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CONCLUSION

The court commitment procedures in Ohio are clearly in need of revision. If Ohio were to adopt some commitment measures which are in effect in Illinois, New York, Pennsylvania or California, the improvement in Ohio's commitment laws would be of considerable significance. This writer would suggest revisions of the Code which would incorporate the following provisions: (1) The application to commit a person as mentally ill should be made to include a verified petition plus a certificate of a physician stating his belief of such mental illness. (2) Notice of receipt of such application should be given to the person alleged to be mentally ill. (3) Upon receipt of the application, the court should have broad discretionary authority to (a) request that the person submit to a medical examination by two court-appointed physicians, or (b) if he refuses, to order his detention for the purpose of an examination. (4) The date of a hearing should be set within fifteen days after the filing of the application. Notice of such hearing should be made to the person. (5) The person alleged to be mentally ill should have the right to a jury trial to determine the question of his mental competency. (6) If this right is not exercised, a hearing should be held at which time the findings of the court-appointed physicians should be introduced. (7) The probate judge should then be given discretionary power to order the person (a) committed, (b) discharged, or (c) temporarily committed for further treatment and care for ninety days.98

LAWRENCE R. SCHNEIDER

Interpretation of Good Faith Bargaining

The incorporation of the device of collective bargaining in the National Labor Relations Act1 had as its basic purpose the achievement of industrial peace. This purpose was to be achieved by providing a system through which representatives of both labor and management could work out their common problems at the conference table. Further, the Act established a means of enforcing the use of the system by restraining certain unfair labor practices.2 Congress in passing the Act intended to lay the foundation for labor's and management's enjoyment of industrial freedom through the utilization of industrial self-government rather than complete government regulation.3 Of course, a minimum of regulation was necessary in order to relieve the economy of the industrial strife and

98. House Bill 529 which was introduced at the 104th Ohio General Assembly incorporates most of the proposed procedural changes set forth in this article.
chaotic conditions that existed between employee and employer prior to 1935. The primary function of the Act was to get the bargaining parties to the door of the conference room. What went on behind those doors, during negotiations, was to be ignored. In other words, the Act was passed to effectuate the procedure of collective bargaining, with the express purpose of not regulating the substantive bargaining issues.

Congress established the National Labor Relations Board (NLRB) to administer the provisions of the Act. While the Board was given power to prohibit parties from engaging in unfair labor practices, it was to refrain from influencing the substantive issues and terms of collective bargaining agreements. Yet an examination of the decisions of the Board shows that it has repeatedly transcended its authority for the sake of maintaining complete industrial peace. Moreover, many reviewing courts have sanctioned the Board's intrusion into the substantive issues of bargaining, and thus have disregarded the original purpose of the Act, as outlined above.

This article will examine and evaluate the conduct of the Board and reviewing courts in relation to the statutory authority and legislative intent.

THE GOOD FAITH CONCEPT

Ostensibly, the issue of good faith is one of statutory interpretation. Section 8(a)(5) of the Act, enacted in 1935, makes the refusal of the employer to bargain collectively with the appropriate representatives of his employees an unfair labor practice. At an early date the Board interpreted the duty of the employer as one to bargain collectively in good faith. Good faith is not a standard new to the law. It is frequently used to evaluate the conduct of an individual by determining his subjective knowledge or intent.

The Board's determination that an employer's duty to bargain collec-

5. Hereinafter referred to as the Board.
7. NLRA, 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958): "It shall be an unfair labor practice for an employer — to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."
tively impliedly includes the duty to bargain in good faith was accepted by the Supreme Court in *NLRB v. Jones & Laughlin Steel Corporation.*

The Court stated:

> The Act does not compel agreements between employers and employees . . . . 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 in itself does not attempt to compel . . . .

Thus, although good faith did not include the duty to agree, it did include the duty to come to the bargaining table with at least an open mind. However, the Board did not continue to use this subjective test of good faith accepted by the Supreme Court. Instead, it set itself up as the judge of what concessions and counterproposals an employer must make. In short it interpreted good faith to include the duty to agree. For example, an employer's refusal to compel his employees to become members of unions was held to be evidence that the employer did not bargain in good faith.12 Also, an employer was not bargaining in good faith when he asked the union to agree to a "no-strike clause,"13 even though other employers were not in bad faith when the unions agreed to such clauses.14 In these cases the Board did not examine the subjective intent of the parties to determine whether or not they had bargained in good faith. Instead it predicated a refusal to bargain in good faith on a single act or proposal of the employer made or stated during the actual negotiations. This, in effect, amounted to a regulation of the substantive terms of the bargaining contract.

In 1947, in order to prevent the Board from infringing upon the substantive terms of the collective bargaining agreements and from using the good faith test to force employers to yield to union demands, Congress included in its amendments to the Act a definition of the term "bargain collectively" as used in section 8(a)(5). The new section, 8(d), stated:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the employees (1) to meet at reasonable times (2) and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . (3) 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 . . . .

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10. 301 U.S. 1 (1936).
11. Id. at 45.
The clear purpose of section 8(d) was to limit the power of the Board by establishing a definition of "collective bargaining" as the term is used in sections 8(a)(5) and 8(b)(3). Congress felt it must assure the parties a full opportunity to use their bargaining power, and that the Board should not dictate how the parties may use their bargaining abilities.

Specifically, section 8(d) created three standards for the Board to use in defining collective bargaining. Two of the standards — to meet and confer at reasonable times and the execution of a written contract — are objective in nature. A breach of either one of these standards is automatically a refusal to bargain collectively, and thus a violation of either section 8(a)(5) or 8(b)(3), regardless of the party's actual good faith. The third standard, to confer in good faith, covers all situations during the actual negotiating. In order to breach this standard a finding of refusal to bargain is not enough; a party violates this section of the Act only when he has refused to bargain in good faith.

What does good faith mean? Although the phrase was not used in the original Act, the Board, at an early date, by its own construction included the phrase into the wording of section 8(a)(5), which makes the refusal of an employer to bargain an unfair labor practice. In those early cases good faith was interpreted in the normal sense to mean the intent and motive of a party as evidenced by his words, actions, and the totality of his conduct.

However, later decisions of the Board discarded this definition for a more objective one. In these later cases, one specific act of a party, such as a demand that a no-strike clause be inserted or a demand for a performance bond was enough evidence for the Board to hold that the party had refused to bargain in good faith without examining other aspects of the bargaining situation.

Congress, in enacting section 8(d) in order to limit the power of

17. Congress also extended the duty to bargain collectively to the representatives of the employees. NLRA § 8(b)(3), as added by 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958), "It shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer...."
22. Ibid.
the Board, used the phrase "good faith" only in the second standard of section 8(d), which governed the actual negotiations of the parties. This part of collective bargaining was to be left as free from regulation as possible. In order to do this Congress intended that the phrase good faith be used as the Supreme Court used it in the Jones & Laughlin case. That meaning was a more general and more subjective one than was used by the Board in many of its decisions prior to 1947. It necessitated a perusal of the total conduct of the party to determine whether or not the party was bargaining with a sincere desire to reach an agreement. The Supreme Court recognized this Congressional intent in NLRB v. American National Insurance Company, where they stated that the duty to bargain in good faith is the duty to negotiate in good faith with the representatives of the employees, to match their proposals, if unacceptable, with counterproposals and to make every reasonable effort to reach an agreement. The Court further held that bad faith could not be found unless the totality of the conduct of the parties was examined in order to ascertain whether there was a sincere effort being made to reach agreement.

Thus, Congress in defining the duty to bargain collectively prescribed two procedural rules for the parties: (1) to meet at reasonable times, and (2) to execute a written agreement once negotiations are completed. The only regulation imposed upon conduct during the actual bargaining was to act in good faith. The remainder of this article will be concerned only with the good faith standard.

Decrees of the Board are usually enforced by the appellate courts when the Board actually examines the subjective intent of the parties in order to determine good faith. When one party engages in certain conduct obviously intending to undermine the collective bargaining negotiations, it has clearly refused to bargain in good faith. For example, in NLRB v. Union Manufacturing Company, the employer refused to allow the union to hold meetings near the plant which would have made

29. Cases cited notes 12 and 13 supra.
30. 343 U.S. 395 (1952).
31. Cases cited notes 2-8 supra.
32. Conduct which defeats demands proposed by a party is not necessarily unlawful; only conduct which undermines a party’s right to use collective bargaining is prohibited.
34. 179 F.2d 511 (5th Cir. 1950).
it easier for union officials and members to attend, sent letters criticizing
union officials to its workers seeking to undermine the union's position at
the bargaining table, and offered wage increases to employees on an in-
dividual basis. These actions by the employer are not bad in and of
themselves. However, considered in the light of the entire bargaining
situation, the Board held, and the court of appeals affirmed, that the em-
ployer refused to bargain in good faith.\textsuperscript{35}

Similarly, in \textit{Richfield Oil Corporation v. NLRB},\textsuperscript{36} the employer pre-
sented to the employees a complicated stock purchase and retirement plan.
The plan offered generous benefits to the employees; however, it provided
that the employer would match seventy-five per cent of the employee's
contribution only if his employment was uninterrupted. The union of-
fered to bargain about the plan, but the employer refused to discuss it
with the union. The reviewing court, in accepting the Board’s order,
found that the employer had refused to bargain in good faith.\textsuperscript{37} Since an
acceptance of this plan would leave unsettled the employee position as
to layoffs, the right to strike, and even sickness, the court found that, al-
though the plan was not illegal per se, its outright acceptance by the em-
ployees could strangle the union. Therefore, to refuse to bargain with
the union about the plan was a refusal to bargain in good faith.

In \textit{NLRB v. Black-Clawson Company},\textsuperscript{38} the employer engaged in an
extensive and costly study to establish a profit-sharing plan with its em-
ployees. It consulted at length with union officials and employees. It
then submitted its plan to the union and eighty-seven per cent of the em-
ployees accepted it. After the plan was instituted the union charged the
employer with refusing to bargain in good faith. The reviewing court
agreed with the Board’s finding that the employer had bargained in good
faith and said that every effort was made by the employer to establish a
plan suitable to union officials, employees, and the employer. Further,
the corporation had sincerely and openly attempted to elicit all objections,
and the union had voiced none whatsoever. Therefore, there was no re-
fusal to bargain in good faith.

Likewise, in \textit{International Union of Electrical Workers v. NLRB},\textsuperscript{39}
the court refused to find a refusal to bargain in good faith. There, al-
though the employer walked out of negotiations, it was found that pre-
viously it had discussed thoroughly all the issues and had sincerely at-
ttempted to find a basis for agreement. It was held that a refusal to make

\textsuperscript{35} \textit{NLRB v. Union Mfg. Co.}, 179 F.2d 511 (5th Cir. 1950).
\textsuperscript{37} \textit{Richfield Oil Corp. v. NLRB}, 231 F.2d 717 (D.C. Cir.), \textit{cert. denied}, 351 U.S. 909
(1956).
\textsuperscript{38} 210 F.2d 523 (6th Cir. 1954).
\textsuperscript{39} 273 F.2d 243 (3d Cir. 1959).
concessions is not bad faith, and that the employer had at all times acted in good faith.  

In all of the above instances the Board decided the good faith issue only after examining the conduct of the party respondent in relation to the whole bargaining situation. This is the subjective good faith approach that Congress intended when it enacted section 8(d).

**MANDATORY SUBJECTS**

Another part of the good faith clause of section 8(d) delineates the subjects of collective bargaining; a party must "confer in good faith with respect to wages, hours, and other terms and conditions of employment." Subjects included in this phrase have been termed mandatory bargaining subjects by the Board. By the accepted interpretation, a party cannot refuse to discuss an issue the subject of which is "wages, hours, or other terms and conditions of employment." Such a refusal alone is a refusal to bargain in good faith. Although the purpose of section 8(d)(2) was to spread the subjective standard of good faith throughout the actual negotiations, its wording has created one exception. This exception, which makes a refusal to discuss subjects that are included in the phrase "wages, hours, and other terms and conditions of employment" a refusal to bargain in good faith, creates an objective standard. This results because good faith is determined, not from the totality of the bargaining situation, but from one specific act of a party, i.e., his refusal to discuss certain subjects.

Therefore, although Congress intended that a subjective standard of good faith be the only criterion for regulating the actual negotiating process, an exception has developed and one objective standard has been applied. The fault lies mainly with the wording of the statute and not in the interpretation of the Board. But, to the extent that the Board can determine the proper subjects of collective bargaining as set forth in section 8(d), they can control the substantive bargaining issues. However this may be justified, the result contravenes the express purpose of the 1947 amendment which was to keep the substantive issues free from Board control.

**Wages and Hours**

How has the Board interpreted the phrase "wages, hours, and other terms and conditions of employment"? The terms "wages and hours" are

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41. See cases cited note 16 supra.
42. W. W. Gross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), aff'd, 339 U.S. 382 (1950).
43. Ibid.
self-evident. However, it has been held that included in wages are pension plans, insurance plans, profit sharing plans, Christmas bonuses, and merit raises. The principle enumerated in each of the above instances is that anything identifiable with remuneration is included in wages and therefore a mandatory bargaining subject.

_NLRB v. J. H. Allison & Company_ is a typical case. The defendant corporation had been bargaining with the complaining union for about five years. Each year a minimum wage scale was established; however, merit wage increases outside of the contract were also made periodically as incentives to efficiency. When the union asked to bargain about the merit wage increases, the defendant refused, saying that they were not a proper subject of collective bargaining, and immediately granted wage increases to thirty-one of its 110 employees. The Board's holding of a refusal to bargain in good faith was affirmed by the Sixth Circuit. The majority held that the defendant corporation showed a lack of good faith in refusing to bargain concerning wages. However, an influential factor in the decision was the unilateral wage increase made to employees of merit. The dissent argued that the Act compels bargaining, not agreement, and that the demand to bargain about merit wage increases was dropped by the union during negotiations. The dissent manifested a desire to use the subjective standard of good faith whenever possible, while the majority and the Board felt no reluctance to apply an objective standard of good faith to this situation, i.e., to determine good faith by a single act, rather than by all the facts of a given situation.

**Conditions of Employment**

"Conditions of employment" is a more controversial term. For example, the Board has consistently held that the rent of company-owned housing is a "condition of employment" if the housing is a necessary part of the company's enterprise. However, the Fourth and Fifth Circuits are in conflict on this issue. The Fourth Circuit supports the Board's holding that the subject is mandatory if the ownership and management

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45. _Inland Steel Co. v. NLRB_, 170 F.2d 247 (7th Cir. 1948), _aff'd_, 339 U.S. 382 (1950).
46. _W. W. Cross & Co. v. NLRB_, 174 F.2d 875 (1st Cir. 1949).
47. _NLRB v. Black-Clawson Co._, 210 F.2d 523 (6th Cir. 1954).
50. _Ibid._
51. _Ibid._
53. Cases cited notes 54 and 55 _infra._
of the housing materially affect the "conditions of employment." The Fifth Circuit holds that the rent of company housing is not a condition of the work unless there is some necessity which requires the workers to live in company housing. That condition did not exist in either the Fourth Circuit or the Fifth Circuit cases. The Board defines the item as a "condition of employment" so that it can better control the substantive issues of bargaining.

Further, the Board seems to have created an additional controversy by holding that a subject which is not within the term "wages, hours and other terms and conditions of employment" is not a mandatory subject, and therefore to insist upon bargaining on it is a violation of good faith. In other words the Board's position is that an insistence on a non-mandatory subject is a refusal to bargain in good faith. In NLRB v. American National Insurance Company, the Board held that a management-functions clause, i.e., one that reserves to the corporation the right to make unilateral decisions concerning certain procedures, such as work schedules, is not within "conditions of employment." Disregarding the questionable holding that such a clause is not a "condition of employment," an analysis of the opinion shows that the Board also held that the clause could be proposed, but could not be insisted upon in good faith, since it was not a mandatory bargaining subject. Thus, the employer was found to have bargained in bad faith. The Supreme Court in a landmark decision overruled the Board and stated that insistence upon bargaining on a non-mandatory subject, such as a management-functions clause, is not in and of itself a violation of good faith. Thus, the objective approach of good faith was rejected in favor of the subjective approach, one in which the whole bargaining situation is examined before a finding of good or bad faith is made. However, the Court held that a management-functions clause is a "condition of employment" and therefore a mandatory subject for collective bargaining, and that the parties, not the Board, should determine the feasibility of such a clause. Thus, although the discussion of non-mandatory subjects is dictum, the Court followed the approach intended by Congress, i.e., a subjective approach to the good faith issue.

56. Cases cited notes 54 and 55 supra.
59. Ibid.
60. Ibid.
61. Ibid.
63. Ibid.
The opinion of the Supreme Court in the American National Insurance Company case was followed in Allis-Chalmers Manufacturing Company v. NLRB, which concerned a strike-vote clause and a ratification clause. The Board held that the clauses were not "conditions of employment," and that an insistence on the subject was a refusal to bargain in good faith. However, it would seem that a strike-vote clause would vitally concern the "conditions of employment." Also, it is not illegal, for the Act is silent on the matter. The reviewing court reversed the Board stating that if evidence of bad faith had been found in the corporation's insistence on the clause, then this insistence would have been an unfair labor practice. It seems that the Board decided the issue of good faith in the Allis-Chalmers case by relying on a single fact, rather than examining the total bargaining situation. The reviewing court, on the other hand, rejected the handling of the good faith issue by the Board, and held that the total bargaining situation must be examined in order to determine whether the employer intended to undermine the union's ability to bargain. If so, the employer was in bad faith, but, if the employer was sincere in his attempt to reach an agreement, no bad faith can be found in such an insistence. Thus, the court reversed the Board's attempt to regulate the substantive bargaining issues.

However, in 1958 the Supreme Court in NLRB v. Borg-Warner Corporation upheld the Board's finding that insistence on a non-mandatory subject was in and of itself a bad faith refusal to bargain. The case concerned an insistence on a pre-strike vote clause. The Court and the Board agreed that the clause was not a "condition of employment." The Court held that although a pre-strike-vote clause is not unlawful in itself, good faith does not allow the employer to condition his consent to a contract upon the inclusion of a clause which is outside the terms of mandatory collective bargaining. The Supreme Court, in essence, held that good faith can be determined by one act of a party, without viewing the totality of the bargaining situation.

Four members of the Court dissented. Mr. Justice Harlan, writing the dissent, strongly questioned the finding of fact that a pre-strike vote clause is not a "condition of employment." However, assuming the majority to be right on that issue, the dissenting justices could not understand why the employer could not insist on the inclusion of the clause, as long as it had acted in good faith, that is, as long as it maintained a sincere desire to reach an agreement.

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64. 213 F.2d 374 (7th Cir. 1954).
The result of the *Borg-Warner* case appears contra to the intention of Congress to keep the substantive bargaining issues free from regulation. The Act specifically forbids the Board's compelling parties to make concessions or to agree. Yet, all the employer did in this case was refuse to agree. Moreover, the trial examiner, after surveying the entire bargaining situation, found that the parties had bargained in good faith. The approach of the trial examiner to good faith is the one which Congress intended when it enacted section 8(d).

When one party can compel another party to agree to a certain clause, it is due to his ability to exert greater economic pressure, rather than to any favorable statutory authority. This kind of compulsion is not forbidden by the Act. The Act does not attempt to regulate the terms for agreement; it simply secures to the representatives an equal status for the purpose of bargaining. The terms of the agreement are to be worked out by the parties, not the Board.

One authority analyzes the *Borg-Warner* decision in this way:

The Board and the United States Supreme Court agree that such insistence on non-mandatory subjects is a refusal to bargain about subjects within the scope of mandatory bargaining, even though the party has otherwise bargained in good faith as to these subjects, irrespective of the motive for the insistence. If good faith is based on the motive standard and if insistence on the inclusion of a non-mandatory subject is a violation regardless of motive, it follows that such insistence is a violation even though the party bargains in good faith. Thus there is an objective procedural rule that non-mandatory subjects cannot be brought into the negotiating process as the basis for a bargaining position.

The *Borg-Warner* decision has opened the door to the Board's regulation of all the subjects of bargaining through the making of objective rules to determine good faith. The only statutory authority for this regulation and control is the good faith clause of section 8(d), and Congress passed this section in order to obtain a subjective approach to good faith. This far-reaching interpretation seems to be the result of both the application of a flexible statutory standard and the failure to comply with the express congressional intent. However, without a flexible statutory standard the Board would, in effect, be severely limited in dealing with labor disputes and in achieving industrial peace.

**DUTY TO FURNISH INFORMATION**

Shortly after the Act was passed in 1935 many union representatives found themselves in a puzzling situation. Their demands for wage raises

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were consistently turned down. No matter what justifications the employers used, the unions were nearly always forced to accept them. The reasons for this were two-fold: (1) union representatives had no way of ascertaining the truth, for they had little or no information regarding the wages that the employer paid, and (2) the union was usually the weaker of the two bargaining parties and thus was in no position to make demands of the employer. Consequently, the unions sought help from the Board in order to strengthen their bargaining position. The Aluminum Ore Company case, decided in 1942, was one of the first decisions handed down in this area. A friendly bargaining atmosphere was pierced when the employer refused to let the union have access to data relative to the wage history of the corporation on the ground that the information was confidential. The Seventh Circuit Court of Appeals affirmed the Board's decision that the employer refused to bargain in violation of section 8(5). The decision was based on the implied good faith standard of section 8(5). However, under the decision a new element, i.e., the furnishing of information, became another source of evidence of good faith or the lack thereof.

Later cases extended the failure to furnish information concerning bargainable issues from mere evidence of subjective bad faith to an objective standard of bad faith, making the refusal of an employer to give the union all possibly relevant data concerning the bargainable issues a violation of the good faith clause. Moreover, the union does not have to prove the relevance of the requested information, for it has been held that this would hamper the bargaining processes since it is virtually impossible to tell in advance whether the information will be relevant unless the request is obviously outside of the bargaining issue. In 1954, in the Whitin Machine Works case, a union sought wage information for "bargaining purposes generally," and the Board had little trouble in finding a duty to furnish the information. The court of appeals found that it was "well settled" that a refusal to supply information concerning wages alone shows a refusal to bargain in good faith, and is an unfair labor practice. In another case an employer's

72. 39 N.L.R.B. 1286 (1943), modified, 131 F.2d 485 (7th Cir. 1942).
73. Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942). Section 8 (5) was subsequently changed to section 8(a) (5) in the 1947 amendments.
74. NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947 (2d Cir. 1951). The issue of the duty to furnish information has arisen in many areas of the labor field. Only the duty to furnish wage information will be discussed here, as the same rules and doctrines are used in each area.
argument that the information sought was confidential was found to be too speculative, and even if such a situation exists, it was held that it must yield to the interests of the union majority.\textsuperscript{78} Also, it was held that the danger of pirating information by competitors is outweighed by the necessity of fully informed bargaining.\textsuperscript{79} However, suppose the giving of confidential information enabled competitors to gather enough knowledge to materially impair the employer's business. It would then seem that the duty to furnish information is outweighed by the danger of pirating by competitors, with a possible result that the employees could lose their jobs. The Board in laying down its rule has made no exceptions. In fact the outer limits of the rule seem nonexistent.\textsuperscript{80}

In \textit{Taylor Forge & Pipe Works v. NLRB},\textsuperscript{81} the employer released to the union the criteria in evaluating employees through a point system on which the rates of pay were based. During grievance meetings the employer allowed the union to examine the individual files, which included the employer's evaluation of the employee based on this point system. However, when the union requested to see all the files, the employer refused and argued that the union already knew exactly how the system worked, and therefore, was in just as good a position to apply the criteria as was the evaluator for the company. The Board and court did not agree with the employer. Yet, instead of rebutting the employer's contentions, the decision of the court merely stated the general rule that a refusal to furnish related information constitutes bad faith and a refusal to bargain under the Act.\textsuperscript{82} The dissent steadfastly maintained that the standard to be used here is one of good faith, that the attitude of the employer can be determined without forcing production of the point system evaluations.\textsuperscript{83} Further, the dissent contended that the Board order forces the corporation to reveal its managerial judgment and opinions concerning the point system. Surely, the dissenting judge stated, the union was in as good a position to apply the system, since it had all the background information needed. The dissent, using the subjective test of good faith, concluded that the employer here had exercised good faith and was sincere in its desire to reach agreement.\textsuperscript{84}

Another inroad on the subjective good faith standard of the Act relative to furnishing information came in 1955 in the Supreme Court's

\textsuperscript{78} Boston Herald-Traveler Corp. v. NLRB, 223 F.2d 58 (1st Cir. 1955).
\textsuperscript{79} Ibid.
\textsuperscript{81} 234 F.2d 227 (7th Cir.), \textit{cert. denied}, 352 U.S. 942 (1956).
\textsuperscript{82} Taylor Forge & Pipe Works v. NLRB, 234 F.2d 227 (7th Cir.), \textit{cert. denied}, 352 U.S. 942 (1956).
\textsuperscript{83} Id. at 231 (dissenting opinion).
\textsuperscript{84} Ibid.
In that case the employer, Truitt, claimed an inability to grant a wage increase because of the financial condition of the corporation. All relevant information was tendered to the union, but the employer refused to allow an independent accountant for the union to examine the books of the corporation claiming this would be harmful to the business and the public. The Court of Appeals for the Fourth Circuit refused to enforce the Board's order allowing the union's accountant to examine the books. It reasoned that if employers were forced to open up their books to disclose information as to financial condition, manufacturing costs, and payment of dividends, many wage increases would be granted merely to keep the books secret. Further, public policy demands that books should be kept secret from competitors or would-be competitors. The court further held that good faith does not require the employer to substantiate, by a high degree of proof, the statements it makes; a sincere desire to reach agreement is proof enough of good faith.

The Supreme Court reversed the circuit court and ordered the books opened to the accountant. It held that the mere denial to open up the books is in itself bad faith; however, claims made by the parties must nevertheless be honest claims and proof of accuracy is needed. Therefore, in this case, the Board's determination that, under these facts, the employer was guilty of bargaining in bad faith was affirmed. The Supreme Court's decision is notably indecisive. In the first place, as the dissent points out, the Board made no determination of fact based on the conduct of the parties. It merely stated a rule that refusal to substantiate a bargaining position is detrimental to industrial peace and shows lack of good faith. Secondly, a mere refusal to substantiate a claim of financial inability should not be conclusive evidence that the employer lacks good faith in his desire to reach an agreement. Therefore, even though the majority opinion mentions that every case must be decided in relation to the whole bargaining situation, it in effect decides that one fact can be determinative of a refusal to bargain in good faith without an examination of the conduct of the parties as a whole.

Thus, in the area of furnishing information, the definition of bad
faith has remained the same, but the requirement that subjective bad faith be found in each case has been abandoned in favor of specific court-made rules of law governing good faith. This position is certainly a novel approach to the concept of good faith. However, it is consistent with the Board's insistence on regulating the substantive terms of the bargaining contract.

The Supreme Court's position is hard to justify in light of (1) the purpose of section 8(d) to limit the power of the Board, and (2) the express words of the statute defining collective bargaining, which are, "to confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." 83

Recently in International Woodworkers of America v. NLRB 84 the District of Columbia Circuit modified the Truitt case. It held that a refusal to supply wage information is in itself a violation of good faith, but a refusal to supply production and sales information must be viewed in light of the relevancy to the particular circumstances of the case. 85 Here, an objective standard is used to determine one situation, and a subjective determination is used in regard to the other issue. If all relevant information must be produced for general bargaining purposes, would it not be bad faith to refuse to supply all information available, since in this way the union can better determine its bargaining position? The court in fact did base the distinction on relevancy in the Woodworkers case. 86 Nevertheless, it would seem that sales and production information is as important if not as relevant as existing wage information in determining the amount of wage increase that can be granted.

It is reasonable to assume that if the Truitt case is followed to its logical end, the Board will have the power to determine not only the substantive bargaining issues, but in regulating the substantive issues, it will be in a position to dictate the right result that should be reached in bargaining. The refusal of the courts to curb the Board's extension of the definition of good faith has caused labor relations to be regulated more completely than Congress contemplated. 87

A NEW HOPE

The Supreme Court in Insurance Agents International Union v. NLRB 88 has recently issued a broad decision in the good faith area of

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83. Cases cited note 16 supra.
86. Ibid.
collective bargaining. At the trial level, the Board laid down the absolute rule that a union participating in slow-down tactics cannot approach the bargaining table with the attitude necessary to enter into discussion with an open mind and a sincere purpose to find a basis for agreement; therefore, it will be bargaining in bad faith. The fact that the union in this case continued to bargain during these negotiations did not alone establish that it fulfilled its obligation to bargain in good faith. The Board here reverted to its position that one act is enough evidence to hold a party in violation of good faith bargaining. The Supreme Court reversed the Board's decision and held that the Board should consider the attitude of the bargaining party by examining the conduct of the party as a whole in order to determine good faith. The Court recognized that the existence of economic pressures, such as slow-downs, is a part of our collective bargaining system. Further, although the use of economic weapons seems inconsistent with the achieving of industrial peace, nevertheless, they must be retained, since each party relies on the power that it has to force an agreement to its liking. This is not the ideal way to reach an agreement but it is the common procedure followed today. The Court stated that economic pressures are not forbidden by the Act; on the contrary, the strike, one form of pressure, is protected from regulation. Therefore, the Court reasoned that if the ultimate form of economic pressure is protected by the Act, other forms should not be illegal unless specifically forbidden. To give the Board power to prohibit the questioned activities that are not illegal would allow the Board to regulate what economic weapons a party might use. With this power, the Board could exercise considerable influence upon the substantive terms of the contract. The Board is given flexibility in deciding whether conduct is in good or bad faith. Yet, it has no flexibility in choosing the devices that can be used in good faith bargaining. In conclusion, the Court held that economic pressures outside the bargaining table are not determinative of good faith. Thus the Board's regulation of the substantive issues was denied in this particular area.

In a more accurate opinion, Mr. Justice Frankfurter agreed with the majority that the decision of the Board should be reversed, but felt that the case should be remanded to the Board for the following reason: Good faith should be determined only after examining the whole bargain-

100. Ibid.
102. Id. at 489.
103. Id. at 492.
104. Id. at 498.
105. Id. at 501 (concurring opinion).
gaining situation. No such determination was made here. The Board determined that there was a violation of good faith after examining only one fact, and the majority of the Supreme Court held that that fact, the use of economic pressures, should not be a factor in determining good faith. However, it is possible that this factor could be important in determining the intent of the union to reach agreement. Therefore, the case should have been remanded to the Board for an evaluation of the economic pressure issue in relation to the whole bargaining situation.

The Insurance Agents' case seems to settle the question of whether the Board can declare conduct outside of the bargaining table a violation of the good faith clause without considering other factors in the total bargaining picture. Does the decision mean a return of the Supreme Court to the subjective good faith test in all instances? Or will the case be limited to this area? Will Truitt and Borg-Warner be allowed to stand, or will they be overruled? The decision is not so broad as to cover all instances under the good faith clause. The distinction could be made in future cases that the Insurance Agents' case only applies to conduct away from the bargaining area, thereby allowing Truitt and Borg-Warner to stand. However, this distinction is not a logical one. Since all the disputed conduct in the cases considered here have had as statutory authority the good faith clause of section 8(d) as applied to sections 8(a)(5) and 8(b)(3), should not the same test of good faith, namely, sincere desire to reach an agreement, be applied in each case? This question will have to be answered by the Supreme Court. The Insurance Agents' case suggests that the objective test of good faith should be abandoned and that the subjective test be reinstated.

CONCLUSION

The Board's interpretations of the good faith clause of section 8(d) have caused much criticism and controversy in the last ten years. What is the reason for the Board's refusal to adopt the procedure for determining good faith intended by Congress? It appears that the Board has used the words of the statute as a tool rather than as a foundation. The Board has set its own standards of fair play to even up the sides in collective bargaining disputes. For example, the strong party should not use economic pressure against the other side. The strong party must divulge all financial material. This policy to make the weak party strong persists today. There can be no other explanation of the Board's action except that there must be a great desire to equalize the bargaining power. This desire does not seem to be impeded by court decisions reversing the Board, because the Board will not accept an unfavorable ruling unless it is issued by the Supreme Court. Even then the Board has circumvented the Supreme Court's rulings.
This attitude taken by the Board is admirable in that it is trying to achieve complete industrial peace. However, this peace is being achieved by a corresponding loss of industrial freedom. As the Board delves more and more into the substantive issues, the bargaining parties lose more of their freedom and more of their bargaining power. The government, through the Board, is taking more of the responsibility in determining bargaining issues. If there were statutory authority to this effect, then such action could be accepted. However there is no such authority; moreover, the established policy of the Act is to preserve freedom from government regulation during negotiations as much as possible.\textsuperscript{106}

It is possible that the \textit{Insurance Agents'} case, if broadly interpreted, will stem this advancement into the substantive issues. If not, Congressional action should be taken to further limit the power of the Board. Industrial peace can best be achieved, in a democracy such as ours, through the preservation of industrial freedom. Only in this way can the attitudes of the bargaining parties be transformed from the antagonistic and militant attitudes of today to a willing and cooperative desire to reach a fair, equitable, and peaceful agreement tomorrow.

\textbf{Don P. Brown}

\textsuperscript{106} \textit{Ibid.}