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Comments and Casenotes

Harassing Tactics Not *Per Se* A Breach Of The Duty To Bargain Collectively

*N.L.R.B. v. Insurance Agents' International Union.*¹

After the defendant union and the company had negotiated for more than a month, hoping to agree on a contract to replace an agreement affecting the company's insurance agents in thirty-five states and the District of Columbia, the union announced that, if "agreement" on the terms of the new contract was not reached by the time the old contract expired, the union members would participate in a work-without-contract program designed to harass the company. When the old contract expired, the union and company remained at the bargaining table, but true to its word, the union launched its program of harassment which consisted primarily of slow-down tactics and uncooperative action.² The company filed a charge of refusal to bargain collectively against the union based on the work-without-contract program. The Trial Examiner recommended a dismissal of the action on the basis of *Textile Workers Union v. N.L.R.B.*³ The N.L.R.B. rejected this recommendation and granted a cease and desist order, ruling that, regardless of the union's good faith at the bargaining table, its tactics during the course of the negotiations constituted, *per se*, violation of the duty to bargain collectively.⁴ The Court of Appeals for the District of Columbia denied enforcement and set aside the cease and desist order.⁵

¹ 361 U.S. 477 (1960).

² The harassment consisted of a refusal for a time to solicit new business, refusal to comply with the company's reporting procedures, refusal to participate in the company's "May Policyholders' Month Campaign," reporting late to district offices, engaging in "sit-in" mornings, absenting themselves from special business conferences arranged by the company, and distributing anti-company leaflets while picketing.

³ 227 F. 2d 409 (D.C. Cir. 1955). In the *Textile Workers* case the Board ruled that harassing tactics by a union during negotiations were *per se* a refusal to bargain collectively in good faith. The Court of Appeals for the District of Columbia denied enforcement of the Board's cease and desist order over the strong dissent of Judge Danaker, who believed "the union actions were designed to unilaterally change working conditions" and were therefore a *per se* breach of the duty to bargain in good faith. *Id.*, 412. See *infra*, ns. 21-22, 26-28, and the text thereto.

⁴ 119 N.L.R.B. 768 (1957), quoted in 361 U.S. 477, 482 (1960).

⁵ 260 F. 2d 736 (D.C. Cir. 1958).

On certiorari, the Supreme Court by a 6-3 opinion, Mr. Justice Brennan, affirmed the Court of Appeals. The Court viewed the "Board's approach" as an "intrusion" into the substantive aspects of the bargaining process and held that the Board exceeded its authority by inferring a lack of good faith "solely and simply" because economic pressure tactics were employed during the course of negotiations.⁶ In a separate opinion Mr. Justice Frankfurter, joined by Justices Harlan and Whittaker, condemned the Board's *per se* approach⁷ but urged that the case be remanded to the Board for a finding based on the totality of circumstances surrounding the bargaining situation.⁸

When the National Labor Relations Act was passed in 1935, it placed upon the employer the duty to bargain collectively with the recognized bargaining agent of his employees.⁹ This Act neither defined what comprised "bargaining collectively" nor placed a corresponding duty on the labor unions. The National Labor Relations Board, set up under the Act, was left with the problem of determining what comprised a breach of the employer's duty to bargain.¹⁰ The Board gleaned from the legislative proceedings that bargaining collectively meant "to recognize and deal in good faith"¹¹ with labor's representatives. Thus, in the early days of the Wagner Act, the N.L.R.B. and the courts¹² on review of Board decisions adopted the concept of bargaining in good faith as a method of separating employers who used the negotiations not to reach agreement but to stall settlement in hopes of breaking the

⁶ Mr. Justice Brennan stated, *supra*, n. 1, 490:

"... the limitations on Board power . . . are exceeded . . . by inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of good faith negotiations."

⁷ 361 U.S. 477, 508 (1960).

⁸ *Id.*, 514.

⁹ National Labor Relations Act (Wagner Act) § 8(5), 49 STAT. 449, 453 (1935).

¹⁰ Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 Mich. L. Rev. 1065, 1089 (1941), states:

"... 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."

¹¹ 79 Cong. Rec. 7571 (1935) (remarks of Senator Wagner):

"... the right [of labor] to bargain collectively through representatives of their own choosing must be matched by the correlative duty of employers to recognize and deal in good faith with these representatives." (Emphasis added).

See also 79 Cong. Rec. 9685, 9711 (1935).

¹² *Singer Mfg. Co. v. N.L.R.B.*, 119 F. 2d 131 (7th Cir. 1941); *Globe Cotton Mills v. N.L.R.B.*, 103 F. 2d 91, 94 (5th Cir. 1939).

union, from employers who were dealing honestly but sternly with a union.¹³

When Congress amended the National Labor Relations Act through the Taft-Hartley legislation, the duty to bargain collectively was placed on both the union and the employer¹⁴ and defined in terms of good faith.¹⁵ Taft-Hartley was finally passed after Congress had defeated an attempt by the House Committee on Education and Labor to stereotype the bargaining process through setting procedural requirements¹⁶ which would have replaced the Board's determinations of good faith.¹⁷

Good faith is a subjective requirement referring to a state of mind, and, absent a declaration of intent by a party, a lack of good faith must be inferred from the party's conduct. Prior to the enactment of Taft-Hartley there had developed a tendency on the part of the Board, with judicial approval on review, to make *per se* violations of the duty to bargain collectively out of items of evidence tending to prove a lack of good faith.¹⁸ When using this *per se* test, the Board focuses its attention on a single

¹³ See Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057, 1079 (1958).

¹⁴ Labor Management Relations Act (Taft-Hartley Act) §§ 8(a)(5), 8(b)(3), 8(d); 61 STAT. 136, 141, 142 (1947); 29 U.S.C.A. §§158(a)(5), (b)(3), (d) (1956).

¹⁵ Labor Management Relations Act (Taft-Hartley Act) § 8(d); 61 STAT. 136, 142 (1947); 29 U.S.C.A. § 158(d) (1956):

"For the purposes of this section, to bargain collectively is the performance of the *mutual* obligation of the employer and the representatives 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 negotiations of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but *such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .*" (Emphasis added).

¹⁶ H.R. 3020, 80th Cong., 1st Sess., § 2 (11) (1946).

¹⁷ H.R. Rep. No. 245, 80th Cong., 1st Sess., 20 (1946):

". . . the committee has deemed it wise to define collective bargaining. . . . This bill does this in two ways: first, it sets up objective standards by which the Board can determine whether or not a party has refused to bargain. . . . The Chairman of the Board has stated that whether or not a person is bargaining 'in good faith' requires apprising his 'state of mind.' The possibility of error and injustice when three Board members, none of whom are psychiatrists, undertake to do this is very great. . . ."

The bill reported by the House Committee, with the above comment, was amended on the floor of Congress and the Act, as finally passed, contained no provision comparable to § 2 (11) of H.R. 3020, *supra*, n. 16. The quoted passage from the House Committee Report referred to § 2 (11). See H.R. Rep. No. 245, 80th Cong., 1st Sess., Minority Report, 69-70 (1946), for a blunt attack on § 2 (11).

¹⁸ Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1422 (1958).

act of a party to the bargaining process and declares that act to be determinative of a lack of good faith on the part of the actor.

This approach has been applied in three situations:¹⁹ (1) where the employer refuses to sign a contract embodying the terms agreed upon,²⁰ (2) where wage increases or other permanent changes in hours or working conditions, beyond what is offered to the union representative at the bargaining table,²¹ are granted directly to the employees by the employer's unilateral action;²² and (3) where the employer fails to grant information relating to the statutory subjects of bargaining after claiming inability to meet union demands.²³

The *per se* approach is explicable and valid in the three mentioned areas. Refusal to embody the terms of an agreement into a writing not only deprives the union of a symbol²⁴ of its achievement at the bargaining table, but the bad faith of such a refusal can be seen when the analogy is drawn between a refusal of an employer to consent to a writing of his agreement with labor and a situation in which a business man enters into negotiations with another entrepreneur for an agreement having numerous provisions with the reservation that he will not reduce it to a writing or sign it. In neither case would there be bargaining in good faith.²⁵

Unilateral changes in the conditions of employment yield to much the same analysis. Where an employer, for example, grants directly to the employees a unilateral wage increase of a higher amount²⁶ than offered to the

¹⁹ *Id.*, 1422-1428; Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 Mich. L. Rev. 806, 812 *et seq.* (1959).

²⁰ *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 (1941). This holding was embodied in § 8(d) of Taft-Hartley Act, *supra*, n. 15.

²¹ A unilateral grant extending to employees what had been offered at the bargaining table, even though it did not fully meet union demands and negotiations were continuing on what was not settled, was not a *per se* violation. *N.L.R.B. v. Bradley Washfountain Co.*, 192 F. 2d 144 (7th Cir. 1951). See also Bowman, *An Employer's Unilateral Action — An Unfair Labor Practice?*, 9 Vand. L. Rev. 487, 500 (1956).

²² *N.L.R.B. v. Crompton Mills*, 337 U.S. 217 (1949); *May Stores Co. v. N.L.R.B.*, 326 U.S. 376 (1945); *Medo Corp. v. N.L.R.B.*, 321 U.S. 678 (1944); *N.L.R.B. v. F. M. Reeves and Sons, Inc.*, 273 F. 2d 710 (10th Cir. 1959); *Lloyd A. Fry Roofing Co. v. N.L.R.B.*, 216 F. 2d 273 (9th Cir. 1954); *Armstrong Cork Co. v. N.L.R.B.*, 211 F. 2d 843 (5th Cir. 1954); *Great Southern Trucking Co. v. N.L.R.B.*, 127 F. 2d 180 (4th Cir. 1942).

²³ *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Taylor Forge & Pipe Works v. N.L.R.B.*, 234 F. 2d 227 (7th Cir. 1956).

²⁴ *Cox, The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1423 (1958).

²⁵ *H. J. Heinz v. N.L.R.B.*, 311 U.S. 514, 526 (1941).

²⁶ *Supra*, n. 21.

union at the bargaining table, this conduct has two relevant effects. First, it casts aspersions on the worth of union membership and collective bargaining by telling the employees that without either they can secure greater advantages.²⁷ Second, since Section 8(d) of Taft-Hartley expressly requires bargaining on "wages, hours and other conditions of employment,"²⁸ the unilateral grant of one of these subjects effectively places that subject beyond the realm of collective bargaining, and violates the duty to bargain.

A refusal to give information to the union as a *per se* refusal to bargain has been justified by referring to the statutory requirement of bargaining on "wages, hours and other conditions of employment" and reasoning that:

"... there could be no negotiations on the subject . . . until the information was supplied to the union. And since there was no bargaining on the statutory subject, the N.L.R.B. was not required to review the conduct of negotiations."²⁹

There simply was no bargaining, and therefore "neither the manner in which the negotiations were conducted nor the employer's state of mind was in issue."³⁰

While the *per se* approach is explicable in regard to areas in which it has been accorded applicability, cases within the categories are not always decided by reference to that approach.³¹ Within the three areas the Supreme Court has not yielded to the *per se* approach without dissent;³² and, expansion of the doctrine to different situations has been thwarted by the general rule that good faith is a subjective requirement to be ascertained by appraising the entire bargaining situation and not by focusing on a single act without reference to the other circumstances of the bargaining situation.³³

²⁷ *Supra*, n. 24.

²⁸ Labor Management Relations Act (Taft-Hartley Act) § 8(d); 61 STAT. 136, 142 (1947); 29 U.S.C.A. § 158(d) (1956).

²⁹ *Supra*, n. 24, 1428.

³⁰ *Ibid.*

³¹ N.L.R.B. v. Herman Sausage Co., 275 F. 2d 229, 234 (5th Cir. 1960); N.L.R.B. v. Stanislaus Imp. & H. Co., 226 F. 2d 377, 381 (9th Cir. 1955).

³² See Frankfurter, J., dissenting, N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 155, 157 (1956).

³³ N.L.R.B. v. Virginia Power Co., 314 U.S. 469, 477 (1941). See also N.L.R.B. v. Truck Drivers Union, 353 U.S. 87, 92 (1957); N.L.R.B. v. American Insurance Co., 343 U.S. 395, 409 (1952); Quaker State Oil Refining Corp. v. N.L.R.B., 270 F. 2d 40 (3rd Cir. 1959); N.L.R.B. v. I.B.S. Mfg. Co., 210 F. 2d 634, 638 (5th Cir. 1954); N.L.R.B. v. National Shoes, 208 F. 2d 688, 692 (2nd Cir. 1953).

The central question presented by the *Insurance Agents' Union* case³⁴ was whether the Board had properly applied the *per se* test to the union's work-without-contract tactics, which admittedly did not fit any of the three pigeonholes fashioned by the courts for that approach. The Supreme Court, although dividing on the proper mode of dispensing with the case, unanimously rejected the Board's *per se* approach to this case.³⁵

The majority condemned the Board's *per se* determination of a lack of good faith by rejecting the Board's claim that it had the power to distinguish among various economic pressure tactics and brand the ones at bar *per se* inconsistent with good faith collective bargaining.³⁶ The majority felt that there is no inconsistency between the application of economic pressure and good faith bargaining,³⁷ and that to uphold the Board's contention would be to allow "the Board's entrance into the substantive aspects of the bargaining process to an extent Congress had not countenanced."³⁸ The Court, however, was careful to

³⁴ *Supra*, n. 1.

³⁵ 361 U.S. 477, 490-491, 508 (1960).

³⁶ Commentators on the labor scene, *supra*, ns. 18-19, have expressed a fear that an expansion of the *per se* test could lead to the establishment of a set of "good bargaining practices," a requirement, they felt, over and above the statutory command of bargaining collectively as defined in terms of conferring in good faith. The comments were sparked by three decisions: *Textile Workers Union v. N.L.R.B.*, 227 F. 2d 409 (D.C. Cir. 1955); *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *N.L.R.B. v. Borg-Warner Corp.*, 356 U.S. 342 (1958). For a summary of *Textile Workers* case, see *supra*, n. 3. *Truitt* ruled that an employer had to justify by proof his claim that a wage increase was beyond his economic position to grant. *Borg-Warner* held that, while there was no bad faith on either side, the insistence that certain terms (that were beyond the scope of mandatory subjects of bargaining) be included in the agreement, was a refusal to bargain. Justices Harlan, Clark and Whittaker, concurring in *Borg-Warner* could not grasp "a concept of 'bargaining' which enables one to 'propose' a particular point, but not to 'insist' on it as a condition to agreement. The right to bargain becomes illusory if one is not free to press a proposal in good faith to the point of insistence." 356 U.S. 342, 352 (1958).

The face of the majority's opinion in *N.L.R.B. v. Insurance Agents' Union*, *supra*, n. 1, reveals awareness of the critical law review articles. Professor (now Solicitor-General) Cox is termed "a close student of our national labor relations laws." 361 U.S. 477, 489 (1960). His article, *supra*, n. 18, was cited at three separate junctures by the majority.

³⁷ *Supra*, n. 35, 494-5.

³⁸ *Supra*, n. 35, 498. The Court's fear of the Board's intrusion into the substantive aspects of collective bargaining is reflected in this statement: ". . . if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the

point out that it did "not mean to question in any way"³⁹ the Board's power to determine whether a party's conduct at the bargaining table evidences a real desire to come into agreement by "drawing inferences from the conduct of the parties as a whole."⁴⁰

Justices Frankfurter, Harlan and Whittaker accused the majority of withdrawing the harassing tactics from the totality of circumstances so that:

"... no evidentiary significance, not even an inference of lack of good faith, is allowed to be drawn from the conduct in question as part of a total context."⁴¹

The mere fact, they argued, that one engaged in tactics designed to exert economic pressure does not preclude the Board from considering such conduct, in the totality of circumstances, as evidence of the actual state of mind of the actor.⁴² These Justices would have remanded the case to the Board for further opportunity to introduce pertinent evidence of the union's lack of good faith.⁴³ It is difficult to understand what purpose a remand would serve, because in this particular case the Board's General Counsel had repeatedly declined the opportunity, afforded by the Trial Examiner, to present any evidence of failure to bargain in good faith other than the harassing tactics.⁴⁴

While the Court unanimously rejected the *per se* approach in this case, the majority recognized the validity of the test in at least one of its restricted areas. Speaking in a footnote,⁴⁵ the Court asserted "an employer's unilateral setting of employment terms during the collective bargaining may amount to a breach of its duty to bargain collectively." One must recognize that "may amount" hardly conveys the conclusiveness of former opinions in that area.⁴⁶

This same footnote also raises the question whether union conduct could be treated, analogously to employer

results of negotiations. . . . Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." (490).

³⁹ 361 U.S. 477, 498 (1961).

⁴⁰ *Ibid.*

⁴¹ *Supra*, n. 39, 504.

⁴² *Supra*, n. 39, 505.

⁴³ *Supra*, n. 39, 514.

⁴⁴ *Supra*, n. 39, 481, fn. 4.

⁴⁵ *Supra*, n. 39, 496-497, fn. 28.

⁴⁶ Mr. Justice Frankfurter in his separate opinion by implication denied that the Court ever accepted the Board's *per se* test when he distinguished away the four cases cited to him in the instant case as supporting the *per se* approach. 361 U.S. 477, 508-510 (1961).

conduct, as unilaterally establishing working conditions, and, as such, amount to a failure to bargain collectively in good faith.⁴⁷ Because this situation, which was hypothetically suggested as arising where a union demanding a 35 hour week simply refused to work more than 35 hours, was not presented in the *Insurance Agents' Union* case, the question was left open.⁴⁸ By referring to the Congressional intent relating to the collective bargaining legislation (as the Court did in *Insurance Agents' Union*), an answer may be suggested. Each step in the legislative process relative to the enactment of Taft-Hartley displays an intent to demand the same bargaining posture of both union and employer.⁴⁹ This intent was reflected in the Act as finally passed, which placed a mutual duty to bargain collectively upon both union and employer,⁵⁰ making their obligations "corresponding."⁵¹ If this supposedly corresponding duty would be interpreted to allow a union to unilaterally establish working conditions while denying to the employer a similar prerogative,⁵² the duty would hardly be corresponding. Furthermore, unilateral action effectively avoids collective bargaining and thereby the statute which seeks to promote it as national policy.⁵³

If, in some future given situation, a union should resort to harassing tactics, while remaining at the bargaining table and delivering no ultimatums and evidencing a reasonable effort to reach agreement, and the employer should react by staying at the bargaining table with a

⁴⁷ *Supra*, circa ns. 26-28.

⁴⁸ The hypothetical question posed by the Court was suggested by Note, *Union Refusal to Bargain*, 71 Harv. L. Rev. 502, 509 (1958).

⁴⁹ The mutual obligation was demanded and endorsed before The House Committee on Education and Labor by impartial observers (e.g., Dr. Harold Metz, representing Brookings Institution, Hearings Before The House Committee on Education and Labor on Amendment to the National Labor Relations Act, 80th Cong., 1st Sess., 227 (1946)) and by employer-oriented witnesses (e.g., Roland Rice, General Counsel American Trucking Association, Inc., *id.*, 584). The "one-sided" character of the Wagner Act was castigated by the Senate Committee as destructive of the equality of bargaining power necessary to maintain industrial peace because it "afford(ed) relief to employees and labor organizations for certain undesirable practices on the part of management [while denying] to management any redress for equally undesirable actions on the part of labor organizations." S. Rep., No. 105, 80th Cong., 1st Sess., 2 (1946).

⁵⁰ Labor Management Relations Act (Taft-Hartley Act) § 8(d); 61 STAT. 136, 142 (1947); 29 U.S.C.A. § 158(d) (1956).

⁵¹ MILLIS AND BROWN, FROM WAGNER ACT TO TAFT-HARTLEY (1950) 448.

⁵² *Supra*, circa ns. 26-28.

⁵³ Labor Management Relations Act (Taft-Hartley Act) § 1(b); 61 STAT. 136 (1947).

similar attitude, but exercising its prerogative of firing⁵⁴ or locking-out⁵⁵ those engaged in the harassment, or applying counter-harassment tactics,⁵⁶ the collective bargaining required by *Insurance Agents' Union* would be met. In such a situation the tactics used outside the conference room would not preclude a sincere desire to reach agreement at the bargaining table. The statutory requirement of good faith demands no more.

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⁵⁴ 361 U.S. 477, 492-95 (1961). The firing of the employees engaged in unprotected activities as an alternative to seeking a cease and desist order on a charge of unfair labor practice, as was attempted without success in the principal case, may be a self-defeating and unusable substitute, especially where the employees involved are skilled tradesmen, who would be difficult to replace if fired, or where the employees in the field are highly organized and would not accept the job opened by a firing arising out of a labor dispute.

⁵⁵ N.L.R.B. v. Truck Drivers Union, 353 U.S. 87, 92 (1957), found that an employer lockout was not *per se* unlawful, and was under the facts of that case a legitimate employer weapon.

⁵⁶ A possible argument for a parity of economic weapons is provided by the legislative intent of Taft-Hartley which aimed at erasing the "one-sided" character of bargaining that existed under the Wagner Act. S. Rep. No. 105, 80th Cong., 1st Sess., 2 (1946). However, management would have to take care not to commit a *per se* unfair labor practice by unilaterally changing working conditions. *Supra*, *circa* n. 22.

The separate opinion of Mr. Justice Frankfurter urged:

"... interpretations of the Act ought not to proceed on the assumption that it actively throws its weight on the side of unionism in order to redress an assumed inequality of bargaining power." 360 U.S. 477, 507 (1960).
