taken as meaning 'regard' or 'act towards,' so that compliance with its mandate requires the employer to meet the authorized representative of the employees only if and when he shall elect to negotiate with them. This suggestion disregards the words of the section, and ignores the plain purpose made manifest throughout the numerous provisions of the Act. Its major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee. The command to the employer to 'treat with' the authorized representatives of the employees adds nothing to the 1926 Act, unless it requires some affirmative act on the part of the employer. . . . As we cannot assume that its addition to the statute was purposeless, we must take its meaning to be that which the words suggest, which alone would add something to the statute as it was before amendment, and which alone would tend to effect the purpose of the legislation. *The statute does not undertake to compel agreement between employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First.*"

The portion of the decree requiring the employer to "exert every reasonable effort to make and maintain agreements" was couched in the language of section 2, first, of the act, which was unaffected by the 1934 amendments. This is a fairly explicit statement of legal obligation, certainly much more so than a "duty to bargain collectively" or to "treat with" employee representatives. The Court's opinion is therefore somewhat confusing, both in stating that the obligation to

[99] Virginian Ry. v. System Federation No. 40, 300 U. S. 515 at 547-548, 57 S. Ct. 592 (1937) (italics added).

"treat with" the union, aded by the amendments of 1934,[100] increased the employer's duties beyond what they were under section 2, first, and also in inconsistently following this with the statement last quoted which assimilates his duties under section 2, ninth, to those under section 2, first. In any event it is clear that the employer's obligations under the Railway Labor Act are much more definitively stated than they are in the National Labor Relations Act, and that under the former act the employer's obligation is to exert every *reasonable effort* to make and maintain agreements, though actual agreement is stated not to be compulsory. Whether, as could easily be held, judicial scrutiny of the reasonableness of the employer's efforts involves inquiry into the reasonableness of his arguments and proposals has yet to be determined.

In general it may be said that so far the Supreme Court has not drawn any distinction between the bargaining obligations imposed upon the employer by the Railway Labor Act and by the National Labor Relations Act.[101] In the *Jones & Laughlin*[102] case the Court, in defending the NLRA against an attack based upon the due process clause, analogized the employer's obligations under section 8(5) to those placed upon railroad employers. It cited the similar policies underlying the two statutes and disregarded the differences in statutory language. More recently in the *Heinz*[103] case the Court, in holding that the employer's refusal to sign an agreement even though an accord is reached constitutes an unfair labor practice, cited the "settled practice" of the National Mediation Board functioning under the Railway Labor Act and of the National Labor Board and its successor functioning under the NIRA. The Court stated that "Congress . . . had before it the record of this experience," and, in incorporating in section 8(5) "the collective bargaining requirement of the earlier statutes included as a part of it, the signed agreement long recognized under

[100] See note 29, supra.

[101] This generalization should perhaps be qualified by reference to National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 59 S. Ct. 501 (1939), where it was held that the employer is under no obligation under the Wagner Act to take the initiative and seek out the union. Such a holding would scarcely be justified under the Railway Labor Act formula which requires the employer "to exert every reasonable effort to make and maintain agreements. . . ."

[102] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 44, 57 S. Ct. 615 (1937).

[103] H. J. Heinz Co. v. National Labor Relations Board, (U. S. 1940) 61 S. Ct. 320.

the earlier acts as the final step in the bargaining process."[104] This reliance upon Railway Labor Act and NIRA "experience" is of doubtful validity in the light of the facts previously adduced herein, but if the process is continued it will, of course, result in a general approval of the principles announced by the present board, and lead to the same uncertainties, since the present board has largely accepted and amplified the principles worked out by the predecessor agencies.

So far, however, the Court has not itself comprehensively stated these principles. In the *Jones & Laughlin* case its language was somewhat restrained, as was perhaps to be expected in its first decision under the act:[105]

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act does not attempt to compel."

In the *Consolidated Edison* case the following view was expressed:[106]

> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining."

In the *Sands* case it was said:[107]

> "The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employes to the end that employment contracts binding on both parties should be made."

The *Heinz* case, as above indicated, accepts completely the board's position that once the parties have agreed, the employer must as a matter of law reduce the agreement to written form. "The freedom of the employer to refuse to make an agreement relates to its terms in

[104] Id. 325.

[105] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 45, 57 S. Ct. 615 (1937).

[106] Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 at 236, 59 S. Ct. 206 (1938).

[107] National Labor Relations Board v. Sands Mfg. Co., 306 U. S. 332 at 342, 59 S. Ct. 508 (1939). The Court cited S. REP. 573, 74th Cong., 1st sess. (1935). Cf. the discussion of this document, supra, p. 1085.

matters of substance," stated the Court, and not to its expression in written form.[108] Lip service, at least, was thus again paid to the proposition that the employer is not under compulsion to make an agreement. But the Court has not had occasion, as yet, to review a situation in which the employer has pursued proper "negotiation procedure" but has failed to come to terms with the union, except in the *Sands*[109] case, which presented an unusual situation and was disposed of principally on matters of law.

More cases have reached the circuit courts, hence the opinions are more replete with statements of principle. Perhaps the most comprehensive of such statements is the following, by Judge Sibley, speaking for the court in *Globe Cotton Mills v. National Labor Relations Board*:[110]

> ". . . As pointed out in National Labor Relations Board v. Jones & Laughlin Steel Corp. . . . the Act does not compel agreements between employers and employees, but commands free opportunity for negotiation as likely to bring about adjustments and agreements which will promote industrial peace. The only compulsion to agreement is the possibility of strike by dissatisfied employees on the one side, or inability to continue business and afford any employment at all on the other. We believe there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for the adjustment of grievances."

[108] H. J. Heinz Co. v. National Labor Relations Board, (U. S. 1940) 61 S. Ct. 320 at 325.

[109] National Labor Relations Board v. Sands Mfg. Co., 306 U. S. 586, 59 S. Ct. 91 (1939). So far as section 8 (5) was concerned, this case presented a disagreement between the union and the employer over a seniority provision in an existing collective agreement. The union purported to disagree with the employer concerning its meaning, but in any event, whatever its meaning, insisted that a certain type of seniority practice be followed. The Court in a sense passed on the merits of the controversy, in that it held the employer's interpretation of the contract to be correct. It then said that, even assuming the employer was obligated to bargain concerning a proposed change in an existing contract, the employer had done so here. The Court did not discuss or attempt to appraise the respective arguments advanced on the question whether the seniority practice should be revised, and seemed to feel that the employer was not obligated to bargain at length on such a question.

[110] (C. C. C. A. 5th, 1939) 103 F. (2d) 91 at 94.

In *National Labor Relations Board v. Express Publishing Co.*[111] the employer met and conferred with union representatives but refused to discuss in detail the provisions of the proffered form of agreement or to make counterproposals. In upholding the board's conclusion that the employer failed to perform its duties under the section 8 (5), the court said:[112]

> "The Guild submitted a contract with many provisions. The employer read a statement outlining its position. It expressed a willingness to exchange viewpoints with the Guild, to consider its proposals, and to notify it as the representative of the employees; and yet we think there was evidence to support the finding of the Board that respondent had determined in advance never to agree to anything. In law this was a refusal to bargain. Of course respondent was not bound to make any agreement, and technically it was not bound to make a counter proposal, but it was required to meet its employees with an open mind, and, if it was unwilling to do more than maintain its present status, to say so, and to express a willingness to have that as the agreement between them."

In a recent decision involving the P. Lorillard Company the Circuit Court of Appeals for the Sixth Circuit, in disagreeing with the board's finding that the company had been too adamant in its negotiations, expressed this rather conservative view:[113]

> "Collective bargaining requires negotiations by the employer with representatives of the employees, chosen by themselves, freely and without coercion, and has no reference to the terms of the agreement offered [by the employer] so long as the parties negotiate in good faith with the view of reaching an agreement. Each party to the controversy will necessarily offer a unilateral draft of the agreement contemplated, and such action, though it results in shaping the terms finally agreed upon, is in no way illegal. The sincerity of the employer's effort in negotiating with a labor

[111] (C. C. A. 5th, 1940) 111 F. (2d) 588, reversed and order of board modified, (U. S. 1941) 61 S. Ct. 693.

[112] 111 F. (2d) 588 at 589. Substantially the same position on the necessity of counterproposals was taken in Globe Cotton Mills v. National Labor Relations Board, (C. C. A. 5th, 1939) 103 F. (2d) 91.

[113] National Labor Relations Board v. P. Lorillard Co., (C. C. A. 6th, 1941) 117 F. (2d) 921. The board had found that the employer, by submitting a form of contract and stating in advance that certain of its terms represented his final word, had refused to bargain.

organization, under the statute, is to be tested by the length of time involved in the negotiations and the persistence with which the employer offers opportunity for agreement."

While the circuit courts have had before them a good many cases involving section 8(5), most of such cases have involved a failure of the employer to engage in "negotiation procedure." Consequently these cases, like most of the board cases, are not enlightening on the question whether the duty to bargain involves a duty to make reasonable proposals. In the *Sands*[114] case the parties were in dispute over a seniority provision in an existing collective agreement. In regard to this dispute the board had found an "honest difference of opinion" and therefore no failure to bargain, up to a certain point of time. Since the board itself had held for the employer on this point, there was no occasion for consideration of it by the court. By way of dictum, however, the court said the employer's interpretation of the agreement was correct, and promulgated the "sincerity" test in terms of "the length of time involved in the negotiations, their frequency, and the persistence with which the employer offers opportunity for agreement,"[115] a formula recently reiterated, as heretofore noted, in the *Lorillard* case. If by "persistence" in offering "opportunity for agreement" the court was thinking in terms of reasonable and acceptable employer proposals, it at least failed to express the idea clearly.

In *Globe Cotton Mills v. National Labor Relations Board*[116] there was detailed employer consideration of the union proposals. The court termed the attitude of the company "sincere," again without considering the merits of the proposals, but upheld the board order because the employer failed to make counterproposals upon request. The only cases discovered in which a circuit court or judges thereof have explicitly suggested the possible relevancy of the factor of reasonableness of the employer's views are certain cases involving the question of

[114] National Labor Relations Board v. Sands Mfg. Co., (C. C. A. 6th, 1938) 96 F. (2d) 721, affirmed 306 U. S. 586, 59 S. Ct. 91 (1939), discussed supra, note 109. See also Jefferey-DeWitt Insulator Co. v. National Labor Relations Board, (C. C. A. 4th, 1937) 91 F. (2d) 134, where the court likewise agreed with the board that up to a certain point of impasse there had been the kind of bargaining required by the act, and this without looking into the merits of the arguments and proposals advanced by the employer.

[115] National Labor Relations Board v. Sands Mfg. Co., (C. C. A. 6th, 1938) 96 F. (2d) 721 at 725.

[116] (C. C. A. 5th, 1939) 103 F. (2d) 91.

necessity of written agreements once accord has been reached,[117] a view now rejected by the Supreme Court in favor of such necessity as a matter of law.[118] No circuit court decision has been found which accepted the bizarre view expressed by the district court in 1936 in *Bendix Products Corp. v. Beman.*[119] The court argued that since "bargain collectively" means "to negotiate over the terms of an agreement" [dictionary definition], and since section 8(3) makes a closed-shop contract legal under certain circumstances, therefore a union demand for a closed shop involves a proper matter to be negotiated, and since good faith requires an intent to enter into some sort of agreement, it follows that an employer must, in this instance, bargain in good faith with an intent to enter into some sort of a closed-shop agreement. ". . . one cannot be said to bargain for the purchase of a house if he have a settled determination never to buy a house on any terms."[120] The fallacy of this view, of course, is not in the thought expressed in the quoted sentence (which, as a matter of fact, is the position taken by the National Labor Relations Board) but in the application of it to a particular employee demand.[121] E.g., the house purchaser might want a house without green shutters.

In summary, the courts so far (1) have assimilated the obligations imposed by section 8(5) to the bargaining duties (whatever they are) placed upon railroad employers by the Railway Labor Act, (2) have questionably given great weight to the views of the boards which functioned under the NIRA in ascertaining legislative intent in enacting section 8(5), (3) have for the most part approved the present Labor

[117] National Labor Relations Board v. Highland Park Mfg. Co., (C. C. A. 4th, 1940) 110 F. (2d) 632 at 637-638. And see the dissenting opinion of Judge Chase in Art Metals Construction Co. v. National Labor Relations Board, (C. C. A. 2d, 1940) 110 F. (2d) 148 at 152.

[118] H. J. Heinz Co. v. National Labor Relations Board, (U. S. 1940) 61 S. Ct. 320. Most of the circuit courts had taken the same position. See Globe Cotton Mills v. National Labor Relations Board, (C. C. A. 5th, 1939) 103 F. (2d) 91; Art Metals Construction Co. v. National Labor Relations Board, (C. C. A. 2d, 1940) 110 F. (2d) 148; National Labor Relations Board v. Highland Park Mfg. Co., (C. C. A. 4th, 1940) 110 F. (2d) 632; National Labor Relations Board v. Sunshine Mining Co., (C. C. A. 9th, 1940) 110 F. (2d) 780; Bethlehem Shipbuilding Corp. v. National Labor Relations Board, (C. C. A. 1st, 1940) 114 F. (2d) 930; and Continental Oil Co. v. National Labor Relations Board, (C. C. A. 10th, 1940) 113 F. (2d) 473. Cf. Inland Steel Co. v. National Labor Relations Board, (C. C. A. 7th, 1940) 109 F. (2d) 9; and Fort Wayne Corrugated Paper Co. v. National Labor Relations Board, (C. C. A. 7th, 1940) 111 F. (2d) 869. See 39 MICH. L. REV. 670 (1941).

[119] (D. C. Ill. 1936) 14 F. Supp. 58.

[120] Id. 69.

[121] See 4 UNIV. CHI. L. REV. 109 at 111 (1936).

Board's statements of principle which might logically be said to imply a testing of the reasonableness of the employer's arguments and proposals in some circumstances, but (4) have so far largely shied away from a deliberate approval of such a testing process, perhaps because the board has done likewise. The function of the courts so far has consisted in the main of determining whether the board's conclusions have been supported by substantial evidence, i.e., of passing upon the reasonableness of the board's inferences of fact. More light will possibly be shed on the practical nature of the employer's bargaining obligations if and when employers are haled before the courts on contempt charges, for in such cases it will be the court, not the board, which finds the facts. There is thus in the situation the possibility of a dual set of standards in fact, even though there be agreement on principles.[122]

CONCLUSION

This paper was started with the suggestion of some diametrically opposed views as to the nature of the employer's duties under section 8(5). Under one view, stated before the provision became law, the employer would simply be compelled to sit across the table and confer, and would be under no obligation whatever to grant any particular union request, such as for a wage increase. Another prediction, however, was that the statute would mean "compulsory arbitration of a unilateral character." And the House investigating committee has charged the Labor Board with disobedience to Congressional intent. The same fundamental cleavage of view may arise concerning the nature of the carrier's obligations under the Railway Labor Act, although in this case the problem is less acute because successful collective bargaining is the rule rather than the exception in the railroad industry.

[122] Dean SPENCER, THE NATIONAL LABOR RELATIONS ACT 27 (1935), first pointed to this possibility, and moreover predicted an administrative breakdown in consequence of the likelihood, as he felt, that a court "will probably resolve the doubt in favor of the employer because of its traditional disinclination to interfere with the exercise of [his] discretion." He felt that this process "is likely to continue until many, if not a majority, of employers subject to the Act are under the jurisdiction of the federal courts." Cf. National Labor Relations Board v. Boss Mfg. Co., (C. C. A. 7th, Mar. 17, 1941) C.C.H., LABOR LAW SERVICE, ¶ 60,342, involving one of the few contempt proceedings so far brought under the act. The company was adjudged in contempt of a decree entered in December, 1939, ordering it to bargain collectively. In reaching the conclusion that the decree had been violated, the court did not appear to be adopting a position any more favorable to the employer than is normally taken in a board proceeding to obtain an original decree.

From the facts previously adduced may it be said that the collective bargaining concept has "evolved" into something in the nature of a system of compulsory arbitration? And, if so, is this contrary to Congressional intent? Answering the second question first, it seems clear that there has been no departure from Congressional intent, for the very good reason that such intent cannot be clearly determined. The problem was obviously not thought out. Moreover, while agreement is in a sense compulsory, at least in some cases, under the decisions—to the extent that counterproposals for the incorporation of existing terms of employment into an agreement with the union are required—neither administrative nor judicial decisions justify the conclusion that the necessarily objective scrutiny of the bargaining process has so far involved the deliberate adoption and use of the technique of judging of the reasonableness of the employer's arguments and proposals, and hence of coercing concessions from him. The most that can be said is that such a technique seems to have been used, perhaps inadvertently, in a few cases, and that progression to this phase as an accepted practice could logically be made in line with principles announced concerning the meaning of section 8(5). It can also be said, now as at the beginning, that employer reasonableness (or, more accurately, lack of it) probably weighs indeterminately in a tribunal's reaction to the evidence even though the test be phrased simply in terms of "good faith."

In a sense, of course, the bargaining process always involves an element of coercion, since each side presumably wants what the other has to offer and is faced with the possibility that he will not be able to obtain it. Likewise in a sense the very imposition of a statutory duty to bargain, whatever be its definition, necessarily adds a certain additional element of compulsion in that failure to reach agreement may mean litigation with attendant discomforts whatever the outcome. The subject for investigation herein, however, has been whether such statutory obligation involves the further possibility that the bargainer, who would normally be free, except for the practical elements of compulsion just noted, to refuse to agree except upon his own terms, is no longer free to do so. At most it can be said that the seeds are planted which, if properly nurtured, may in time yield such a result.

Both the problem and its ultimate solution would seem to be pretty much inevitable. What is "collective bargaining," actually, in the light of experience? It is an "X" (variable) concept. It assumes recognition as a *sine qua non*, and negotiation, but no particular result, or, in fact, any result at all. What results in a given case depends on the particular

desires, whim, artifice, strategy, skill, etc., of the parties in formulating their proposals, on the same or a different combination of factors which govern the reshaping of proposals during negotiations, and finally, on the relative bargaining (i.e., economic) strength of the parties and the combination of factors (public opinion, patriotism, official pressures, etc.) entering into a decision whether or not to resort to it. If this is so, how can a duty to engage in the process possibly be susceptible of legal enforcement? As a practical matter, a "duty to bargain" must, in order to be capable of enforcement, be given a *special* definition. Two possibilities are: (1) that it be deemed simply to require union recognition and negotiation; (2) that it be deemed to require that plus the making of objectively reasonable proposals. These are both theoretically workable concepts, though the second is fraught with problems not present in the first and presupposes that standards of reasonableness can be found, an assumption which many will deny. If the Labor Board and courts, in their pioneering struggles with the disingenuous bargaining provisions of our labor relations acts, eventually proceed in the direction of the second possiblity, they will at least have achieved the result of taking provisions barren on their face and clothing them with life and meaning. In any event it is clear that the abstraction, "good faith," so convenient in solving problems of priorities under the recording acts and elsewhere because it centers around the comparatively simple question of notice, is by no means so clear a beacon light in the complex field of collective bargaining.