The Employer's "Good Faith" Bargaining Duty--A Troublesome Test in the Taft-Hartley Act

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The Employer's "Good Faith" Bargaining Duty—
A Troublesome Test in the Taft-Hartley Act

A CHARGE FREQUENTLY LEVELLED against employers in proceed-
ings before the National Labor Relations Board is the refusal
to bargain in good faith as required by sections 8(a) (5) and 8(d)
of the Labor Management Relations Act (LMRA) of 1947.¹ Since
approximately one-third of all cases heard by the NLRB involve
refusal-to-bargain charges,² it is important for an employer to know
what activities on his part will give rise to such a charge. This is
increasingly true in light of recent decisions requiring the employer
to bargain over such issues as subcontracting, plant removal, and
other activities formerly thought to be exclusively within the realm
of management's rights.³

The duty to bargain in good faith is imposed on both the em-
ployer and the representative of his employees by section 8(d) of
the LMRA.⁴ Sections 8(a) (5) and 8(b) (3)⁵ of the act make it
an unfair labor practice for employers and unions to refuse to bar-
gain with each other, and since section 8(d) modifies both of these
sections, it would seem at first glance that all refusal-to-bargain
charges against an employer must be interpreted in light of his
willingness to meet and confer in good faith about wages, hours,
and conditions of employment. Taken literally, the language of
section 8(d) seems to require a finding of subjective bad faith on

¹ Labor Management Relations Act (Taft-Hartley Act) § 8 (a) (5), 61 Stat. 140-41
reads: "(a) It shall be an unfair labor practice for an employer . . . (5) To refuse to
bargain collectively with the representatives of his employees . . . ."

² Thirtieth Annual Report of the Nat'l Labor Relations Board 180 (1965). The
report lists a total of 3615 section 8(a) (5) charges for the fiscal year 1965, which
represented 34.9% of all the charges filed with the Board. However, most of these
were not singular § 8(a) (5) charges, but were raised in combination with one or
more of the other prohibitive subsections of § 8(a).

³ See notes 37-41 infra, and accompanying text.

reads:
For the purposes of this section, to bargain collectively is the performance
of the mutual obligation of the employer and the representative of the em-
ployees to meet at reasonable times and confer in good faith with respect to
wages, hours, and other terms and conditions of employment . . . .

⁵ L.M.R.A. § 8(b) (3), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (3) (1964). This
section is the counterpart of section 8(a) (5) and imposes the same duties on the
unions in respect to bargaining as exist for the employer. The section reads: "(b) It shall
be an unfair labor practice for a labor organization or its agents . . . (3) to refuse to
bargain collectively with an employer, provided it is the representative of his em-
ployees . . . ."
the part of the employer to substantiate a refusal-to-bargain charge. Such has not been the case, however. Decisions by the NLRB interpreting section 8(a)(5) have tended to divide the wide range of employer activities which give rise to such a charge into three broad categories, two of which are forbidden under the act. First, there are some acts which are so violative of the spirit of the LMRA that they constitute unfair labor practices without a finding of subjective bad faith. These are said to be per se violations. A second type of activity, less onerous than those of the previous category, may be evidence of over-all bad faith. Within this grouping, conduct ranges from single acts which are conclusive of bad faith to acts which are accorded only slight evidentiary value in the total findings. Often, the decisions do not indicate what weight is given to the various activities under scrutiny. A third type of conduct consisting of economic pressure and harassing tactics is perfectly consistent with the duty to bargain, and cannot be considered as evidence of bad faith in any refusal-to-bargain charge.

The purpose of this Note is to categorize and discuss various activities of employers within this tripartite framework, presupposing that the employer and the union have already entered into a pattern of contract negotiations. An attempt will also be made to indicate what weight the decisions have accorded to each type of conduct within the evidentiary category.

I. PER SE VIOLATIONS

Per se violations of section 8(a)(5) do not require a finding of subjective bad faith on the part of the employer. The single, controlling difference between these violations and other employer activities is that they are considered so inconsistent with the duty to bargain that one act alone will sustain a refusal-to-bargain charge under section 8(a)(5), regardless of the employer’s good faith.

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6 This impression is the author’s own and results from an extensive study of NLRB and federal court decisions interpreting § 8(a)(5) of the Taft-Hartley Act since its inception in 1947. Generalization is difficult, however, because of the indistinct boundary lines separating these categories and also because of the multiple-violation charges which unions traditionally levy. The latter practice makes it nearly impossible to determine what weight the NLRB trial examiners attribute to each activity in the over-all findings.

7 Refusals to bargain prior to the institution of negotiations comprise a significant portion of the section 8(a)(5) charges which the NLRB hears. These refusals are generally based on the lack of some prerequisite to management’s duty to bargain with the union, and are beyond the scope of this Note. Examples are refusals to bargain on the grounds that the union does not in fact represent a majority of the workers, or that there existed an irregularity, such as union coercion of voters, in the election itself.
belief that his actions are justified. Among the prohibited activities in this category are unilateral changes in mandatory bargaining subjects, refusals to supply financial data, refusals to discuss mandatory bargaining subjects, and several other miscellaneous actions.

A. Unilateral Changes in Mandatory Bargaining Subjects

Prior to 1962, the NLRB had consistently held that unilateral changes by the employer in conditions about which the parties were obligated to bargain was strong evidence of the employer's bad faith. In Williamsburg Steel Prods. Co., the NLRB extended this holding by finding that an employer who institutes wage increases during bona fide contract negotiations without consulting the union violates section 8(a)(5) regardless of his good faith in making the change. The Supreme Court upheld the Board in NLRB v. Katz, finding that all three of the employer's changes — reducing the number of sick leave days per year, increasing wages, and instituting merit increases to twenty employees out of fifty in the unit — were mandatory subjects of collective bargaining, which the employer was required to discuss with the union. Any action withdrawing one of these subjects from discussion was in effect a refusal to bargain, and the Board could hold such unilateral action to be a violation of section 8(a)(5) without also finding the employer guilty of over-all bad faith. However, the Court did not relegate all unilateral changes made by the employer to the per se category. Instead, the Court stated that while there did exist "the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here . . . ." In light of this statement, pre-Katz Board rulings and court decisions which permitted isolated wage and merit increases during bargaining so long as they did not represent a pattern, may still be valid.

Since the Supreme Court in Katz specifically found that the par-
ties had not bargained to an impasse, the question remained open as to whether the existence of an impasse would justify the employer in increasing wages. Subsequently, however, in Dallas General Drivers v. NLRB,14 the Court of Appeals for the District of Columbia held that an employer could decrease wages unilaterally where the union had demanded an increase and the parties had bargained to a stalemate on the wage issue.16 Similarly, at least two post-Katz decisions have upheld unilateral wage increases by the employer where a genuine impasse existed in negotiations and an increase was "necessary."16

The Board has held that a unilateral reduction in employee working hours along with an unprecedented plant shutdown and consequent layoff by the employer without consulting the union are likewise per se violations of section 8(a)(5).17 This seems proper in light of the decision in Katz and would appear to modify earlier cases holding that such activities were only strong evidence of bad faith.18 The Board has also found that where an employer, after union certification, unilaterally imposes minimum sales quotas on employee salesmen, when none had existed before, such action is a one-sided attempt to set conditions of employment and amounts to a per se violation.19 Realistically, it would seem that the employer cannot make any changes in conditions which are mandatory

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14 355 F.2d 842 (D.C. Cir. 1966).
16 The union maintained that since the parties continued to bargain and reached agreements on other issues, there was no genuine impasse. The court rejected this argument however, saying that an agreement on other issues did not mean that an impasse had not been reached on wages.
16 In NLRB v. Almeida Bus Lines, Inc., 333 F.2d 725 (1st Cir. 1964), the court distinguished Katz on the grounds that a genuine impasse in bargaining had been reached and the company representatives had discussed the issue with the union, whereas in Katz the increase was sudden and undisclosed. The court also spoke of "economic necessity" as a justification for the unilateral wage increase. One can question whether the need for a raise should justify an employer in granting it unilaterally, when that is the very thing the union is trying to achieve. Nevertheless, the same basic reasoning was applied to sustain the increase in NLRB v. Southern Coach & Body Co., 336 F.2d 214 (5th Cir. 1964).
17 Generac Corp., 149 N.L.R.B. No. 85 (1964). For earlier decisions holding that such activity was only evidence of bad faith, see St. Cloud Foundry & Mach. Co., 130 N.L.R.B. 911, enforced, 295 F.2d 411 (6th Cir. 1961); Mount Hope Finishing Co., 106 N.L.R.B. 480 (1953), enforcement denied on other grounds, 211 F.2d 365 (4th Cir. 1954). A vigorous dissent in the latter case said that nothing in the LMRA restricted an employer's right to go out of business.
subjects of collective bargaining under the Katz rationale, with the probable exception of isolated wage changes which may be made after consultation with the union.

B. Refusal to Supply Financial Data

A second category of conduct which is considered a per se violation is a refusal on the part of the employer to furnish the union with information on job rates and classifications, and other pertinent financial data. The rationale for this position seems to be that such information is essential to the union in establishing a meaningful set of demands. Thus, employers have been required to supply detailed statements of their financial condition when they deny wage increases on the grounds of lack of resources. In one case the NLRB found that an unwarranted delay in furnishing the requested information constituted a violation where the employer failed to explain why he could not furnish the information on time.

A few exceptions to the duty to supply requested wage information have been recognized in certain circumstances. The Board has upheld an employer who failed to supply requested information contained in thirty-one filing cabinets and covering over 800 jobs, where the union was allowed to inspect and copy anything it desired. In a recent case, the Seventh Circuit exonerated an employer who reduced wages because of a seeming inability to pay.

Various members of a trucking association claimed that they were losing money on local hauls and demanded a wage cut in all drivers’ categories. The association refused to supply the union with financial information as to its over-all operations, and granted the request only as to local hauling. The Board upheld a refusal-to-

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22 Dierk’s Forests, Inc., 148 N.L.R.B. 923 (1964). Interestingly enough, while the Board found that the refusal and later delay in furnishing requested information was a refusal to bargain per se, and violated § 8(a)(5) standing alone, it went on to say that such conduct was only influential in determining the employer’s over-all subjective bad faith. This again is indicative that § 8(d) does not operate as an automatic modifier for § 8(a)(5) and § 8(b)(3), as would appear from the reading of the former section. See notes 1, 4, and 5 supra.


24 United Fire Proof Warehouse Co. v. NLRB, 356 F.2d 494 (7th Cir. 1966).
bargain charge. However, on appeal the court stated that the failure to supply requested information was not based on a claimed inability to pay, but on a steadfast refusal to raise wages or maintain them at existing levels. The court further stated that since an employer can always refuse to raise wages or could even demand a decrease in rates, the association was under no duty to supply financial data. If this decision stands, the duty to supply financial information may be easily avoided. The employer could evade a section 8(a)(5) charge by a carefully-worded reply bordering — but not relying — on a claimed inability to pay.

C. Refusal to Discuss Mandatory Subjects

It is now well settled that any refusal by the employer to discuss mandatory subjects of collective bargaining is a per se violation of section 8(a)(5). This obviously requires a finding of whether or not the particular item on which the charge is based is a "mandatory" subject. Anything embraced within the phrase "wages, hours, and conditions of employment" is a "mandatory" subject in the language of section 8(d). Accordingly, unilateral wage changes by an employer amount to a refusal to discuss the issue, and therefore constitute a per se violation. "Wages" include pensions, group health and accident policies, and bonuses. While the term "hours" is fairly self-explanatory, the phrase "conditions of employment" has given rise to considerable litigation.

The NLRB has taken the position that the price of meals served at a place of employment where public facilities are unavailable is a mandatory subject. The same is true with respect to leases on company-owned homes. On the other hand, employer contribu-

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26 United Fire Proof Warehouse Co. v. NLRB, 356 F.2d 494, 498 (7th Cir. 1966). 
27 Ibid. 
29 Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).
30 W. W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949).
33 Elgin Standard Brick Mfg. Co., 90 N.L.R.B. 1467 (1950). Compare NLRB v. Bemis Bros. Bag Co., 206 F.2d 53 (5th Cir. 1953), where the court said an employer did not have to bargain over the rental of company-owned houses when the rent was below the market price, and living in them was optional for the employee.
tions to a fund to promote a certain industry through advertising, and the giving of indemnity or performance bonds, have both been held to be outside the mandatory bargaining realm.

When an employer decides to move or shut down his business, or subcontract or discontinue an operation, must he bargain with the union about it? The subject deserves special mention, since it is one of the most prevalent issues in the area of "mandatory" bargaining. Management consistently maintains that such decisions relate solely to the running of the business, and are a matter of management discretion, particularly where motivated by economic necessity. The NLRB and the courts have not always agreed. In *Town & Country Mfg. Co.*, the Board held that subcontracting, even for economic reasons, was a mandatory item within the "other terms and conditions of employment" phraseology of section 8(d).

A more recent Supreme Court decision, *Fibreboard Paper Prods. Corp. v. NLRB*, can be interpreted as limiting the *Town & Country* holding to a certain extent. In *Fibreboard*, management decided to contract out work that the plant employees were capable of doing and in fact had been doing under an old contract. In upholding a Board order that the company must discuss this issue with the union, the Supreme Court said:

> [T]he type of "contracting out" involved in this case — the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment — is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

Thus the door does not seem to be closed to all types of subcontracting by the employer.

The Court has found that an employer has the unrestricted right

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36 Economic necessity seems to be one clear justification for plant removal. The problem is at least as closely related to the §§ 8(a) (1) and (3) violations as it is to § 8(a) (5), since the "runaway shop" is often a weapon employed by management to undermine the union and discourage union membership. Again, the topic is beyond the scope of this article. Some articles treating the subject in depth are Sheinkman, *Plant Removal Under the National Labor Relations Act*, 38 TEMP. L.Q. 229 (1965); and Turner, *Plant Removals and Related Problems*, 13 LAB. L.J. 907 (1962).
37 136 N.L.R.B. 1022 (1962), enforced, 316 F.2d 846 (5th Cir. 1963).
to cease operations for any reason short of a clear intention to destroy the union,\(^{40}\) and it would seem that a subcontracting operation which was absolutely vital to the continuation of the business might also fall within the realm of management prerogatives. Another justifiable action would seem to be the subcontracting of a new operation, or parts of it, over which the union never had jurisdiction. Curiously enough, the Board does not seem to consider plant removal to be in the same per se category as subcontracting.\(^{41}\) This appears somewhat inconsistent, since plant removal looks at first glance to be just as destructive of jobs as subcontracting. A possible justification for this classification lies in the fact that the Board could shape a remedy in the former situation so as to require a moving employer to carry the employees with him.

A 1958 Supreme Court decision illustrates some of the far-reaching effects of classifying a subject as mandatory or non-mandatory. In *NLRB v. Borg-Warner Corp.*,\(^{42}\) management insisted that any contract it negotiated must contain a ballot clause, calling for a secret, pre-strike employee vote on the last offer, and a "recognition" clause which excluded the certified international union as a party to the contract and substituted its uncertified local affiliate. The Court found that neither of these demands were mandatory subjects, hence insistence on their inclusion in the contract was a refusal to bargain about other items which were mandatory subjects, and a per se violation.

D. Miscellaneous Per Se Violations

In a few other situations, the language of the NLRB and the courts has indicated extension of the per se doctrine to other employer activities. Among these have been insistence on the inclusion of illegal provisions in a contract\(^ {43}\) and an announced re-

\(^{40}\) Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965). This point remains somewhat unclear. It appears that the employer has an absolute right to go out of business if he so desires, and lower courts have said that this right exists even if the closing of the business is generated by anti-union animosity. NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962); NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961). However, the Court in Darlington qualified this right by insisting that it must be a *true* shut-down, not a mere paper change in corporate entity, or a plant removal.

\(^{41}\) See Standard Handkerchief Co., 151 N.L.R.B. No. 2 (1965), discussed at text accompanying notes 110-12 *infra*.


fusal to discuss any changes from the contract then in force. Similarly, an employer has been held to violate section 8(a)(5) without a showing of bad faith where he refuses to bargain with a certified representative of the employees during a strike, or where he agrees to bargain only with the non-strikers when part of the employees are out on strike. One court of appeals found it was a per se violation for the employer to refuse to negotiate grievances with a representative of the union, on the ground he had not been appointed by the union executive board in the manner specified in their constitution. A source of uncertainty is a recent Second Circuit decision which held that it was a per se violation for a member of a multi-employer bargaining group to withdraw from the group after contract negotiations had commenced, with no showing that the unit was an inappropriate bargaining agent.

II. EMPLOYER CONDUCT EVIDENCING BAD FAITH IN BARGAINING

With the exception of the situations mentioned previously, all other acts of the employer are only indicative of bad faith, and a violation of the good faith clause of section 8(d) must be found before the activity can be construed as a refusal to bargain. In order to gain an understanding of those acts which constitute bad faith, it is necessary to first examine the employer's duties.


46 Knight Morley Corp., 116 N.L.R.B. 140 (1956), enforced, 251 F.2d 753 (6th Cir. 1957), cert. denied, 357 U.S. 927 (1958). The Board also said that the expiration of an old collective bargaining agreement relieved the employer of any duty to discuss grievance procedures which had arisen under it with the union, but that expiration of the old contract revived the general statutory duty to bargain under § 8(a)(5). On this point the court of appeals reversed, saying that such a result was inconsistent with the holding in Timken Roller Bearing Co. v. NLRB, 161 F.2d 949 (6th Cir. 1947) and approved in NLRB v. Standard Oil Co., 196 F.2d 892 (6th Cir. 1952). The rationale of these cases was that an employer can channel an unsettled grievance through an agreed grievance procedure even after the contract has expired, and such action will not be a refusal to bargain.

47 Prudential Ins. Co. v. NLRB, 278 F.2d 181 (3d Cir. 1960). The court said that an appointment procedure was strictly a matter of internal union business, in which the employer could have no legitimate interest. A refusal to bargain with the appointee was therefore a refusal to bargain per se, regardless of the employer's good faith in contesting the appointment. The employer apparently felt the union officials were overworked and were attempting to delegate grievance negotiations to unqualified personnel.


49 See the examples discussed at text accompanying notes 8-48 supra.
A. The Employer’s Duties in General

A great many attempts have been made since passage of the LMRA in 1947 to define the employer’s duty to bargain under section 8(d)\(^{50}\). In essence, they all impose the same three basic requirements: (1) the employer must meet with the union at a reasonable time and place; (2) he must carefully consider the union’s proposals and demands; (3) and he must make counterproposals for any that he rejects as unsatisfactory.\(^{61}\) Beyond these requirements, the federal courts have been reluctant to impose any restrictions on the employer.\(^{53}\) The courts have been adamant in their position that an employer’s failure to make concessions to the union, or to retreat from his position on an issue, does not alone constitute bad faith bargaining. This attitude has often shown up in verbal reprimands to the NLRB when the Board has shown a tendency to infer bad faith from the employer’s adherence to a stubborn bargaining position. In the leading case of \textit{NLRB v. American Nat’l Ins. Co.},\(^{53}\) the Board held that bargaining for the inclusion of a “management rights” clause in the agreement, covering promotions, discipline, and work scheduling, was a per se violation.\(^{54}\) In reversing the Board’s decision, the Supreme Court said that bargaining for management rights clauses covering some conditions of employment was to be reviewed in light of the good faith test, not automatically characterized as a per se violation. The Court chastised the Board for attempting to set itself up as the judge of what concessions an employer must make, and of the proposals and

\(^{50}\) See \textit{NLRB v. American Nat’l Ins. Co.}, 343 U.S. 395 (1952); \textit{NLRB v. Reed & Prince Mfg. Co.}, 205 F.2d 131 (1st Cir.), \textit{cert. denied}, 346 U.S. 887 (1953); \textit{NLRB v. Bachelder}, 120 F.2d 574 (7th Cir. 1941), \textit{cert. denied}, 314 U.S. 647 (1941), \textit{modified}, 125 F.2d 387 (7th Cir. 1942); \textit{Globe Cotton Mills v. NLRB}, 103 F.2d 91 (5th Cir. 1939).

\(^{51}\) Lasko Metal Prods., Inc., 148 N.L.R.B. 976 (1964). See also Dierk’s Forests, Inc., 148 N.L.R.B. 923 (1964). A federal judge has defined the duty as an obligation of the employer and the representative of the employees:

\begin{quote}
To enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for the adjustment of grievances. \textit{Globe Cotton Mills v. NLRB}, 103 F.2d 91, 94 (5th Cir. 1939).
\end{quote}

\(^{52}\) The Board is usually not so reluctant, and the thirty-year history of the Wagner and Taft-Hartley Acts is filled with many instances of court reversals of Board opinions for imposing requirements on the parties beyond its authorization. See, \textit{e.g.}, \textit{American Ship Bldg. Co. v. NLRB}, 380 U.S. 300 (1965); \textit{NLRB v. Insurance Agents’ Int’l Union}, 361 U.S. 477 (1960); \textit{NLRB v. American Nat’l Ins. Co.}, 343 U.S. 395 (1952); \textit{NLRB v. Cascade Employers Ass’n}, 296 F.2d 42 (9th Cir. 1961).

\(^{53}\) 343 U.S. 395 (1952).

counterproposals that he may or may not offer. The case provides an excellent discussion of the general duties of the employer at the bargaining table, and the limitations on the Board in inferring bad faith from his stand on substantive contract terms.

B. Specific Employer Conduct as Evidence of Bad Faith

(1) "Hard" Bargaining.—It has been very difficult for the Board and the courts to distinguish between a stubborn, legitimate stand by an employer on a particular subject, and the subterfuge of surface bargaining with no intent to reach an agreement. The former is completely consistent with the requirements of section 8(d), while the latter is a method of circumventing the act by outward compliance with its terms. It is fundamental that an employer does not satisfy the requirements of the act by entering into bargaining with a mind sealed against agreement. Although failure of negotiations is not in itself determinative of the employer's state of mind, "the duty to bargain in good faith is not satisfied by merely meeting with union representatives to inform them that the employer cannot or will not change its position." Nor can an employer circumvent the duty to bargain by making such patently ridiculous counterproposals that no union official could possibly accept them. In NLRB v. Reed & Prince Mfg. Co., after an exhaustive study of the bargaining negotiations, the court said:

It is difficult to believe that the Company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of dis-

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56 NLRB v. Israel Putnam Mills, 197 F.2d 116, 117 (2d Cir. 1952). See also Vanderbilt Prods. v. NLRB, 297 F.2d 835 (2d Cir. 1961); NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953).

57 See, e.g., United States Gypsum Co., 94 N.L.R.B. 112 (1951), enforced in part and denied in part, 206 F.2d 410 (5th Cir. 1953), cert. denied, 347 U.S. 912 (1954), where management made the following demands: (1) the unlimited right to set individual wage rates and job classifications; (2) the absolute right to select employees for lay off, transfer, and promotion; (3) cessation of all union activity on company property, including all activities taking place on the employee's own time; (4) no union representation at grievance meetings unless requested by management; and (5) assumption by the union of responsibility for all strikes at the plant, including unauthorized, wildcat strikes. See also Vanderbilt Prods. v. NLRB, 297 F.2d 833 (2d Cir. 1961), where the demands were: (1) a completely open shop with no maintenance of membership provisions; (2) absolute management rights to discharge and lay off with no seniority restrictions; and (3) a five-year contract.

58 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953).
GOOD FAITH BARGAINING DUTY

Occasionally, the decisional language of the NLRB indicates a tentative return to the refuted position that bad faith can be inferred from a stubborn refusal by the employer to make concessions. In Denton Co., the Board decided that an employer's concessions in granting bulletin board space and overtime pay, and in assuming responsibility for maintenance of plant health and safety conditions, were not substantial enough in light of a steadfast refusal to recede from a hard position concerning grievance procedures, union security, dues check-off, and paid vacations and holidays. Since the concessions were characterized as illusory in that most of them were required under either federal or state law, the Board held that the failure to grant concessions on substantial issues could properly be considered as evidence of bad faith. On its face, the decision seems incorrect, and probably would not survive present-day court scrutiny. Yet, it illustrates the strong temptation to regard adherence to a stubborn, legitimate position as evidence of bad faith. The Board has further circumvented the restrictions placed upon it in NLRB v. American Nat'l Ins. Co. by adopting the position that an employer who enters into negotiations with a set mind and an

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69 Id. at 139. Reed & Prince probably represents the most exhaustive court study of the problem of inferring bad faith from a position adopted at the bargaining table. The company responded to an initial union request for meetings on August 9th by stating that it could not possibly meet before September 15th. It delayed in furnishing wage rate data requested on August 9th until October. When the first meetings were finally held, the company refused to discuss dues check-off on the grounds that its was not a proper subject of bargaining — an erroneous position. It also rejected union proposals on grievance procedure, wage increases, and seniority, and refused a proposal to pay any bonuses, or adopt any pension plan whatsoever. Management never offered any counterproposals except a seniority provision culled from the expired contract, and a small wage increase. There was also quibbling and refusal on several minor issues, such as bulletin board space, supplying employees with a record of their achievements in piecework, etc. Only on November 10, after eight meetings, did the company submit its first proposed contract. After rejection, the union struck, and the company refused arbitration or mediation. One company agent told an employee the company would never sign a contract with the union. Finally, claiming an impasse had been reached, the management granted a 10-cent wage increase.

After reviewing all these facts, the Board ordered the employer to cease and desist from refusing to bargain with the union. In upholding the Board's order, the court upheld its basic argument that it must take some cognizance of the reasonableness of positions adopted by the employer during negotiations, and while it could not force the employer to make concessions on any issue, "the employer is obliged to make some reasonable effort in some direction to compose his differences with the union, if 8(a)(5) is to be read as imposing any substantial obligation at all." Id. at 134-35. See also Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

60 106 N.L.R.B. 1335 (1953), enforced as modified, 217 F.2d 567 (5th Cir. 1954), cert. denied, 348 U.S. 981 (1955).

61 343 U.S. 395 (1952).
announced decision that the expired contract is the only thing he will agree to has "not assumed a bargaining position."\(^2\)

(2) **Stalling Negotiations.**—Frequently management will attempt to avoid reaching an agreement with the union by deliberately stalling until there is a break down in negotiations or until it has had an opportunity to undermine the union in a new election. If deliberate stalling tactics can be proved, they are usually conclusive evidence of bad faith. Normally, however, stalling is so difficult to prove that it rarely is relied on as conclusive evidence of the employer's attitude. It is usually cited in conjunction with other evidence to build a case of over-all bad faith.

There are any number of tactics an employer can adopt to stall negotiations. The NLRB has held that an unnecessary delay in furnishing information which would make the bargaining meaningful, such as wage rates and job classifications, is strong evidence of bad faith.\(^6\) Again, since section 8(d) specifically requires the employer to "meet at reasonable times" with the union, a persistent refusal to schedule new meetings at the close of a bargaining session has been held by the Board to be highly indicative of bad faith.\(^6\)

The fact that the employer's chief negotiator lives several hundred miles away and has a busy and uncertain schedule, is no excuse for a refusal to schedule future meetings.\(^6\)

Occasionally an employer will delay future negotiations pending the outcome of de-certification proceedings, or because of a genuine doubt as to the union's majority status. At least one case has said that an employer is obligated to negotiate with the certified representative of the employees throughout the certification period, even if it is obvious the union no longer represents a majority of the employees.\(^8\)


\(^{63}\) NLRB v. Kit Mfg. Co., 335 F.2d 166 (9th Cir. 1964), cert. denied, 380 U.S. 910 (1965); Butcher Boy Refrigerator Door Co., 127 N.L.R.B. 1360 (1960), enforced, 290 F.2d 22 (7th Cir. 1960). One case, however, has spoken of a similar delay in terms of a per se violation, much as a refusal to supply such information. See note 22 supra and accompanying text.

\(^{64}\) Solo Cup Co. v. NLRB, 332 F.2d 447 (4th Cir. 1964), enforcing 142 N.L.R.B. 1290 (1963); See also Exchange Parts Co., 139 N.L.R.B. 710 (1962), enforced, 339 F.2d 829 (5th Cir. 1965).

\(^{65}\) Insulating Fabricators, Inc., 144 N.L.R.B. 1325 (1963), enforced, 338 F.2d 1002 (4th Cir. 1964).

\(^{66}\) NLRB v. Satilla Rural Elec. Membership Corp., 322 F.2d 251 (5th Cir. 1963). *Contra* Carpinteria Lemon Ass'n v. NLRB, 274 F.2d 492 (9th Cir. 1960). The rule announced by the Supreme Court is that an employer must bargain with a certified union for one year following certification, even if he believes, in good faith, that it no longer
Sickness or disability of the employer's chief negotiator is a justification for postponing scheduled talks with the union, and is not evidence of bad faith. However, the Board in one case found that two brothers had bargained in bad faith when one of them had a heart attack during negotiations, and the other refused to carry on discussions or to postpone them to a reasonable future date. The Board relied heavily on the fact that the healthy brother continued to run the business and made all other management decisions, including the filing of an election petition, discharging of strikers, and the hiring of replacements. This seems to be in keeping with the employer's duty to promptly reschedule meetings and make expeditious and prompt arrangements for negotiations. A final type of stalling tactic which the Board has held to be evidence of bad faith is where the employer conditions the continuance of bargaining on the withdrawal of an unfair labor practice charge filed by the union.

(3) Change of Position.—Occasionally the parties will arrive at a tentative or final agreement on a particular subject after a long and arduous bargaining session, only to have the employer repudiate or “shift” position on it at a later time. The general rule, stated repeatedly in the older cases, is that such changes of position during bargaining are to be expected as part of the give and take of the bargaining process. The NLRB has held that an employer can withdraw an offer after it has been rejected by the union, and represents a majority of the employees.


69 For an explanation of the scope of this duty, see J. H. Rutter-Rex Mfg. Co., 86 N.L.R.B. 470 (1949); Burgie Vinegar Co., 71 N.L.R.B. 829 (1946). The Board is quick to assert, however, that it is the duty of the union to request bargaining sessions, and no scheduling duty rests on the employer until such requests are made. Solo Cup Co. v. NLRB, 332 F.2d 447 (4th Cir. 1964), enforcing 142 N.L.R.B. 1290 (1963).


a retreat to a lower offer on a single item, such as wage rates, is justified where the higher offer was part of a "package" deal which the union rejected. A sudden worsening of a company's financial position is justification for a shifting position on wages.

The degree of finality of an offer is also important in determining whether there has been an unreasonable change of position. In 1959, the Board refused to sustain a charge of bad faith bargaining when the employer withdrew a tentative offer adopted at the very outset of negotiations which was never finalized or accepted.

In recent years, some deep inroads have been made on the general rule that changes of position during bargaining sessions are not evidence of bad faith. The breakthrough has come in cases where the employer withdraws a wage offer which the union has accepted and replaces it with a lower one; where management suddenly demands an open shop clause after previously agreeing to union security provisions; and where an employer refuses to sign an agreement on the grounds that the union does not represent a majority of the employees after he had previously abandoned this argument. A recent Ninth Circuit opinion has indicated that withdrawing previously-accepted proposals is conclusive evidence that management is engaging only in "sham" or surface bargaining with no intent to reach an agreement.

(4) Dilatory Tactics.—The first type of conduct which the NLRB seems to consider as conclusive evidence of bad faith, is a refusal by the employer to sign an agreement after it has been reduced to writing. The same holds true when management negotiates an agreement with the union, but later insists that the individual employees sign it.

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77 Marley Co., 150 N.L.R.B. No. 82 (1965).
79 NLRB v. J.A. Terteling & Sons, 357 F.2d 661 (9th Cir. 1966).
80 See generally Artistic Embroidery, Inc., 142 N.L.R.B. 974 (1963); Mixer Mobile Mftrs., Inc., 149 N.L.R.B. 592 (1964). However, a mere delay in executing a contract when the employer is willing to negotiate is not evidence of bad faith. Arkansas Louisiana Gas Co., 154 N.L.R.B. No. 72 (1965).
A second situation indicative of bad faith is a failure on the part of the employer to give his bargaining representative authority to enter into an agreement or to make any concession. No case decided thus far has said that such conduct would constitute bad faith standing alone, whereas several have said it would not. However, the Board has said that a withdrawal of bargaining authority from a representative after agreement was reached is enough to show management's bad faith. A similar conclusion was reached in a situation where either the employer or his attorney failed to attend most of the bargaining sessions, and each insisted he could not enter into an agreement in the absence of the other.

Another class of dilatory activities highly indicative of bad faith is when the employer by-passes the certified union and makes his offers directly to the employees. At first glance, such an offer would seem to be a per se refusal to bargain with the certified agent of the employees. However, the NLRB and the courts have chosen to speak of such offers in terms of bad faith, while recognizing that the single act is conclusive of bad faith in most situations. Thus, an offer of wage increases to employees if they would abandon the union was held to be bad faith bargaining. The same holds true for better wages offered to the employees, individually, than to the union, or better offers to a company-based union sponsored by the employer than to a rival international union. Conversely, an offer to individual workers generally to “sit in” on negotiations was not bad faith where there was only a sincere desire to educate the work-

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82 Roy E. Hanson, Jr., Mfr., 137 N.L.R.B. 251 (1962).
83 See, e.g., Lloyd A. Fry Roofing Co. v. NLRB, 216 F.2d 273 (9th Cir. 1954), modified, 220 F.2d 432 (9th Cir. 1955).
84 Gittlin Bag Co., 95 N.L.R.B. 1159 (1951), enforced, 196 F.2d 158 (4th Cir. 1952).
85 Lloyd A. Fry Roofing Co., v. NLRB, 216 F.2d 273 (9th Cir. 1954), modified, 220 F.2d 432 (9th Cir. 1955).
87 Wheeler Elec. Membership Corp., 153 N.L.R.B. No. 99 (1965). See also Houston Sheet Metal Contractor's Ass'n, 147 N.L.R.B. 774 (1964), where the employer offered higher wages and more paid vacations if striking workers would abandon the union and return to work, and added insult to injury by guaranteeing to pay any fines the union might levy on them.
89 Colson Corp. v. NLRB, 347 F.2d 128 (8th Cir. 1965); Wein-Joseph Weinstein Elec. Corp., 152 N.L.R.B. No. 3 (1965).
ers in the bargaining process with no intent to undermine the union.\textsuperscript{80}

A fourth situation which the NLRB occasionally considers to be evidence of dilatory tactics in bargaining is the employer's insistence on piecemeal, short-term contracts. The rationale for this attitude seems to be that the LMRA contemplates fruitful agreements which will govern the employment relationship for an extended period, and insistence on short term contracts violates the spirit, if not the letter, of the act. Recently, the NLRB stated that one clear example of such conduct was a case in which the employer refused to negotiate a contract extending past the union's certification year and then stalled the meetings so long that the completed contract would only have been in effect for seven weeks.\textsuperscript{91} The short term contract was held to be acceptable, however, where the original election had shown a majority of only three, and it seemed likely the union would lose this slim margin under normal turnover.\textsuperscript{92}

Certain other dilatory conduct has been held to be evidence of bad faith in isolated cases. A refusal to codify certain proposals into the contract on the grounds they were present company practices, or were required by law, is indicative of an intent not to honor the agreements in the future.\textsuperscript{93} Also indicative of bad faith has been the refusal to allow the union's chief negotiator on company premises during negotiation,\textsuperscript{94} and the insistence that the union bargain separately with each of four citrus growers associations, although all four produced the same product, had headquarters in the same city, and were represented by common counsel.\textsuperscript{95}

(5) \textit{Breaking Off Talks}.—Generally speaking, the duty to bargain is a continuous one, and there are few situations which will justify an employer in breaking off talks over unsettled issues. The duty has been consistently held to extend through a strike period.\textsuperscript{96}

\textsuperscript{80} Cox Market, Inc., 155 N.L.R.B. No. 1 (1965).

\textsuperscript{91} Capitol Aviation, Inc., 152 N.L.R.B. No. 80 (1965), \textit{enforcement denied}, 355 F.2d 875 (7th Cir. 1966). See also NLRB v. W. R. Hall Distrib., 341 F.2d 359 (10th Cir. 1965).

\textsuperscript{92} Capitol Aviation, Inc. v. NLRB, 355 F.2d 875 (7th Cir. 1966).

\textsuperscript{93} Seniorita Hosiery Mills, Inc., 115 N.L.R.B. 1304 (1956).


\textsuperscript{95} Carpinteria Lemon Ass'n v. NLRB, 274 F.2d 492 (9th Cir. 1960).

\textsuperscript{96} NLRB v. Southern Coach & Body Co., 336 F.2d 214 (5th Cir. 1964). See also NLRB v. United States Cold Storage Corp., 203 F.2d 924 (5th Cir.), \textit{cert. denied}, 346 U.S. 818 (1953), where the court said that although there was an impasse in bargaining, it had been broken by the strike, and the company did not fulfill its duty to bargain in
Perhaps the most common instance of an employer discontinuing talks is where he thinks he holds the upper hand, and does it as a pressure tactic against the union. In *NLRB v. Satilla Rural Elec. Membership Corp.*, the management refused to grant a scheduled wage increase to union workers on the grounds the rates were being "negotiated." Other employees not represented by the union received increases. The employer then circulated a petition, signed by the majority of employees, which stated that the union no longer represented them. Thereafter all offers were made directly to the workers as a body and talks with the union were cut off. The Board ordered the dissident employer to resume his negotiations, at least until the certification period had run out, and held such tactics to be conclusive evidence of bad faith. Similarly, the Board charged an employer with bad faith bargaining where the parties had almost reached an agreement, but the employer suddenly broke off the talks on learning that a union strike had failed.

Occasionally an employer is justified in breaking off talks. In *NLRB v. Florida Citrus Canners Co-op.*, the citrus crop suffered a severe freeze while the parties were negotiating a new contract. The employer suspended talks without requesting a delay upon receiving the union's ultimatum that an agreement had to be reached that day or the employees were going out on strike. Both the NLRB and the court upheld this action saying that the emergency justified it, and the act did not require the making of a useless request. At least one case has suggested that an employer can temporarily suspend negotiations in order to clear up a good faith doubt as to the union's majority status.

(6) *Anti-union Statements.*—As early as 1940, a federal court adopted the position that disparaging remarks by an employer against unions in general and the NLRB in particular were not indicative of bad faith in bargaining. The court said that no state-
ment of a general opinion, as such, can constitute an unfair labor practice.\textsuperscript{102} The 1940 rule probably still holds true as to general statements,\textsuperscript{103} or in situations in which the union tries to twist in-temperate remarks, made at the bargaining table during heated discussion, into evidence of bad faith.\textsuperscript{104} As to other statements, however, there has been a steady erosion of the idea that an employer is free to speak his mind and have his comments ignored by the fact finders in all cases.\textsuperscript{105} Such comments are still only slight evidence of bad faith, but when considered in conjunction with other conduct may well be persuasive. The statements vary, of course, in intensity. A comment by a company general manager to a union steward to "Get those union agitating sons of bitches out of Fitzgerald [the company]," and that he would "die and go to hell" before he would sign a contract with the union, speaks for itself.\textsuperscript{106} A request to the employees that they get up a petition to throw the union out, coupled with a remark that he was meeting with the union only to avoid a refusal-to-bargain charge, is even more indicative of the employer's bad faith.\textsuperscript{107}

Occasionally a great deal of weight is accorded to anti-union sentiments expressed by management. In one recent case a federal court sustained a bad faith charge by the Board based largely on minimal questioning of employees by management officials as to how they were going to vote during a forthcoming union election

union statements appeared in print, were directed to the public at large, and were made sometime after the union had filed its unfair labor practice charge.

\textsuperscript{102} \textit{Id.} at 626.

\textsuperscript{103} See NLRB v. Dale Indus., Inc., 355 F.2d 851, 852 (6th Cir. 1966), where the court said:

\textit{The expression of any views shall not be evidence of an unfair labor prac-tice if such expressions contain no threat of reprisal or force or promise of benefit.}

\textsuperscript{104} Administrative Decision of NLRB Gen. Counsel, Case No. F-758 (1958).


\textsuperscript{106} NLRB v. Fitzgerald Mills, Inc., 313 F.2d 260 (2d Cir.), \textit{cert. denied}, 375 U.S. 834 (1963). See also NLRB v. Swift & Co., 127 F.2d 30 (6th Cir. 1942), where the employer stated he would not agree to bind himself for a single day to continue the existing forty hour week; Solo Cup Co., 142 N.L.R.B. 1290 (1963), \textit{enforced}, 332 F.2d 447 (4th Cir. 1964), where the employer's foreman told workers that as far as the company was concerned the union would never get a contract, and when he found out who the union agitators were, he said he was going to "give it to them up here," drawing a finger across his throat.

\textsuperscript{107} NLRB v. W. R. Hall Distrib., 341 F.2d 359 (10th Cir. 1965), \textit{enforcing}, 144 N.L.R.B. 1285 (1963).
and whether they were satisfied with their salaries.\textsuperscript{108} There was
other evidence of bad faith in the trial examiner's findings, but the
court in enforcing the charge attached undue significance to the
aforementioned statements. Such reliance might be rationalized,
however, on the employer's duty to refrain from any coercion prior
to election. There do not seem to be any opinions where statements
alone have been conclusive of bad faith.

(7) Private Management Matters.—Frequently the employer
will refuse to discuss certain aspects of the employment relationship
with the union, on the grounds that they are strictly the concern of
management. If the reserved subject is a mandatory one, there is
obviously a refusal to bargain over it, and it would seem to be a
per se violation. The older cases spoke of such conduct in terms of
bad faith, however, and the language has carried over to modern
cases. In \textit{NLRB v. Wonder State Mfg. Co.},\textsuperscript{109} the court exonerated
management from refusing to discuss Christmas bonuses, on the
grounds they were not properly a part of wages. Since they were
not offered consistently, nor uniform in amount, they were termed
gifts, not wages, and a refusal to discuss them was not bad faith bar-
gaining. It seems safe to assert that the courts will abandon the bad
faith language in the near future, however, and refusals to discuss
mandatory subjects will be universally classified as per se violations.

The failure to discuss plant removal has also been attacked
as bad faith bargaining, rather than as a per se violation. In
\textit{Standard Handkerchief Co.},\textsuperscript{110} the NLRB found that an employer's
failure to mention the removal of his business to the union negotia-
tor, at a time when he was secretly concluding the transfer, reduced
the negotiations to little more than an "exercise in frivolity," and
was conclusive evidence of bad faith bargaining. Other cases have
said that a refusal to discuss an arbitration clause\textsuperscript{111} or a proposed
dues checkoff\textsuperscript{112} amounted to bad faith.

\textsuperscript{108} NLRB v. The Coachman's Inn, 357 F.2d 134 (8th Cir. 1966).
\textsuperscript{109} 344 F.2d 210 (8th Cir. 1965). Compare cases where bonuses were held to be
regular remuneration, and in reality wages within the meaning of the statute. NLRB
v. Citizen's Hotel Co., 326 F.2d 501 (5th Cir. 1964); NLRB v. Electric Steam Radiator
Corp., 321 F.2d 733 (6th Cir. 1963); NLRB v. United States Air Conditioning Corp.,
336 F.2d 275 (6th Cir. 1964); NLRB v. Niles-Bement Pond Co., 199 F.2d 713 (2d
Cir. 1952).

\textsuperscript{110} 151 N.L.R.B. No. 2 (1965). See also Rapid-Bindery, Inc., 127 N.L.R.B. 212
(1960), enforced, 293 F.2d 170 (2d Cir. 1961); Vac-Art, Inc., 124 N.L.R.B. 989
(1959).

\textsuperscript{111} Dixie Corp., 105 N.L.R.B. 390 (1953). The refusal to discuss arbitration was
part of an over-all attitude of management that it need make no concessions at all, and
could insist on complete control to run its plant as always. The trial examiner held
A few cases have upheld the employer's right to refuse to discuss even mandatory subjects. In *NLRB v. Southern Coach & Body Co.*, the Board upheld an employer who refused to discuss layoffs with the union, relying on the fact that the seasonal nature of the work necessitated frequent layoffs and recalls, and the employer was always willing to discuss his layoff policy with the union.

Frequently the employer insists, as a condition of bargaining, that his rights be enumerated in a "management rights" clause of the contract. The leading cases have sustained the employer's right to such a clause, providing it does not withdraw mandatory subjects from bargaining. There seems to be somewhat of a split when the clause does cover mandatory subjects, however, because a few cases have held that an employer's insistence on a management rights clause covering wage rates, shop rules, and merit increases did not amount to bad faith bargaining.

(8) The Take-it-or-Leave-it Attitude.—In 1964 the International Union of Electricians challenged the General Electric Company's entire attitude toward collective bargaining. General Electric's approach, popularly called "boulwareism," grew out of a 1946 strike which caused an extensive review of the company's labor policies. The company decided that it had to "sell" its program to the employees, and that the best way to do this was to put forward its best offer at the first bargaining session, so that employees could influence the union to accept it. The object was to sell the program directly to the individual employee by every means of communication at the company's disposal. Thus, management set itself up as the final arbiter of what was "good" for the workers.

That to sustain such an attitude would make the duty to bargain a mere play on words. In effect, there would be nothing left to bargain about.


113 336 F.2d 214 (5th Cir. 1964). *Contra* Globe-Union, Inc., 97 N.L.R.B. 1026 (1952), where the Board refused to find bad faith in a response to a casual union inquiry, not pressed, that the employer's hiring policy was not a proper matter for discussion, and he would hire whom he pleased.

114 NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). See also NLRB v. Berkley Mach. Works & Foundry Co., 189 F.2d 904 (4th Cir. 1951). Here the employer did not insist on a management rights clause, but refused to formulate the existing wage rates into the agreement. The court inferred from this that management was attempting to reserve exclusive control over wage rates and merit increases, in violation of § 8(a) (5). To like effect, where a management rights clause was directly involved, see Majure Transp. Co. v. NLRB, 198 F.2d 735 (5th Cir. 1952).

115 White v. NLRB, 255 F.2d 564 (5th Cir. 1958). See also Arkansas-Louisiana Gas Co., 154 N.L.R.B. No. 72 (1965); NLRB v. Levin-Mathes Co., 285 F.2d 329 (7th Cir. 1960), where the court upheld management's right to exclusive control over work assignments, particularly in an area where jurisdictional work disputes with other unions were likely.
The Board, in a highly publicized decision, held that this approach did not satisfy the necessity to bargain in good faith and amounted to a refusal to bargain.\footnote{116} The Board ruled that this attitude was a deliberate attempt to by-pass the union and discredit it in the eyes of its members. Moreover, it evinced no desire to resolve differences and reach a common ground of agreement, as envisioned in the LMRA. Subsequent decisions have solidified the Board's repudiation of this "take it or leave it"\footnote{117} attitude, and it apparently is conclusive evidence of the employer's bad faith.

(9) Transcripts of Negotiations.—Periodically, a union will voice objection to the employer's insistence that a stenographic record be kept of all bargaining sessions. In 1951, the NLRB held that insistence on such a record was evidence of bad faith on management's part.\footnote{118} Although it upheld an overall charge of bad faith bargaining, the First Circuit disagreed with the Board regarding the company's insistence on a transcript. In NLRB v. Reed & Prince Mfg. Co.,\footnote{119} the court said:

[W]e are not inclined to agree with the Board that the Company's insistence, over the Union's strenuous objection, on having a stenotypist present at all the bargaining meetings to take down a verbatim transcript of the proceedings was evidence of the Company's bad faith.\footnote{120}

The Board indicated its dissatisfaction with this decision in a later opinion by absolving a union of a failure to bargain charge when it refused to meet with an employer who insisted on keeping a transcript of the proceedings.\footnote{121} Then, in 1965, the Board broke squarely with the First Circuit in holding that an employer who refused to bargain without a stenographic record was guilty of bad faith.\footnote{122} When the Board petitioned for enforcement of its order, it was once again chastised, this time by the Eighth Circuit. In NLRB v. Southern Transp., Inc.,\footnote{123} the court held that an employer can re-
fuse to bargain unless the union agrees to allow a certified transcript of all proceedings, paid for by the employer. The court emphasized that the employer had been guilty of bad faith bargaining in the past, and that he was in a quandary unless he could prove his good faith by a transcript. Thus the most recent rulings on stenographic records seem to uphold the employer's right to insist on one as a condition of bargaining.

The discussion thus far illustrates the varying approaches of the NLRB and the courts toward specific types of employer conduct. A single act might be held to be a per se violation of section 8(a)(5) without a showing of bad faith, it might be conclusive evidence of management's bad faith, or it might be only evidence to be considered in conjunction with other activities. The courts have generally agreed with the NLRB as to these three categories, while disagreeing occasionally as to what acts fall within each grouping. An area in which the courts and the Board have completely disagreed is the category of conduct known as unilateral economic pressure.

III. ECONOMIC PRESSURE AND THE INSURANCE AGENTS CASE

In 1956, following expiration of its contract with Prudential Insurance Company, the Insurance Agent's Union instituted a "work without contract" program against Prudential, which consisted of concerted on-the-job activities designed to harass the company. These activities included a refusal by the agents to write new policies, tardiness in reporting to work, slowdowns, petitioning policy holders, and refusing to attend company-called conferences or make out required reports. Although negotiations continued toward an eventual agreement, the company filed a refusal to bargain charge against the union. The NLRB found the union guilty of a refusal to bargain; however, the court of appeals denied enforcement of the order, and the Board appealed to the Supreme Court. In NLRB v. Insurance Agents' Int'l Union, the Court dismissed the Board's argument that the work-without-contract activity was a per se violation of the LMRA. The majority further said that such economic pressure tactics were legitimate bargaining weapons in the union's arsenal, and their use was completely consistent with the duty to bar-

gain in good faith. There was no evidence of anything but willingness on the part of the union to reach an agreement, and the Court felt there was no inconsistency between economic pressure and good faith collective bargaining. In summary, the Court said:

The scope of § 8(b)(3) and the limitations on Board power which were the design of § 8(d) are exceeded, we hold, 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 the good-faith negotiations.\(^{127}\)

Justice Frankfurter, in a concurring opinion joined by Justices Harlan and Whittaker,\(^{128}\) took issue with the broad language of the majority opinion. While agreeing that there was not enough evidence to justify the refusal to bargain charge, the concurring justices stated that the ultimate issue upon which the Board must pass in each such charge was the *state of mind* of the offending party. This could only be discovered by a consideration of all the circumstances surrounding the negotiations, and the three concurring justices thought that the majority's language foreclosed the Board from ever finding even an inference of bad faith from the use of pressure tactics during bargaining. The concurring opinion thus represented a compromise position between the Board's characterization of economic harassing tactics as a refusal to bargain per se, and the majority's refusal to consider them as any evidence at all in examining a section 8(a)(5) charge.

In recent years, the Supreme Court has examined several refusal to bargain charges against employers which involved the use of economic pressure tactics. Since the LMRA imposes the same duties and sanctions on both management and the unions in regard to the duty to bargain,\(^{129}\) the *Insurance Agents* case is directly applicable to the use of economic pressure by the employer. The only complicating factor is that the unfair labor practices chargeable against an employer overlap to a considerable extent. Thus, particular acts which could be a refusal to bargain under section 8(a)(5) might easily be discriminatory against the union—a section 8(a)(3) violation—or an interference with the rights guaranteed by section 7 of the act\(^{130}\)—a section 8(a)(1) violation. Frequently all three vio-

\(^{127}\) *Id.* at 490.

\(^{128}\) *Id.* at 501.

\(^{129}\) See notes 1, 4, and 5 *supra*, for the text of the appropriate statutory sections.

\(^{130}\) The basic provisions of § 8(a)(3) prevent an employer from encouraging or
lations are alleged in the same complaint. Since it is usually easier to find that certain activities are discriminatory against the union, or interfere with section 7 rights, these charges are pursued more often on final argument than the cumbersome bad faith charge or the economic harassment problem of the Insurance Agents case.

The most frequently utilized weapon of an employer is the lockout. In *NLRB v. Brown*, the Supreme Court upheld the use of a multi-employer lockout to combat a "whipsaw" strike. The employers, a food retail store group, had locked out union employees who supported striking members and hired temporary replacements to continue operations. The NLRB had previously held that a multi-employer lockout to combat a whipsaw strike was a legitimate pressure tactic, but refused to sanction replacement of strikers by anyone but the striking members.

The Court rejected the Board's contention that the replacement was a per se violation of the act which carried its own indicia of unlawful intent. The Court was willing to balance the discriminatory effect of the activity against an honest employer intent to achieve legitimate bargaining and business ends. In light of these goals, and the "slight" tendency of the lockout to discourage union membership, the lockouts were held to be justified.

A second significant case involving a lockout was *American Ship Bldg. Co. v. NLRB*. There, the employer, a ship repair company whose work was highly seasonal, had engaged in fruitless negotiations with eight unions for new contracts. Fearing a strike at a time of the year when its seasonal work was at a peak, the company locked out employees at two of its four ship repair yards on the great lakes. Although negotiations continued, and a new contract was signed two months after the lockout began, the court of appeals upheld a cease and desist order of the Board, based on violations of sections 8(a)(1) and (3) of the act.

On appeal to the Supreme Court, the issue was concisely stated by Justice Stewart:

"discouraging membership in a labor organization, with the exception of the union shop. Section 8(a)(1) prevents the employer from interfering with the rights guaranteed to employees in §7, including the right to form labor unions and to strike. Any act which violates §8(a)(5) must also necessarily be a violation of §8(a)(1)."

132 A "whipsaw" strike is a total strike by a union against one of a group of employers with whom the union bargains and maintains contracts.
133 NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957).
The question presented is . . . whether an employer commits an unfair labor practice under . . . the Act when he temporarily lays off or "locks out" his employees during a labor dispute to bring economic pressure in support of his bargaining position.\textsuperscript{138}

The Court answered this question in the negative quoting from \textit{Insurance Agents}\textsuperscript{137} that economic activity in support of a bargaining position does not violate the act. Therefore, a lockout which was intended merely to bring about a settlement of a labor dispute on favorable terms and which did not indicate an intention to discriminate against the union, could not properly be construed as an unfair labor practice.

It is interesting to note that none of these lockout cases involved a refusal to bargain charge in the final arguments before the Supreme Court. In the \textit{American Ship Bldg.} case,\textsuperscript{138} however, such a charge was prosecuted before the Board but was dropped when the agreement was reached on a new contract. In referring to the charge, the Supreme Court said: "The passage quoted below in the text of this opinion from \textit{Labor Board v. Insurance Agents' Int'l Union} . . . has even more direct application to the § 8(a)(5) question."\textsuperscript{139} The obvious implication was that if no agreement had been reached, the section 8(a)(5) issue might properly have been pursued to a decision. The question which remains unanswered is whether, in a proper setting, the Court would ever consider the lockout as \textit{some indication} of the employer's bad faith in bargaining. From the language of the majority, such a result seems unlikely. The Court's willingness to look at \textit{all} the evidence in determining the employer's state of mind concerning a section 8(a)(3) charge in \textit{Brown}\textsuperscript{140} seems directly opposed to its unwillingness to consider harassing activities as any indication of a refusal to bargain under section 8(a)(5).

While the NLRB and the lower federal courts have generally paid lip service to the \textit{Insurance Agents} doctrine, there has been a significant trend toward the reasoning of Justice Frankfurter's concurring opinion.\textsuperscript{141} In \textit{Kennedy v. Long Island R.R.},\textsuperscript{142} the court was asked to hold that a strike insurance plan, instituted by the railroad to minimize the effects of selective strike tactics, was an under-

\begin{itemize}
  \item [\textsuperscript{138}] American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 301-02 (1965).
  \item [\textsuperscript{137}] NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960).
  \item [\textsuperscript{138}] American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).
  \item [\textsuperscript{139}] Id. at 306 n.5.
  \item [\textsuperscript{140}] NLRB v. Brown, 380 U.S. 278 (1965).
  \item [\textsuperscript{141}] See text accompanying notes 142-49 infra.
  \item [\textsuperscript{142}] 319 F.2d 366 (2d Cir.), \textit{cert. denied}, 375 U.S. 830 (1963).
\end{itemize}
mining of the union’s guaranteed right to strike, hence a per se violation of the Railway Labor Act. The court dismissed this argument, saying that a per se violation was only that conduct which necessarily interfered with the employee’s rights under the act. Since a strike insurance plan did not interfere with the union’s right to strike, but only diminished the strike’s effects, it was an economic tactic perfectly consistent with the duty to bargain in good faith. However, the court departed from the Insurance Agents doctrine in holding that the total surrounding circumstances could be considered in evaluating the intent of the parties at the bargaining table. This could include any history of employer-union animus, the extent of the insurance coverage, and the exertion of economic pressures as an index of the union’s capacity to withstand work stoppages. The court quoted from Frankfurter’s concurring opinion in Insurance Agents, which stated:

"[I]n determining the state of mind of a party to collective bargaining negotiations the Board does not deal in terms of abstract ‘economic pressure.’ It must proceed in terms of specific conduct which it weights as a more or less reliable manifestation of the state of mind with which bargaining is conducted.”

A second significant case which circumvented the teaching of Insurance Agents was NLRB v. Cascade Employer’s Ass’n. There, the NLRB found that an employer’s association committed an unfair labor practice when, after bargaining to a stalemate with the union, it advised its members to make certain unilateral changes in wages and working conditions. The circuit court, in a pre-Katz decision, held that such a conclusion marked a return to the rejected per se doctrine of Insurance Agents and remanded the case to the Board for additional findings as to the employer’s state of mind. The court held that such “pressure” tactics as unilateral changes might properly be considered as evidence of the employer’s intent. Quoting extensively from both the majority and minority opinions in Insurance Agents, the court adopted Justice Frankfurter’s

\[^{143}\text{44 Stat. 577 (1926), as amended, 45 U.S.C. § 152 (1964). The Railway Labor Act contains basically the same provisions regarding employee’s rights as the LMRA, and decisions under one act are often cited as analogous in construing the other.}\]


\[^{145}\text{296 F.2d 42 (9th Cir. 1961).}\]

\[^{146}\text{Cascade Employers Ass’n, Inc., 126 N.L.R.B. 1014 (1960), remanded, 296 F.2d 42 (9th Cir. 1961).}\]

\[^{147}\text{NLRB v. Katz, 369 U.S. 736 (1962).}\]
reasoning without expressly saying so.\textsuperscript{148} Other courts have also chosen to follow the reasoning of the Frankfurter concurring opinion, either deliberately or unknowingly.\textsuperscript{149}

In the cases where it has been followed, the \textit{Insurance Agents} doctrine has led to some questionable results. In \textit{Hawaii Meat Co. v. NLRB},\textsuperscript{140} the company arranged terms of a subcontracting agreement with an outside shipper, such contract to go into effect the instant that an impending trucker's strike was called. The union charged that this was a refusal to bargain on the issue of subcontracting under section 8(a)(5). Relying heavily on the language of \textit{Insurance Agents}, the court of appeals for the seventh circuit decided that the LMRA imposed no duty on an employer to bargain over the issue of subcontracting when it was being employed as an economic weapon to combat a work-crippling strike.

\textsuperscript{148} NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960). As to the unilateral wage increases, the case is of doubtful reliability following \textit{Katz} unless a genuine impasse existed. However, the opinion contained the following quotation:

\begin{quote}
In order to determine whether the respondent has bargained with the requisite good faith, the Board may not condemn the action by itself, but must, if it is to determine intent, inquire into the totality of circumstances surrounding the bargaining. ... From a reading of the decision of the Board it is apparent that it has adhered to the rejected per se rule in this case. Nowhere is there a finding concerning the respondent's state of mind based upon a "totality of the evidence." \textit{Id.} at 48.
\end{quote}

Thus, not only is the case doubtful precedent for the unilateral wage increases, but it also does not reflect the reasoning of the majority opinion of \textit{Insurance Agents} — the case on which it relies.

\textsuperscript{140} See Cheney Cal. Lumber Co. v. NLRB, 319 F.2d 375 (9th Cir. 1963). The court refused to find a per se violation of the act in a strike which violated a no-strike contract clause, saying that a contract violation was never automatically an unfair labor practice. The important language from the \textit{Insurance Agents} standpoint, however, was the following: "Whether the conduct of the Union in calling the strike constitutes a refusal to bargain in good faith must be determined not on a per se basis but upon a scrutiny of the circumstances taken in their entirety." \textit{Id.} at 378. Other courts have distinguished \textit{Insurance Agents}, sometimes on rather flimsy grounds. In \textit{Standard Oil Co. v. NLRB}, 322 F.2d 40 (1963), enforcing 137 N.L.R.B. 690 (1962), an international union put pressure on a local agent not to sign an agreement it had negotiated with Standard Oil Company in Ohio, because negotiations were troubled or stalled at three other refineries. Although this was economic pressure of the same order as occurred in \textit{Insurance Agents}, the court distinguished that case in finding a § 8(b)(3) violation, on the somewhat hazy grounds that it had involved harassing economic pressure on the part of parties to the negotiations — not those negotiating on a separate contract. Similarly, in Crestline Co., 133 N.L.R.B. 256 (1961), the Board sustained a § 8(a)(5) charge against an employer who suddenly discontinued payment of his portion of a group insurance policy for employees, the night before a proposed increase in the plan was to be put to a plant vote. The parties had bargained to an impasse on the issue, and the employer maintained that his action was only an economic pressure tactic designed to bring about a favorable settlement, and was justified by the \textit{Insurance Agents} holding. The Board said that the action was unilateral manipulation of terms and conditions of employment, and the fact that it incidentally exerted economic pressure did not save it from being an unfair labor practice.

\textsuperscript{150} 321 F.2d 397 (9th Cir. 1963).
As indicated by the court in *Hawaii*, the use of subcontracting as an economic weapon might have been justified by economic necessity. However, the *Insurance Agents* doctrine has caused other courts to justify employer conduct that was decidedly reprehensible. In *NLRB v. Great Falls Employer’s Council, Inc.*[^151^], an employer’s association locked out members of a union engaged in a whipsaw strike. Under Montana law, the laid-off employees were eligible for unemployment benefits totaling thirty-two dollars a week.[^152^] If any candidate earned over sixteen dollars a week in regular employment, however, he was ineligible for any benefits. The association adopted the practice of hiring the workers for two days a week so they earned over sixteen dollars, then releasing them and recalling them the next week. On the authority of *Insurance Agents* the Ninth Circuit Court of Appeals reversed the Board’s cease and desist order, holding that the practice was simply a legitimate economic weapon which the Board could not consider as evidence of an unfair labor practice.

Under the *Insurance Agents* doctrine, the NLRB and the courts can only analyze the conduct of the parties at the bargaining table, and must ignore any outside economic harassment as evidence of bad faith bargaining. This view is unfortunate in that it presupposes that collective bargaining takes place in a vacuum. The closed door of the bargaining room cannot shut out the effects of harassing tactics and coercion on the participants’ positions. Viewed in light of this attitude, collective bargaining takes on the aspects of an Indian-wrestling contest, with the Board assuming the role of referee. The contestants are allowed to use any type of external leverage, and the rules forbid the referee to intervene as long as both parties keep their elbows on the table.

In today’s complicated industrial society, it is becoming increasingly obvious that this concept of “power” bargaining is not the final answer to our national labor problems. One partial solution to increasing industrial strife would be to overrule the *Insurance Agents* doctrine and allow the NLRB to examine all the evidence in a refusal to bargain charge. Although the Board cannot and should not be allowed to dictate the terms of collective agreements, a closer watch over bargaining activities by the Board would be bound to have a conciliatory effect on both sides, and lead to faster and more equitable settlements. It seems somewhat of a paradox that the

[^151^]: 277 F.2d 772 (9th Cir. 1960).
government should create a special tribunal such as the NLRB, with expertise in dealing with specialized problems, and at the same time allow it to be hampered by judicial decisions which allow it to consider only partial evidence.

IV. CONCLUSION

Judicial interpretation of the refusal to bargain sections of the Taft-Hartley Act has resulted in the grouping of management activities into several more or less distinct categories. The first of these — the per se violation — is an automatic refusal to bargain regardless of the employer's good or bad faith. The concept of per se violations achieved respectability in the Katz decision in 1962 and it seems likely that the types of these violations included in this Note will increase in the near future.

Beyond the per se violations, there is a wide range of employer activity which is evidence of a refusal to bargain, and requires a finding of the employer's bad faith before the charge will be sustained. Such activities vary from single acts which are conclusive evidence of bad faith, such as the now defunct take-it-or-leave-it attitude, to acts which are only slight evidence and would be inconclusive standing alone. An example in this latter category would be anti-union statements.

A final category of employer activity is the type of harassing activities which brings economic pressure to bear in support of management's bargaining position. The Supreme Court has said that this type of conduct is perfectly consistent with the duty to bargain in good faith, and cannot be considered as evidence of bad faith. The NLRB has been somewhat reluctant to follow this reasoning, since it results in the withdrawal of a significant part of the evidence from Board consideration. It is difficult not to sympathize with the Board in this respect, since the judicial attitude on economic activity does seem to hamper the Board's over-all effectiveness.

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