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right to make any investments; he will only be liable for the losses which were occasioned by investments which would not, at the time of the investment, have been made by a prudent investor, not in regard to speculation, but in regard to the permanent disposition of the funds, considering the probable income, as well as the probable safety of the capital.³³

The fallacy of the present investment laws in Wyoming may best be summarized by the following statement. There is no man or group of men presently alive who can be certain, at any point in human history, which investment is likely to be sound and which unsound; or which investment will continue to produce reasonable income and which not; therefore, any attempt to freeze an authorized list of investments is doomed to disappointment.

WADE BRORBY

THE CONCEPT OF GOOD FAITH BARGAINING UNDER THE LABOR-MANAGEMENT RELATIONS ACT OF 1947

The National Labor Relations Act of 1947, more commonly referred to as the Taft-Hartley Act, describes unfair labor practices of both employers and labor organizations in Section 8. After setting out activities that constitute such practices the following provision outlines the statutory duty to bargain collectively:

. . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .¹

The primary objective of our national labor policy is to promote industrial peace by encouraging the practice of collective bargaining. This objective was first developed under the original National Labor Relations Act of 1935 and it continues in the 1947 amendment to the Act. To best describe this theory of successful labor-management negotiation, it is appropriate that we examine the legal requirements of bargaining collectively. A more thorough examination can be achieved by first giving content to the phrase, "to . . . confer in good faith."

HISTORY OF THE DUTY TO COLLECTIVELY BARGAIN IN GOOD FAITH

If collective bargaining were to aid in resolving industrial strife and eliminating costly strikes, some requirement of good faith was necessary.

33. *Harvard College v. Armory*, 9 Pick, 446 (Mass. 1830).

1. Act of June 23, 1947, c. 120, § 8 (d), 61 Stat. 142, 29 U.S.C. § 158 (1952 ed.).

The duty to bargain first took statutory form in the Transportation Act of 1920 in which there was a duty on the part of "all carriers and their officers and employees . . . to exert every reasonable effort" to resolve their disputes in conference.² The first glimmer of an idea of good faith was nurtured by this Act as interpreted by the Railroad Labor Board when it proposed that:

Naked presentations 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.³

The National Labor Board, created in August, 1933, determined that there was a reciprocal duty to bargain and that the duty included more than the bare requirement that the employer meet and confer with the employee representative. Prior to this time, when the employee representative was engaged in bargaining, it was often in a precarious bargaining position whereby it could be "talked to death" by an apparently cooperative employer. It was to avoid this result that the additional duty of the employer arose. Peremptory rejection of employee proposals was then held improper,⁴ as was unwillingness to reduce agreements reached to written form.⁵ In effect, the employer was said to be obliged to be open-minded and to make reasonable efforts to come to an agreement.

On July 9, 1935, the National Labor Relations Board entered the scene. It interpreted the decisions of the National Labor Board as having the "sound principle that the employer is obligated by the statute to negotiate in good faith with his employee's representatives, to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement."⁶ This did not mean that the employee representative was not obligated in like manner, but it must be recalled that protection of these embryonic employee organizations was a paramount consideration at this time and they were always assumed to be ready and willing to negotiate.

So the term good faith began its slow growth into a more definite status. A logical subsequent step would have been for the Board to judge the reasonableness of the employers' contentions and proposals on a theory that failure to accept reasonable proposals and the making of unreasonable counter-proposals would be evidence of intent not to agree, if not a show of bad faith. But the Board stated that "the statute does not require an employer to acquiesce in particular demands."⁷ Thus while willingness

2. Act of February 28, 1920, c. 91, § 301, 41 Stat. 469.

3. *In re International Association of Machinists*, 2 R.L.B. 87, 89 (1921).

4. *S. Dresner & Son*, Dec. of the Nat. Labor Bd. 26 (Aug. 1933 - Mar. 1934).

5. *Pierson Mfg. Co.*, Dec. of the Nat. Labor Bd. 53 (Aug. 1933 - Mar. 1934).

6. *Houde Engineering Corp.*, Dec. of the Nat. Labor Rel. Bd. 35 (July 1934 - Dec. 1934).

7. *Atlanta Hosiery Mills*, Dec. of the Nat. Labor Rel. Bd. 144, 146 (July 1934 - Dec. 1934).

and desire to reach an agreement are required, a failure to agree does not necessarily indicate absence of the legally required state of mind.

The final legislative effort of the seventy-fourth Congress was the enactment of the National Labor Relations Act, also known as the Wagner Act.⁸ Again no appropriate statutory language was set out to serve as a guide to the duty to bargain in good faith. A study of the more recent legislation makes the reasons self-apparent; it simply can not be isolated and defined in the stilted statutory terminology. The chore of definition re-dounded to the National Labor Relations Board and to the courts.

The National Labor Relations Board, prior to 1947, strove mightily to keep its collective head above the mass of generalities as to what constituted this duty to bargain in good faith.⁹ The employer was to approach the bargaining table with an open and fair mind with the thought of finding a basis for agreement, yet the Act did not require an employer to agree to particular terms. The resulting confusion was a natural concomitant of the legislative lack of definition.

For over a decade then, in the interim between 1935 and 1947, under the terms of the Wagner Act it had been held to be unlawful for an employer "to refuse to bargain collectively with the representatives of his employees."¹⁰ This quoted provision had uniformly been construed to require bargaining in good faith, which construction has now been expressly confirmed by the Labor-Management Relations Act of 1947. Under the original Wagner Act no duty to bargain collectively rested on the employee representative. The addition of Section 8 (b) (3) in the Taft-Hartley amendments now imposes the obligation to bargain in good faith on labor organizations as well as employees. The section follows:

It shall be an unfair labor practice for a labor organization and its agents to refuse to bargain collectively with an employer, provided it is the representative of his employees. . . .¹¹

Thus failure of either the employer or the employee's representative to bargain collectively is declared to be an unfair labor practice under the 1947 Act, Section 8 (a) (5) applying to the employer and the above quoted Section 8 (b) (3) being applicable to the unions. Yet the obligation does not "compel either party to agree to a proposal or require the making of a concession."¹²

After having made it clear at the outset that the intention of the Act was to impose upon the unions the same duty to bargain in good faith which was imposed on the employers by the Wagner Act, the Board con-

8. Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C. §§ 151 - 166 (1940 ed.).

9. "The indicia of good faith are notoriously elusive. . . ." S. L. Allen & Co., 1 N.L.R.B. 714, 727 (1936).

10. Act of July 5, 1935, c. 372, § 8 (5), 49 Stat. 453, 29 U.S.C. § 158 (5) (1940 ed.), as amended by Act of June 23, 1947, c. 120, § 8 (5), 61 Stat. 140, 29 U.S.C. § 158 (5) (1952 ed.).

11. Act of June 23, 1947, c. 120, § 8 (b) (3), 61 Stat. 141, 29 U.S.C. § 158 (b) (3) (1952 ed.).

12. Act of June 23, 1947, c. 120, § 8 (d), 61 Stat. 142, 29 U.S.C. § 158 (d) (1952 ed.).

cluded that decisions of the Board and courts construing the employer's duty to bargain under the Wagner Act were significant guideposts in construing the new union duty to bargain.¹³

Little authority exists as to what is required of the unions, but the foregoing points out that the cases involving employers, inconclusive as they are, may be adapted as applicable to the unions. However, this solution to the nature of the statutory duty to negotiate in good faith is undercut with much fallacious reasoning.

REQUIREMENTS OF GOOD FAITH BARGAINING

When both parties have fulfilled all prior conditions in relation to collective bargaining they approach the negotiation table under the obligation "to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground."¹⁴ It appears then that the Act is complied with if negotiations occur even though no mutual agreement is reached or an impasse results. The Act, in effect, would seem to impose only the duty to bargain collectively with an honest, bona fide, open-minded attitude coupled with an earnest effort to arrive at an agreement if possible.

It is necessary to observe court and Board decisions that will aid in interpreting the statutory obligations to bargain in "good faith." The standards and tests set forth in Section 8(d), applicable to both employers and unions, closely paraphrase those established in decisions under the Wagner Act.

Of course, the most flagrant single area of bad faith in the conducting of bargaining is the outright refusal to negotiate. Let us, however, examine some of the less obvious attempts to avoid the statutory duty of collective bargaining in good faith. The Board has ruled that mere presence of the employer in a meeting with representatives of the employees is insufficient to constitute collective bargaining where no bona fide attempt to bargain is present. In this case the union had been recognized as the bargaining agent and sent a committee to the employer to demand better sanitary facilities and working surroundings. The employer at first gave a curt negative answer and then later realized the justice of the demands. He acted on a few of the suggestions, not with an attitude of agreement or collective bargaining but with one of acquiescence. Statements by the employer made it clear that he would confer with union committees, but only because that was what the law required. Also clear was the fact the employer was indisposed to explore with an open mind the possibility of making an agreement with its employees. The Board concluded that the "employer refused to discuss the committee ideas or any detail of them and made it clear that it had a fixed policy precluding such discussion.

13. National Maritime Union, 78 N.L.R.B. 971 (1948).

14. N.L.R.B. v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943).

He thus refused in his dealings with his employees, to accede even to the forms and the procedure of collective bargaining."¹⁵

In another more recent case it was held that there must be an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation. The contract in that instance was nearing termination and negotiations were underway toward a new one when a snag arose as to wage increases and a commercial fee clause. The contract terminated and negotiation went on until suddenly the employer said he was opposed to signing, saying he objected to third parties and outside elements and that he was opposed to union activities and wanted to "get rid of them." This was held an attitude incompatible with a good faith endeavor to reach an understanding with the union. The union then offered the concession of withdrawing the two noxious clauses if the employer would reopen negotiations on a certain date. The employer rejected the offer saying it would grant wage increases at a time when revenues warranted. The union asked that he put "it in writing," showing their willingness to accept the counterproposal, but the employer never replied. The failure to reply showed absence of good faith. The Board touched on other elements of the bargaining that failed to meet the good faith requirement. The employer's attempt at trying to sign up the individual employees rather than going through their bargaining representative was a "complete negation of the principles of collective bargaining." Injection of new matters, not brought up at a more appropriate earlier date, was held to be for the purpose of keeping the parties from reaching agreement and thus further evidence of lack of good faith. A demand for radical changes particularly at the eleventh hour in the negotiations showed beyond any doubt the absence of a sincere intention on the employer's part to reach an agreement.¹⁶

Just as mere pretended bargaining will not suffice to constitute collective bargaining as contemplated by the Act, neither must the mind of the employer be "hermetically sealed" against the thought of entering agreement. The holding here determined that the employer recognized he was to bargain by law but he refused to agree to matters covering wages, rates of pay and working conditions saying that was interfering with management. The employer also would not discuss scheduling of new rates except after they were put in effect; he refused to discuss or make any agreement as to overtime, Sunday or holiday labor, saying they were already covered by law; he said he would not consider contractually binding himself against lockouts or agreements to arbitrate any differences that might arise; and finally and boldly he maintained he would not make counterproposals since it was against company principles. The Board determined that there was a fixed intention not to agree to any proposal, irrespective of whether the proposed terms were otherwise acceptable. Such

15. *Timkin Silent Automatic Co.*, 1 N.L.R.B. 335, 342 (1936).

16. *N.L.R.B. v. Woodruff*, 193 F.2d 641 (5th Cir. 1952).

an attitude was a show of total want of good faith and made genuine collective bargaining impossible.¹⁷

Merely meeting with the employee representative to inform it that the employer can not or will not change its position does not satisfy the Act's requirements.¹⁸ Willingness of an employer to meet with the union manifested in numerous conferences, is an indication of the required attitude.¹⁹

A proper distinction was drawn in the case of *N.L.R.B. v. Highland Park Mfg. Co.*,²⁰ where the court stated the Act did not require that the parties "agree" but did require that they "negotiate" with a view to reaching an agreement if possible. The employer here had the discussions postponed and later called off, taking the position that he had complied with the requirement to bargain collectively inasmuch as his mill superintendent had conferred with the union's shop committee concerning several specific grievances. The Board stated that mere discussion with the employee's representative, with a fixed resolve on the part of the employer not to enter into an agreement with them even regarding matters as to which there is no dispute, does not satisfy the Act.²¹

Failure to divulge to the union certain of the management's records of employment was ground for holding that the employer had failed to cooperate whole-heartedly in collective bargaining. A question which arose here was whether to negotiate for a flat wage rate or for wages tailored to groups within the union that engaged in different levels of skilled work. The union finally acceded to the latter and accord seemed near until the employer said it would determine, as it always had, what the wages and rates of pay would be. The employer did not want bargaining but desired the former ex parte fixing of increases by the management. The union requested employment records as to group pay rates in order to compile a wage history of those to whom increases were granted. The employer refused saying such material was confidential. Aside from the above language the decision added that such matters may have been confidential before the Act but could "not be held so in the face of the expressed social and economic purposes of the Statute."²²

A limitation on the above holding was expressed nine years later in the decision of *N.L.R.B. v. Yawman & Erbe Mfg. Co.*²³ The union demanded, and the employer refused to divulge, the names, positions, and current wages of the employees in the bargaining unit during the previous year. The employer wanted to resort to a 1948 wage scale and yet would not let the union see it while trying to formulate a 1949 wage scale. The

17. *N.L.R.B. v. Boss Mfg. Co.*, 118 F.2d 187 (7th Cir. 1941).

18. *N.L.R.B. v. Israel Putnam Mills*, 197 F.2d 116 (2d Cir. 1952).

19. *N.L.R.B. v. Norfolk Shipbuilding and Dry Dock Corp.*, 195 F.2d 632 (4th Cir. 1952).

20. 110 F.2d 632 (4th Cir. 1940).

21. *Ibid.*

22. *N.L.R.B. v. Aluminum Ore Co.*, 131 F.2d 485, 487 (7th Cir. 1942).

23. 187 F.2d 947 (2d Cir. 1951).

decision stated that it was "difficult to conceive a case in which current or immediately past wage rates would not be relevant during negotiations for a minimum wage scale or for increased wages."²⁴ Only current or immediately past records were relevant and not the complete wage history as demanded in the former case.

In another instance an employer had granted a wage increase in the midst of negotiations and made it clear that the raise was not given as a result of the efforts of the union. The employer was then asked by the union if he would sign an agreement accepting certain other conditions of employment if the union withdrew the demands for wage increases and a closed shop. He stated that it was against company policy to sign an agreement. It was held that "entering into negotiations for agreement with the reservation not to reduce it to writing or sign it is conclusive of bad faith bargaining."²⁵

The offering of counterproposals or suggestions has always been a fertile area of contention. In the case of *N.L.R.B. v. Globe Cotton Mills*,²⁶ it was determined that the proffering of legitimate counterproposals by an employer revealed evidence of good faith in bargaining. Although there is authority to the contrary,²⁷ the complete failure to submit counterproposals is generally held as inconclusive evidence of a refusal to bargain²⁸ and if it is quite apparent from the union's position that counterproposals would be useless, an employer's failure to make the gesture of submitting them is not even indicative of bad faith.²⁹ It must be concluded that a genuine counterproposal, without a shrouded motive or any hint of stalling tactics, will be viewed as an integral step toward successful bargaining relations.

The foregoing decisions have served to illustrate the many facets of the problem and the impossibility of trying to describe every conceivable type of bad faith in labor relations. However, in summary, a lack of good faith may generally be inferred from evasions or stalling, refusal to consult, unilateral action, misrepresentation, refusal to provide negotiators with authority, refusal to furnish information, or interference with union activity. These and a host of other attitudes indicate conduct the law condemns as bad faith. This conduct is not to be considered individually but must be observed in relation to the facts of both the present and any prior negotiations. The role of factual findings and prior conduct is often conclusive of the decision. As the Supreme Court of the United States has aptly phrased it:

24. *Id.* at 949.

25. *N.L.R.B. v. Barrett Co.*, 135 F.2d 959, 961 (7th Cir. 1943).

26. 103 F.2d 91 (5th Cir. 1939).

27. *N.L.R.B. v. Rapid Roller Co.*, 126 F.2d 452 (7th Cir. 1942); *Woodside Cotton Mills Co.*, 21 N.L.R.B. 42 (1940).

28. *N.L.R.B. v. Lightner Pub. Corp.*, 113 F.2d 621 (7th Cir. 1940).

29. *N.L.R.B. v. Globe Cotton Mills*, 103 F.2d 91 (5th Cir. 1939).

Our role in such situations has special applicability to cases where, as here, a statutory standard such as good faith can have meaning only in its application to the particular facts of a particular case.³⁰

STATUS OF THE MUTUAL OBLIGATION TO BARGAIN COLLECTIVELY

One of the primary failings of the original Wagner Act was its characterization as "pro-union." It developed a one-sidedness whereby the union could advance its objectives at the bargaining table and then sit back to watch the employer try to sidestep the more unreasonable demands and still avoid the stigma of an unfair labor practice. The statutory recognition of the mutual character of the obligation is a provision of the Taft-Hartley Act.³¹ It was said that it removed the complaint of favoring the unions. Yet in examining the Board and court authority presented above it still seems evident that the duty to collectively bargain in good faith rests more heavily upon the employer. Only rarely has union willingness to freely discuss and justify position been questioned.

In *N.L.R.B. v. American National Ins. Co.*,³² where the employer was bargaining for a management function clause as a counter proposal to the union demand for unlimited arbitration, it was held by the United States Supreme Court that this did not constitute a refusal to bargain in good faith but the employer's unilateral action in changing working conditions during negotiations was held to be a departure from good faith bargaining. Observing this result then, it would seem logical to conclude that if the employee representative also engaged in such unilateral action during bargaining it too would breach the requirement. And in effect, it was so held by the Board in *Personal Products Corporation*.³³ The union-employer meetings had resulted in deadlock and without further specific demands the union members engaged in slow downs, walk-outs, partial strikes for portions of a shift or an entire shift and refusal to work overtime. This might fairly be construed as a unilateral change in working conditions by the union. The Board held that the union indulged in these tactics while purporting to confer in good faith and they had interfered with production and visited strong economic pressure on the employer. The Board thought it clear that such unprotected harassing tactics were an abuse of the union's bargaining power and irreconcilable with the purposes of the Act. However, the Court of Appeals for the District of Columbia³⁴ set the Board finding aside, asserting that there was not the slightest inconsistency between a genuine desire to come to an agreement and use of these economic pressures to get the type of agreement one wants. Since a total strike would not have been evidence of bad faith, no such inference could be drawn from a partial withholding of services at that time.

30. *N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395, 410, 72 S.Ct. 824, 832, 96 L.Ed. 1027, 1040 (1952).

31. See text at note 10 supra.

32. Supra note 30.

33. 108 N.L.R.B. 743 (1954).

34. 227 F.2d 409 (D.C. Cir. 1955).

CONCLUSION

The Taft-Hartley Act attempts to create an atmosphere and an attitude in which an agreement is inevitable. It does not compel agreement; and yet under present decisions are not the employers compelled, in effect, constantly to yield more ground to the union demands? This is a harsh inquiry that must receive fair attention by the Board and federal courts. Legislation over the state of mind of employer or union is impossible; thus it is imperative that the over-all conduct in negotiation be used and compared with that of those negotiators who have accepted collective bargaining as a workable postulate in daily industrial living. This application would supplement the administrative and judicial interpretations standing alone and would serve to halt the threatened pressures on the employer.

The emphasis in successful labor-management relations must continue to lie on the process of good faith collective bargaining in order to safeguard not only the legitimate interests of labor unions, but also those of employers, individual employees, and, of primary import, the American public, whose stake in the process of collective bargaining is of great importance.

The Act now requires that both parties act in good faith in bargaining and also provides remedies for failure to perform in that manner, but the Congress, the National Labor Relations Board, and the courts must continue to contribute definiteness to the term to better enable those gathered around the bargaining table to interpret it.

Administrative and judicial regulation of the collective bargaining procedure into predetermined channels is certainly not a wholesome solution. Should it ever become possible for the unions or management to simply present themselves before the Board at any instance of balkiness on the part of a bargaining opponent, it would lead to destruction of the very negotiation the Act was promulgated to protect. Harmonious labor relations are the natural result of accepted standards or policies tempered with a spirit of mutual trust, good-will and respect, all of which aid in giving underlying sustenance to the rather naked statutory term "good faith."

ALAN K. SIMPSON

A COMMENT ON WYOMING'S NEW ACCOUNTS
RECEIVABLE STATUTE

The Wyoming Legislature in 1957, keeping pace with the prospective commercial development of the state, adopted a new act relating to the assignment of accounts receivable.¹ The legislation endeavors to make the practice of accounts receivable financing more useful by eliminating

1. Wyo. Comp. Stat. §§ 39-1401 to 39-1416 (Supp. 1957).