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Recent Case: Labor Relations - Collective Bargaining - Good Faith Bargaining [*H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)]

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Broad, reciprocal pretrial discovery in criminal cases is an important development which will promote early and just resolutions of cases that need not go to trial, and will make those cases that do go to trial more dependent upon their facts than upon techniques such as concealment and surprise. In the area of the jury, 12 is no longer a sacred number, and the size of juries in the future will depend upon the desires of the various legislatures. But the greatest significance of *Williams* is that the Court has given the states freedom to serve as laboratories to test new approaches to criminal justice, with the hope that they will discover more progressive procedures to administer justice in a speedy but fair manner.[30]

LABOR RELATIONS — COLLECTIVE BARGAINING — GOOD FAITH BARGAINING

H.K. Porter Co. v. NLRB,
397 U.S. 99 (1970).

Federal labor law requires parties negotiating a collective bargaining agreement to confer in "good faith."[1] Many problems surround this simply stated requirement, and generally they fall into two principal areas. First, there is the difficult task of establishing what actions constitute a breach of the good faith duty. Second, there is the problem of what the National Labor Relations Board (NLRB) can do to remedy a violation. The experience of the 35 years since the adoption of the National Labor Relations Act (NLRA) has generated some rules which purport to identify what constitutes a violation of the good faith standard,[2] but the application of these rules to particular fact situations is fraught with difficulty. A greater problem, however, is the fashioning of effective remedies.

H. K. Porter Co. v. NLRB[3] illustrates the problems the Board faces in the area of remedies. During the initial stages of negotiating a collective bargaining agreement with the United Steelworkers, the Porter company had refused to agree to check off dues for the union, a practice followed by 95 percent of all manufacturing industries.[4] In testimony before the trial examiner, the company admitted that its objection to checking off union dues was not due to

[30] *See* Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

inconvenience or economic considerations; it was simply "not going to aid and comfort the union."[5] The Board found that Porter was not bargaining in good faith and ordered the company to cease and desist from its unfair labor practices and to comply with the requirements of the NLRA.[6] When the company failed to comply with this order, the Board ordered Porter to grant a contract clause to the union providing for the check off of dues.[7] The court of appeals affirmed the order on the grounds that the imposition of a check-off clause is, at most, a minor intrusion on the freedom of contract policy of the NLRA, and that the history of the company's violations called for just such a remedy.[8] The Supreme Court reversed, holding that the Board lacks the power to compel an employer or a union to agree to a substantive provision in a collective bargaining agreement.

Mr. Justice Black, speaking for the majority, looked at the legislative history of the NLRA. He found that the drafters never in-

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1 Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a) (1964), makes it an unfair labor practice for an employer to refuse to bargain collectively with his employees' representatives. Section 8(d) of the Act, 29 U.S.C. § 158(d) (1964), added in 1947 by the Labor Management Relations Act, defines to bargain collectively, in part, as conferring in good faith with respect to certain terms and conditions of employment. For a commentary on the good faith requirement, see Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1412-18 (1958). *See also* Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248 (1964); Fanning, *The Duty to Bargain in 1962*, 14 LAB. L.J. 18 (1963); Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807 (1959); Fleming, *New Challenges for Collective Bargaining*, 1964 WIS. L. REV. 426.

2 *See* NLRB v. United States Cold Storage Corp., 203 F.2d 924 (5th Cir.), *cert. denied*, 346 U.S. 818 (1953) (refusal to meet with duly elected employee representative); NLRB v. Ozark Dam Constructors, 190 F.2d 222 (8th Cir. 1951) (offering a contract on a "take it or leave it" basis); NLRB v. Hoppes Mfg. Co., 170 F.2d 962 (6th Cir. 1948) (attaching conditions to entering negotiations). *See also* Cox, *supra* note 1, at 1403-06; McCulloch, *Past, Present and Future Remedies under Section 8(a)(5) of the NLRA*, 19 LAB. L.J. 131 (1968).

3 397 U.S. 99 (1970).

4 2 BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 87:3 (1970). Under a check-off clause, a company agrees to periodically deduct dues from the employees' wages and to pay that money directly to the union.

5 397 U.S. at 101.

6 H.K. Porter Co., Disston Div.-Danville Works, 153 N.L.R.B. 1370 (1965), *enforced*, United Steelworkers v. NLRB, 363 F.2d 272 (D.C. Cir.), *cert. denied*, 385 U.S. 851 (1966).

7 H.K. Porter Co., Disston Div.-Danville Works, 172 N.L.R.B. No. 72, 1968-2 CCH NLRB Dec. 25,114, *aff'd*, 414 F.2d 1123 (D.C. Cir. 1969), *rev'd*, 397 U.S. 99 (1970). On a motion by the union asking it to clarify its 1966 opinion, the court of appeals had held that in certain circumstances, such as the employer's continued refusal to bargain in good faith, a check-off provision could be imposed as a remedy. United Steelworkers v. NLRB, 389 F.2d 295, 298 (D.C. Cir. 1967).

8 H.K. Porter Co. v. NLRB, 414 F.2d 1123 (D.C. Cir. 1969), *rev'd*, 397 U.S. 99 (1970).

tended that the duty to bargain collectively would require any employer to reach an agreement.[9] The Court had acknowledged this policy in *NLRB v. Jones & Laughlin Steel Corp.*,[10] where it said: "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever."[11] In 1947 Congress added section 8(d) to the NLRA which provided that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession."[12] Mr. Justice Black agreed with the court of appeals that literally section 8(d) refers only to determining whether a violation of the duty to bargain collectively has occurred. But he considered it anomalous to contend that, while section 8(d) prohibits the use of a refusal to agree as proof of bad faith bargaining, the NLRA permits the Board to compel agreement. Thus, the Court found that the Board had exceeded its authority in requiring the Porter Company to check off dues.

The Court left the Board with only its conventional remedy of issuing a cease and desist order[13] and having it enforced by the courts if the employer fails to comply.[14] Mr. Justice Black recognized that the present remedial powers of the Board are too narrow to cope with important labor problems, notably in the area of good faith bargaining, but he concluded that it is the job of Congress, and not the Board or the courts, to decide "when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands."[15] Thus, although the Board is charged with the duty to order parties to act affirmatively to effectuate the policies of the NLRA,[16] it is restricted to those actions that will not upset the time-honored principle of freedom of contract.

Mr. Justice Douglas, joined by Mr. Justice Stewart, dissented. He felt that, because of the repeated obstinacy of the company, there was no alternative but to grant the Board the authority to

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[9] *See, e.g.*, S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935); 79 CONG. REC. 7659 (1935) (statement of Senator Walsh). *See also* Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1087 (1941).

[10] 301 U.S. 1 (1937).

[11] *Id.* at 45.

[12] Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 158(d) (1964), *amending* NLRA, ch. 372, § 8, 49 Stat. 449 (1935).

[13] NLRA § 10(c), 29 U.S.C. § 160(c) (1964).

[14] *Id.* § 160(e).

[15] 397 U.S. at 109.

[16] NLRA § 10(c), 29 U.S.C. § 160(c) (1964).

impose the check off as "affirmative action" necessary to remedy the company's flagrant refusals to bargain in good faith. Justice Douglas was quite aware that such a ruling might later be interpreted too broadly and "gain a momentum not warranted by the exigencies of its creation."[17] But he still felt that where there are repeated abuses, as in *Porter*, the Board has the power to compel submission to one-sided proposals. In the future, should an employer's refusal to reach agreement be founded on any business consideration, rather than arbitrary avoidance of an agreement with the union, the remedy would not be available. Mr. Justice Douglas' emphasis on the narrow factual situation in *Porter* indicates that he too feels that the Board is normally limited in its discretion by the principle of noninterference with the substance of the collective bargaining process.

A study of the duty to bargain cases made by Professor Phillip Ross of the University of Buffalo concluded that the major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to violate the NLRA.[18] The Court's decision in *Porter* has frustrated the Board's attempt to fashion a new and effective remedy. This is unfortunate because the conventional Board remedy does not realistically recognize the consequences of a violation of the duty to bargain in good faith.

Presently it may take a year before the Board makes a finding of bad faith bargaining,[19] and perhaps another year before the courts enforce a cease and desist order,[20] which may be little more than exhortatory anyway.[21] A remedy granted more than 2 years after the event will bear little relation to the human situation which gave rise to the need for governmental intervention.[22] During the time

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[17] 397 U.S. at 110.

[18] Ross, *Analysis of Administrative Process Under Taft-Hartley*, 63 LAB. REL. REP. 132, 133 (1966).

[19] Under section 10(j) of the NLRA, 29 U.S.C. § 160(j) (1964), the Board, after issuing a complaint, can obtain a temporary injunction against the unfair labor practice. Attempts to secure such relief, however, have not been viewed favorably by the courts, essentially because of the judicial unwillingness to interfere with the bargaining process. *See, e.g.*, Meter v. Minnesota Mining & Mfg. Co., 273 F. Supp. 659 (D. Minn.), *rev'd*, 385 F.2d 265 (8th Cir. 1967) (injunction denied when the Board sought to compel employers to negotiate with a recognized union).

[20] Under section 10(e) of the NLRA, 29 U.S.C. § 160(e), the Board can ask for temporary injunctive relief when it petitions a court of appeals for enforcement.

[21] *See* McCulloch, *supra* note 2.

[22] *See* HOUSE SUBCOMM. ON EDUCATION AND LABOR, 87TH CONG., 1ST SESS., REPORT ON THE NLRB 16-26 (Comm. Print 1961).

between the filing of a complaint and the issuance of a Board order, employees are deprived of the benefits of collective representation, and the power of their chosen representatives wanes. Employee turnover and changing conditions further weaken the union which cannot bring back a satisfactory contract. As the court of appeals recognized during the *Porter* litigation, when the unfair practices are committed in localities where hostility to unions runs deep, the determined employer who litigates often succeeds in ousting the union despite the Board's finding of NLRA violations.[23]

The recent decision by the NLRB in the *Ex-Cello Corp.*[24] case illustrates the impact of *Porter*. In 1967, the trial examiner found that Ex-Cello had unlawfully refused to bargain in good faith. He recommended as a remedy, in addition to the standard bargaining order, that Ex-Cello be required to compensate its employees for the wages and benefits they would have received through collective bargaining if Ex-Cello had bargained in good faith. Although recognizing that a mere affirmative order to bargain upon request does not eradicate the effects of an illegal delay of over 2 years, the Board reluctantly concluded that, because of *Porter*, it could not approve the trial examiner's recommendation.

Although the *Porter* remedy was a prospective one, which would have bound the employer to a specific contract provision, and the *Ex-Cello* remedy would have acted retroactively to impose financial liability upon an employer based upon a presumed contract, the Board did not think the cases were distinguishable. It felt that the presumption of an agreement in the latter situation would be tantamount to the imposition of an agreement, and thus was prohibited by *Porter*.

The *Ex-Cello* decision demonstrates the constraining effect that *Porter* will have on the Board. The Board is adhering to Mr. Justice Black's conclusion that the bold changes in the law which are necessary must be advanced by the legislature, not by the Board or the courts.[25] Whether Congress will provide the necessary legislation

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[23] United Steelworkers v. NLRB, 389 F.2d 295, 301 (D.C. Cir. 1967).

[24] Ex-Cello Corp., 185 N.L.R.B. No. 20, 5 CCH LAB. L. REP. (1970 CCH NLRB Dec.) ¶ 22,251 (Aug. 25, 1970). For analyses of this case while it was pending before the Board and of both the scope and nature of the Board's remedial powers, see McGuiness, *Is the Award of Damages for Refusals to Bargain Consistent with National Labor Policy?*, 14 WAYNE L. REV. 1086 (1968); Comment, *Employee Reimbursement for an Employer's Refusal to Bargain: The Ex-Cell-O Doctrine*, 46 TEXAS L. REV. 758 (1968).

[25] 5 CCH LAB. L. REP. (1970 CCH NLRB Dec.) at 28,672-73.