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Head'em off at the Impasse: A Victory for Management in the War to Implement Its Last Best Offer - Mountain Valley Educational Ass'n v. Maine SAD No. 43

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NOTES

Head 'em Off at the Impasse!: A Victory for Management in the War to Implement its "Last Best Offer"

Mountain Valley Educational Ass'n v. Maine SAD No. 43[1]

I. INTRODUCTION

The impasse doctrine in collective bargaining allows limited unilateral action by an employer when a good-faith deadlock in negotiations is reached between the employer and employees' representatives.[2] This doctrine is a judicial invention used to reconcile the dual mandate of the National Labor Relations Act: to enforce the duty of good-faith bargaining while not compelling parties to accept agreements or make concessions.[3] Traditionally, the impasse doctrine has been viewed as a tool to promote an ongoing bargaining process; more recently, it has been viewed as a terminal point in the negotiation process.[4]

By broadening the definition of impasse, courts ascribing to the recent revision of the impasse doctrine have moved impasse away from its historical role in an ongoing bargaining system.[5] This liberalization of the impasse doctrine has increased managerial discretion in the bargaining process by permitting an employer to safely resort to unilateral action in a wider variety of situations.[6]

II. FACTS AND HOLDING

In *Mountain Valley Educational Ass'n v. Maine SAD No. 43,* Mountain Valley Education Association ("Association") appealed from a judgment entered in the Superior Court of Kenebec County, Maine.[7] The Superior Court had affirmed a decision of the Maine Labor Relations Board ("Board") upholding

1. 655 A.2d 348 (Me. 1995).

2. Peter Guyon Earle, *The Impasse Doctrine,* 64 CHICAGO-KENT L.REV. 407, 407 (1989) (quoting Huck Mfg. Co. v. NLRB, 693 F.2d 1176, 1186 (5th Cir. 1982)).

3. *Id.* (quoting NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1963)).

4. *Id.*

5. *Id.* at 408.

6. *Id.*

7. *Mountain Valley,* 655 A.2d at 350.

Maine School Administrative District Number 43's ("SAD 43") unilateral implementation of its last best offer on wages and insurance benefits.[8]

The Association and SAD 43 began negotiations in June, 1990, for an initial contract that would benefit a combined unit of teacher aides and assistants.[9] The negotiations were protracted with the parties participating in factfinding and three mediation sessions.[10] Thereafter, the parties submitted several unresolved issues to arbitration.[11] Following a hearing, the arbitration panel issued a report, on July 9, 1992, which made non-binding recommendations on wages, health insurance, and retirement benefits and imposed a two-year contract term covering school years 1991-92 and 1992-93.[12]

In September 1992, SAD 43 sent a proposal on wages and insurance to the Association.[13] The terms, although an improvement over previous offers, were not in complete accord with the arbitrators' recommendations.[14] The parties met and rejected this proposal and issued counterproposals.[15] In November 1992, SAD 43 notified the Association of its last best offer on the issues of wages and insurance.[16] Though the Association immediately filed for mediation, SAD thereafter unilateraly implemented its wage and insurance proposals.[17]

The Association filed a prohibited practice complaint with the Board.[18] In its complaint, the Association alleged that SAD 43 had violated the Maine Municipal Public Employees Labor Relations Law[19] ("Act") by unilaterally implementing its wage and insurance proposals and by failing to observe the arbitrators' binding determination on the duration of the agreement.[20] The Board ruled that SAD 43 did not violate the Act by its unilateral implementation.[21] The Board further provided, however, that SAD 43 did violate

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8. *Id.*

9. *Id.* The combined bargaining unit was a consolidation of two previously distinct school departments within SAD No.43. Pending negotiation of a new agreement, the aides and assistants each chose, as a group, which parts of pre-existing benefit packages would apply. *See Id.* at 351.

10. *Id.* at 350.

11. *Id.* at 350-51. Among the issues submitted included were wages, health insurance benefits, and contract duration.

12. *Id.* at 351. Arbitrators cannot, under Maine law, issue binding decisions on the important subjects of wages, insurance, and pensions. ME. REV. STAT. ANN. tit. 26, § 965(4) (West 1988). Therefore, any findings on such issues are to be advisory only. *Id.*

13. *Mountain Valley*, 655 A.2d at 351.

14. *Id.*

15. *Id.*

16. *Id.* Generally, SAD 43's last best offer, as summarized by the Board, fell short of the arbitrator's recommended resolution in terms of salary increases, the retroactivity of such increases, and health insurance contributions. See *Id.* n.2.

17. *Id.* at 351.

18. *Id.*

19. ME. REV. STAT. ANN. tit. 26, §§ 961-975 (West 1988 & Supp. 1994).

20. *Mountain Valley*, 655 A.2d at 351.

21. *Id.*

the Act in its refusal to implement the binding decision of the arbitrator as to contract duration.[22]

Following the Board's ruling, the Association filed a petition for review in the Superior Court.[23] The Superior Court affirmed the Board's decision, and the Association appealed this decision to the Maine Supreme Judicial Court.[24]

III. LEGAL BACKGROUND

Previous decisions have not precisely defined "impasse" as used in labor law. Virtually every case on the subject, however, has included good faith bargaining and futility of further negotiation in their anecdotal treatments of impasse.[25] In 1967, the Board attempted to set out an ordered approach to identifying impasse.[26]

In *Taft Broadcasting*, the Board enunciated specific factors which would become the standard the courts looked to when evaluating impasse as a matter of law.[27] The factors include: (1) the bargaining history, (2) the good faith of the parties in the negotiations, (3) the length of negotiations, (4) the importance of the issues over which there is disagreement, and (5) the contemporaneous understanding of the parties as to the state of negotiations.[28] The second *Taft* factor assures the presence of good faith throughout the process. The remaining factors are intended to inform the court of the futility of further negotiations.[29] The Board in *Taft* applied each of the above-mentioned factors except bargaining history to determine whether the unilateral changes made by the employer were acceptable given the existence of impasse.[30]

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22. *Id.*

23. *Id.*

24. *Id.*

25. Ellen J. Dannin, *Collective Bargaining Impasse and Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment*, 19 U. TOL. L. REV. 41, 44 (1987); Heller, *Unilateral Action in a Concession Bargaining Context*, 35 LAB. L.J. 747, 754 (1984); Terrence H. Murphy, *Impasse and the Duty to Bargain in Good Faith*, U. PITT. L. REV. 1, 2 (1977); Frank H. Stewart & William K. Engeman, *Impasse, Collective Bargaining and Action*, U. CIN. L. REV. 233, 241 (1970). *See* NLRB v. Katz, 369 U.S. 736, 741-42 (1962) (providing a straightforward statement of the general rule of the impasse exception: "unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5) [of the National Labor Relations Act], for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal."); *Id.* at 745 (providing an implicit acknowledgment of the impasse exception).

26. Taft Broadcasting, 163 N.L.R.B. 475 (1967), *enforced sub nom.;* American Fed'n of Television and Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

27. *See, e.g.*, NLRB v. Charles D. Bonnano Linen Serv., 630 F.2d 25 (1st Cir. 1980), *aff'd*, 454 U.S. 404 (1982); Bell Transit Co., 271 N.L.R.B. 1272 (1984); George Banta Co., 256 N.L.R.B. 1197 (1981); Southern Newspapers, 246 N.L.R.B. 39 (1979); Allen W. Bird II, 227 N.L.R.B. 1355, 1357 (1977); Times Herald Printing Co., 221 N.L.R.B. 993, 1003 (1973).

28. *Taft*, 163 N.L.R.B. at 478.

29. *Id.*

30. *Id. See* Earle, *supra* note 2, at 412 (discussing in detail the facts of *Taft*).

Courts have continued to generally apply the *Taft* factors, even in cases that appear to move away from the philosophical idea of impasse expressed in *Taft* and other decisions of its era. What follows is a brief survey of each factor as applied in the years between *Taft* and *Mountain Valley*.

A. Bargaining History

Bargaining history has been the least important *Taft* factor. In *Taft*, no indication was made as to the significance of bargaining history in determining impasse.[31] Although this factor has been commonly listed as a recitation rather than used as a substantive consideration, the Board has subsequently applied it in a meaningful and useful way on occasion.

Bargaining history has been effectively used as a means of giving perspective to the other factors -- especially the "good faith of the parties."[32] Courts will assume that parties with an amicable history are more likely to negotiate in good faith, and inversely, that parties with an acrimonious history are less likely to do so.[33]

Bargaining history has also been used to consider the length of time over which the parties have negotiated. Parties with a brief history of negotiating are less likely to have reached a bona fide impasse and more likely to be merely experiencing the difficulties of a transition.[34] The substance of the inverse assumption, however, has been questioned insofar as courts consider the length of a bargaining history without considering its nature as discussed in the preceding paragraph.[35]

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31. *Id. See also*, Dahl Fish Co. Seapac, 279 N.L.R.B. 1084 (1986); Coalite, Inc., 278 N.L.R.B. 293, 301-03 (1986); TKB Int'l Corp., 240 N.L.R.B. 1082, 1083 n.8 (1979).

32. Earle, *supra note* 2, at 413. One example given by Earle is the decision in Salt River Valley Water Users Ass'n, 204 N.L.R.B. 83, 87 (1973), wherein the Board noted that the parties long history of "excellent relations" suggested the absence of bad faith. *See also*, San Diego Van Storage Co., 236 N.L.R.B. 701 (1978); Times Herald Printing Co., 221 N.L.R.B. 225 (1975).

33. There is less case law indicating the converse presumption. *See supra* note 31 and accompanying text.

34. *See, e.g.*, Seattle-First National Bank, 267 N.L.R.B. 897 (1983); Excavation-Constr., 248 N.L.R.B. 649, 650, 654 (1980); Alsey Refractories, 215 N.L.R.B. 785 (1974).

35. Earle, *supra* note 2, at 414 (citing courts "mechanical" application of this factor in Lou Stecher's Super Markets, 275 N.L.R.B. 475 (1985) and Bell Transit Co., 271 N.L.R.B. 1272 (1984)).

B. Good Faith

Good faith bargaining is perhaps the single fundamental requirement of the National Labor Relations Act and is specified in section 8.[36] Good faith is concerned with the intent of the parties to settle or agree rather than to simply try to "wait out" the opposition.[37] While good faith alone is not the dispositive factor in determining impasse, it can fairly be characterized as a prerequisite.[38]

Courts and the Board have pointed to specific conduct which evidences a lack of good faith in the negotiations: delaying tactics, unreasonable demands, arbitrary scheduling of meetings, and unilateral action.[39] For instance, the Board in *M&M Building & Electrical Service*[40] cited delaying tactics of the union as justification for unilateral action by the employer.[41] The "good faith" element of this decision rests on the party claiming impasse -- the employer. Therefore, the Board noted that an employer should generally demonstrate its good faith, as opposed to the union's bad faith, in its attempt to show impasse.[42]

In *Crane Co.*,[43] the Board held that delaying tactics were of heightened significance when they occurred toward the end of a contract or at the end of other limitation periods.[44] Therefore, the context of delaying tactic is of crucial significance to the issue of good faith.[45]

Traditionally, courts and the Board have agreed that an employer that has committed an unfair labor practice and has not remedied that practice could not invoke the protections of impasse.[46] This prohibition is based on the necessary failure of good faith in such instances.[47] *NLRB v. Cauthorne*[48] is an example of the recent movement away from this traditional view.

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36. *See N.L.R.B. v. Tex-Tan, Inc.*, 318 F.2d 472, 482 (1963) (impasse is a deadlock that occurs "despite the best faith" between parties); Hi-Way Billboards, 206 N.L.R.B. 22, 23 (1976) (providing that "a genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject of subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position."). *See also* NLRB v. Independent Ass'n of Steel Fabricators, 582 F.2d 135, 147 (2d Cir. 1978) *cert. denied*, 439 U.S. 1130 (1979); Dallas Gen. Drivers v. NLRB, 355 F.2d 842, 845 (D.C. Cir. 1966); Excavation-Constr., 248 N.L.R.B. at 650; *Taft*, 163 N.L.R.B. at 478.

37. *See* NLRB v. Wonder State Mfg. Co., 344 F.2d 210, 215 (8th Cir. 1965); Akron Novelty Mfg. Co., 224 N.L.R.B. 998, 1001 (1976); *Taft*, 163 N.L.R.B. at 478.

38. *See* Earle, *supra* note 2, at 415.

39. ACL Corp., 214 N.L.R.B. 1600, 1603 (1984).

40. 262 N.L.R.B. 1472 (1982).

41. *Id.*

42. *Id.*

43. 244 N.L.R.B. 103 (1979).

44. *Id.*

45. *See* Earle, *supra* note 2, at 416.

46. NLRB v. Allied Products Corp., 548 F.2d 644, 652 (6th Cir. 1977); Hyatt Corp. v. NLRB, 939 F.2d 361, 371 (6th Cir. 1991).

47. C. MORRIS, THE DEVELOPING LABOR LAW 637 (2d ed. 1983).

48. 691 F.2d 1023 (D.C. Cir. 1982).

In *Cauthorne*, the court acknowledged that although "some evidence concerning the good faith" of some employer conduct had been presented, evidence was not dispositive of the good faith factor.[49] With this decision, the court explicitly disavowed any absolute rule denying employers committing unfair labor practices the benefits of impasse.[50]

In the absence of overt conduct demonstrating a lack of good faith, courts and the Board have also looked to the substance of the proposals exchanged by the parties in determining impasse.[51] This branch of good faith analysis, however, like that of overt acts, seems to have been liberalized in some recent decisions. For example, in *Seattle-First National Bank v. NLRB*[52] the court held that inferences drawn from the content of the parties' proposals could not be the sole grounds for a finding of bad faith.[53]

C. Length of Negotiations

The length of the negotiations is clearly the most empirical of the five *Taft* factors. Not only is the information as to the number and length of actual meetings easy to collect, but it is also difficult for the parties to distort.[54] Length of negotiations alone, however, has not been a relatively compelling factor to the Board. The Board has held that this factor does not control the question of impasse.[55] The random decisions of the Board in negotiations of various lengths attest to the little weight given to this factor.[56]

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49. *Id.* at 1024-26.

50. *See infra* notes 58-60. *See also* Dependable Bldg. Maintenance Co., 276 N.L.R.B. 27 (1985) (relying on the court's rule as expressed in *Cauthorne*); Eagle Express Co., 273 N.L.R.B. 501 (1984) (allowing an employer to implement, under the impasse exception, the wage proposal it had already unlawfully implemented).

51. The most widely cited case establishing this practice is NLRB v. Reed & Prince Manufacturing Co., 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). *See* NLRB v. Wright Motors, Inc., 603 F.2d 604, 608 (7th Cir. 1979). *See also* A-1 King Size Sandwiches, Inc. 265 N.L.R.B. 850, 858 (1982); Glenmar Clinestine, Inc., 264 N.L.R.B. 236 (1982) (citing *Reed & Prince*, 205 F.2d at 131).

52. 638 F.2d 1221 (9th Cir. 1981).

53. *Id.* at 1226.

54. *See* Earle, *supra* note 2, at 420.

55. *See, e.g., Coalite*, 278 N.L.R.B. at 293.

56. *See* Hamady Bros. Food Mkts., 275 N.L.R.B. 1335 (1985) (impasse after five meetings); Bell Transit Co., 271 N.L.R.B. 1272 (1984) (impasse after three meetings); Good GMC, Inc., 267 N.L.R.B. 583, 585 (1983) (no impasse after two meetings); R.A. Hatch Co., 263 N.L.R.B. 1221 (1982) (impasse after two meetings); Crest Beverage Co., 232 N.L.R.B. 116 (1977), *modified*, 575 F.2d 661 (8th Cir. 1978), *cert. denied*, 437 U.S. 1069 (1979) (no impasse after four meetings); Atlas Tack Co., 226 N.L.R.B. 222, 227 (1976) (no impasse after fifteen meetings); Akron Novelty Mfg. Co., 224 N.L.R.B. 998 (1976) (no impasse after eight meetings); Taylor-Winfield Corp., 225 N.L.R.B. 457 (1976) (impasse after eighteen meetings).

D. The Importance of Issues as to Which There is a Disagreement

The parties must disagree over a "key issue" to validly assert impasse.[57] In *Taft*, the Board held that if a single issue is sufficiently important to the negotiation, that issue could be the basis of a deadlock.[58]

The issue which the parties agree on has also been, and perhaps was always meant to be, an important consideration under this factor. When determining whether a sufficient degree of latitude exists for continued bargaining, all issues on which there is an agreement or continued disagreement may be significant.[59] Important issues which the parties agree on are relevant in this factor's analysis because they offer the parties an opportunity to trade-off and compromise. This opportunity suggests that ultimate agreement on all issues is more likely.[60]

For example, in *Saunders House v. NLRB*,[61] the Court of Appeals for the Third Circuit reversed the Board's finding that no impasse existed because the outstanding issues of wages and union security were so important.[62] Reaching a similar decision, the Board in *Bell Transit* found a valid impasse based on disagreement over only one issue, wages.[63] This decision, however, has been criticized as a repudiation of the "Importance" factor and an indication of the trend toward pro-employer policymaking by the Board.[64]

E. The Contemporaneous Understanding of the Parties as to the State of Negotiations

In *Taft*, the Board applied the contemporaneous understanding factor by focusing its attention on the parties' last two sessions.[65] Based on these last two sessions, the Board concluded that the parties believed they were further from an agreement at that point than they were at the beginning of the negotiation.[66]

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57. *Dallas Gen.*, 355 F.2d at 845.

58. 163 N.L.R.B. at 478.

59. Earle, *supra* note 2, at 422.

60. *See, e.g., American Fed'n*, 395 F.2d at 628; NLRB v. Webb Furniture Corp., 366 F.2d 314, 316 (4th Cir. 1966); Patrick & Co., 248 N.L.R.B. 390, 393 (1980).

61. 719 F.2d 683, 689 (3d Cir. 1983).

62. *Id.* at 688-89.

63. *Bell Transit*, 271 N.L.R.B. at 1272-73.

64. Earle, *supra* note 2, at 423. In *Bell Transit* the employer was under significant pressure from its sole client, a multinational chemical corporation. *Bell Transit*, 271 N.L.R.B. at 1272-73. Furthermore, the Board's finding of impasse, albeit based on a disagreement over a single factor, could be considered consistent with traditional "Importance" analysis because of the extreme importance or "supremacy of the issue" over which the parties disagreed. *Id.* at 1273.

65. *Taft*, 163 N.L.R.B. at 478. *See also* Earle, *supra* note 2, at 424.

66. *Taft*, 163 N.L.R.B. at 478.

Therefore, a finding of impasse was proper because the parties seemed to have a contemporaneous understanding that impasse existed.[67]

The Board has called the contemporaneous understanding factor the most difficult of the five *Taft* factors to resolve because it demands objective proof of subjective facts -- the parties' respective state of mind.[68] In *Inta-Roto*, the Board said it would consider "objective evidence to warrant a belief that an impasse had been reached."[69]

In *Seattle-First National Bank*, the Board held that because the employers' proposals were so onerous, the parties likely knew that agreement to such terms was virtually impossible.[70] The naked use of "impasse" in negotiations alone does not suggest any contemporaneous understanding between the parties; instead, the courts and the Board, as in *Seattle-First National Bank*, look to the substance of the relationship.[71]

In summary, the Board and courts have applied differing standards. Some have suggested that the underlying principles of impasse as set out in the *Taft* factors are under siege. Still, *Taft* and its five factors remain, in name if no longer fully in fact, the standard used in determining whether or not impasse exists.

F. Five Factors Under Siege

Two recent federal circuit court decisions demonstrate that the impasse doctrine is surrounded by increasing tension and is resulting in the reduction of management's free reign: *Toledo Blade Co. v. NLRB*[72] and *Colorado-Ute Electric Ass'n, Inc. v. NLRB*[73]. In both cases, the Board and court of appeals hesitated to find impasse. In *Toledo*, the court hesitated to find impasse where management sought to circumvent the traditional duties of union representatives.[74] In *Colorado-Ute*, the court did not find impasse where management sought to exercise unfettered discretion in implementing merit pay increases.[75] In both cases, either the board or the reviewing court chose from the

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67. *Id.*

68. Inta-Roto, Inc., 252 N.L.R.B. 764 (1980).

69. *Id.* Presumably, the Board would charge both parties with knowledge of such evidence and would assume their reasonable assessment of it.

70. 267 N.L.R.B. at 898.

71. *See* T. Marshall Corp., 279 N.L.R.B. 1126 (1986). This case illustrates an instance where the Board has refused to consider the mere use of the word "impasse" as evidence that the parties understood impasse to exist or threaten to loom.

72. 295 N.L.R.B. 626 (1989), *remanded*, 907 F.2d 1220 (D.C. Cir. 1990).

73. 295 N.L.R.B. 607, *rev'd*, 939 F.2d 1392 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 2300 (1992).

74. *Toledo*, 907 F.2d at 1224.

75. 939 F.2d at 1397.

complex issues of the case a single issue which was sufficient to defeat the finding of impasse.[76]

Toledo and *Colorado-Ute*, however, involved questions of law where the most significant abrogation of labor rights under impasses seems to have arisen from the Board's factfinding activities (or lack thereof), rather than its legal analysis. For this reason, the labor victories won in *Toledo* and *Colorado-Ute* may appear hollow to those concerned about the future integrity of the impasse doctrine.

IV. INSTANT DECISION

A. The Impasse Exception and State Labor Law

In *Mountain Valley Educational Ass'n v. Maine SAD No. 43*, the court began its analysis by reaffirming the general rule followed in Maine and federal courts that prevents either party in a labor negotiation from unilaterally implementing changes in prevailing wages, hours, or working conditions.[77] The court continued to explain that such a proscription "[prevents a private employer] from 'going over the head' of the bargaining agent by unilaterally" manipulating wages or other benefits.[78] Instead, the parties must maintain the status quo while bargaining, regardless of whether they are bargaining over a new contract, a contract renewal, or a contract modification.[79] The court also demonstrated the applicability of the general rule to public sector bargaining in the state of Maine.[80]

After setting out the general rule against unilateral implementation, the court raised the impasse exception as adopted in Maine.[81] The court said that this exception allows a party to unilaterally implement its last best offer when negotiations have reached a bona fide impasse.[82] This exception, the court noted, does not end the duty to bargain in good faith, but instead, merely suspends such duty until changed circumstances indicate that impasse no longer exists.[83]

The court identified one difference between Maine law and the federal impasse exception: Impasse cannot occur as a matter of law until the parties have

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76. *See, Id.; Toledo*, 902 F.2d at 1224.

77. *Mountain Valley*, 655 A.2d at 351 (citing Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991); NLRB v. Katz, 369 U.S. 736, 743 (1962); NLRB v. McClatchy Newspapers, Inc., 964 F.2d 1153, 1157, 1161-62 (D.C. Cir. 1992)).

78. *Id.* at 351-52.

79. *Id.* at 352 (citing *Litton*, 501 U.S. at 198).

80. *Id.* (citing Lane v. Board of Dir. of Me. Sch. Admin. Dist. No. 8, 447 A.2d 806, 809-10 (Me. 1982); State v. Maine Labor Relations Bd., 413 A.2d 510, 515 (Me. 1980)).

81. *Id.* (citing *Maine Labor Relations*, 413 A.2d at 510).

82. *Id.* (citing *Litton*, 501 U.S. at 198; *McClatchy Newspapers*, 964 F.2d at 1157, 1164-65).

83. *Id.* (citing *McClatchy Newspapers*, 964 F.2d at 1164-65).

completed a protocol of Alternate Dispute Resolution (ADR) processes.[84] The rationale for this additional element of impasse lies in the restrictions Maine places on its public employees.[85] Unlike private employees, Maine public employees do not have the right to strike.[86] The court reasoned that since the law eliminates the most common form of employee impasse resolution, the legislature added to the duty of good-faith bargaining the burden of completing the ADR regimen.[87] This addition offsets the union's right with a burden most often borne by management.[88]

The court appeared to support the holding of the Maine Labor Relations Board that unilateral implementation prior to completion of the statutory ADR regimen would be a *per se* violation of the duty to bargain in good faith.[89] In reality, however, the court focused its analysis in *Mountain Valley* on whether the Act permits an employer to unilaterally implement a last best offer after completion of said ADR procedures, and if so, when?[90] The court first dismissed the argument raised by the Association to abandon the impasse exception altogether.[91] The court stated that although the parties can agree to resolve issues of wages and insurance by binding arbitration, they should never be compelled to do so.[92] Such compulsion would rob the parties of the important power not to agree and, in this case, would undermine government control of the public finances.[93]

Next, the Association raised a similar argument that a unilateral implementation, whether under the auspices of impasse or otherwise, contradicts the Act's policy that "neither side shall be compelled to agree to a proposal or be

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84. *Id.* This protocol includes the obligation to participate in mediation, factfinding, and arbitration. Arbitration, traditionally the final step in the process, is binding on all except the most crucial subjects: wages, insurance and pensions. *See* ME. REV. STAT. ANN. tit. 26, § 965(4) (West 1988).

85. *Mountain Valley*, 655 A.2d at 351.

86. *Id.* (quoting ME. REV. STAT. ANN. tit. 26, § 964(2)(C) (West 1988)).

87. *Id.*

88. *Id.* (quoting ME. REV. STAT. ANN. tit. 26, § 965(4) (West 1988)). For example, the instant case involved SAD 43 making a series of concessions. Because this process of concession is not commonly the role of management, unilateral implementation of the last best offer (which effectively halts this process of conceding) is commonly the tool of management, not labor. *Id.*

The court acknowledged that though the limitation that the ADR requirement never binds either party serves to pressure the employer to bargain, it stops short of usurping traditional public prerogatives over management of public organizations and finances. *Id.* (quoting Raymond G. Maguire & Bryan M. Dench, *Public Employee Bargaining Under the Maine Municipal Public Employees Labor Relations Law: The First Five Years*, 27 ME. L. REV. 107, 115 (1975)).

89. *See Id.*

90. *Id.*

91. *Id.* at 353.

92. *Id.*

93. *Id.*

required to make concession." [94] The court distinguished what the Association contended was the practical effect of such unilateral action from the legal philosophy underlying the exception. The court stated, "The association confuses the making of a contract with the unilateral implementation of a last best offer *during a period in which no contract exists.*"[95] (emphasis added). While admitting that the unilateral action of SAD 43 had created a new "status quo" from which negotiations would begin upon the end of the impasse, the court refused to equate this new "status quo" with the imposition of a final contract.[96] Rather, the court considered it to be only a temporary measure.[97]

The court continued to hold that the Act differs from the National Labor Relations Act in one respect - its prohibition of strikes.[98] Therefore, it is not appropriate to argue that the other elements of the federal version of the Act are inapplicable.[99] Specifically, the court held that the impasse exception in the federal law should survive the National Labor Relations Act's translation into the laws of Maine.[100]

B. The Board's Finding of Impasse

Having generally affirmed the continued recognition of the impasse exception as an element of Maine law, the court next reviewed the Board's specific finding of impasse in the instant case.[101]

The Association claimed that the Board's findings should be reversed under the Act because the Board failed to support its finding of impasse with substantial recorded evidence.[102] The court responded to this claim by stating that:

> the Board was not required to make express findings that further negotiations would be fruitless. The parties here had completed mediation, factfinding, and arbitration . . . the Board [also] concluded that SAD 43 had participated in further negotiation for a reasonable period of time after receiving the arbitration report . . . . We find the

94. *Id.* (quoting ME. REV. STAT. ANN. tit. 26, § 965(1)(C) (West 1988)). The Association cited the court's decision in Caribou Sch. Dep't v. Caribou Teachers Ass'n, 402 A.2d 1279 (Me. 1979) in which the court affirmed the Board's inability to impose wage terms on parties.

95. *Mountain Valley*, 655 A.2d at 353.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 354.

102. *Id.* (citing ME. REV. STAT. ANN. tit. 26, § 968(5)(F) (West 1988); *Saunders*, 719 F.2d at 687-88, *cert. denied*, 466 U.S. 958 (1984)).

Board's findings on impasse to be supported by substantial evidence on the record.[103]

In addition to the court's finding of the above-quoted evidence of statutory compliance, the court cautioned that it stood in a poor position to review the Board's factfinding.[104] The Board, the court reasoned, was far "better suited" to evaluate complex issues of industrial relations.[105]

The court concluded its analysis by affirming the Board's decision on contract duration.[106] This court affirmed the Board's decision despite the Board's finding that SAD 43 violated the Act by failing to implement the binding decision of the arbitrator, and it did not remedy this violation before it allowed SAD 43 to unilaterally implement its last best offer.[107] Noting the broad discretion of the Board in remedying violations of the Act, the Court affirmed.[108]

C. Judge Lipez's Dissent

Judge Lipez wrote in opposition to the majority because he feared the court had tacitly adopted the concept of "statutory impasse."[109] The concept of statutory impasse reasons that impasse is the result of a mechanical completion of the ADR protocol set forth in ME. REV. STAT. ANN. tit. 26, § 965, and not necessarily the result of any actual breakdown in negotiations.[110] The majority in this case did not cite any evidence that negotiations had in fact broken down, but instead, focused on the parties' completion of various procedures.[111]

Judge Lipez noted that an affirmative finding "that further bargaining would be futile" is central to finding impasse.[112] Lipez contended that the facts of the instant case revealed "an ongoing process" as opposed to a "deadlock."[113]

Lipez argued that the court should insist on a rigorous review before acknowledging the existence of impasse because unilateral implementation of any kind conflicts with the very concept of collective bargaining and because of the inherent advantage given to employers under the impasse doctrine.[114] He warned

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103. *Id.* It should also be noted that the court did not mention any findings by the Board as to the quality or nature of relations between the Association and SAD 43 at the time of unilateral implementation. The court also did not mention that such findings needed to be made.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (Lipez, J., dissenting).

110. *Id.*

111. *Id.*

112. *Id.* (citing Alsey Refractories Co., 215 N.L.R.B. 146 (1974). *See* James W. Heller, *Unilateral Action in a Concession Bargaining Context*, 35 LAB. L.J. 747, 754 (1984)).

113. *Id.* at 355.

114. *Id.*

that the "diluted impasse standard" adopted by the majority will compromise the effectiveness rather than endorse the importance of impasse resolution procedures mandated by statute.[115] This compromise will stem from the ease of unilateral implementation that an employer will see at the end of the ADR process.[116]

Lipez argued that the majority's opinion has vitiated the rule that unilateral implementation of the last best offer prior to completion of requested impasse resolution procedures shall *per se* violate ME. REV. STAT. ANN. tit. 26, § 964(1)(E)[117] and that the majority opinion has also weakened "the fundamental tenets of fairness in public sector bargaining."[118]

Lipez then demonstrated the flaws in the majority's holding by considering the facts of the instant case.[119] He noted that, *inter alia*, on October 13, 1992,[120] the parties had met and resolved the retirement benefits issue.[121] In addition to agreeing on retirement benefits, the Association made corrections and additions to a working draft of a final agreement and presented counterproposals to SAD 43's last best offer.[122] Lipez argued that these facts revealed that at the time SAD 43 unilaterally imposed its last best offer, the two-year negotiation process was nearing an independent, consensual resolution, rather than hopeless deadlock.[123]

Citing *Sanford Firefighters,* Lipez set out the factors to be considered in evaluating impasse: (1) the progress parties were making in negotiations, (2) the issues remaining to be resolved, (3) whether the parties had met to resolve the remaining issues, and (4) whether the non-declaring party had been consulted regarding declaration of impasse.[124]

In addition, Lipez pointed out that the majority had not considered SAD 43's refusal to honor the binding decision of the arbitrator regarding contract duration.[125] Lipez claims that this refusal "unmistakably contributed to the inability of the parties to resolve their differences during the post-arbitration

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115. *Id.*

116. *Id.*

117. This provision of the Maine code sets out the general duty to bargain in good faith.

118. *Id.*

119. *Id.*

120. The last best offer was unilaterally implemented on November 20, 1992 -- just over a month after what Judge Lipez apparently considered significant progress in the negotiations.

121. *Id.*

122. *Id.*

123. *Id.* Lipez noted, however, the remaining differences between the parties at the end of the October 1992, negotiating session which included health insurance coverage, the retroactive effective date of wage increases for year one, and a difference of ten cents in wage levels for year two. *Id.*

124. *Id.* at 356.

125. *Id.*

period" and, therefore, indicated something other than a good faith failure to agree - something other than impasse.[126]

Noting that each *Sanford* factor in the instant case suggested that impasse did not exist and noting the existence of affirmative evidence of bad faith by the party claiming impasse, Lipez worried that the majority's decision given these facts raises the possibility of a statutory impasse regime in Maine.[127]

V. COMMENT

The majority's decision in *Mountain Valley Educational Ass'n v. Maine SAD No. 43* raises general concerns about the continuing erosion of labor rights under the impasse exception and specific concerns about the potential for misapplying statutory ADR protocols as a new means of negotiation.

A. Protecting Management through Impasse

The final stop in the movement away from the traditional impasse standards embodied in *Taft Broadcasting* has arguably created a system which distorts the ideals and policies embodied in collective bargaining.[128] The playing field on which both sides of a labor negotiation pursue their interests has been severely slanted in favor of management through the fortification of managment's rights under impasse.[129] Some argue that a union representative attempting to satisfy constituents' diverse needs must negotiate in this system where there are no firm guidelines or guidelines which provide only illusory support.[130]

To describe this development as simple pro-management activism, however, would be incorrect. The recent decisions of the Board regarding impasse do not defer to management as much as they fail to uphold any traditional standard of fair dealing. In essence, these decisions encourage lawlessness.[131]

In the absence of legal safeguards, naked capitalism tends to favor ownership in these situations for two reasons. First, corporate ownership ultimately "brought the ball" by founding the business, and it can choose to discontinue business

126. *Id.* Lipez quotes a legal scholar here: "The impasse exception to the unilateral action proscription goes hand in hand with good faith. Absent good faith bargaining, there can be no impasse." James W. Weller, *Unilateral Action in a Concession Bargaining Context*, 35 LAB. L.J. 747, 754 (1984).

127. *Mountain Valley*, 655 A.2d at 356.

128. *See* Dannin, *supra* note 25, at 65.

129. *Id.*

130. *Id.*

131. *Id.*

altogether.[132] Second, corporate owners are generally less dependant upon regular income for their day-to-day existence. A dividend that has been delayed for the purpose of resolving a troublesome labor dispute can be forborne more easily than a paycheck which is missed and will never arrive due to a work stoppage.

The lawlessness descends upon the process as the Board abdicates its role as factfinder in cases of impasse in favor of increased deference to the party asserting impasse.[133] *Mountain Valley* symbolizes this system of increased deference. In this case, the court affirmed the impasse in the absence of any affirmative evidence thereof, excepting the length of the negotiation and the parties' completion of the statutory scheme of ADR.[134]

Those commentators who have most vigorously asserted the Board's failure to preserve the integrity of the impasse doctrine seem to improperly extend their argument beyond the law and into the realm of economic policy. For example, Ms. Dannin notes:

> Employers have a great deal of power at the best of times to determine the conditions of the workplace. In times of economic downturn that power increases as unions and employees are cowed by fear of unemployment . . . . At the same time unions are weakened as a consequence of economic disasters on their membership. [135]

This kind of rhetoric seems to suggest not only that the Board should return to close scrutiny of the facts of labor negotiations, but also that such scrutiny should extend to the substance of those negotiations. Only this kind of judicial interventionism would sufficiently allay such concerns about the perilous economic challenges facing labor today. Such interventionism, however, goes far beyond the task of rational factfinding.

Notwithstanding philosophical disagreements, it should also be noted that other lawyers have discussed an impasse doctrine that is becoming less clearly deferential to management, if not less vague.[136]

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132. The colloquial phrase "brought the ball" refers to universal truths of power and influence on the playground. Should a game break down due to an unresolved controversy (a grade school "impasse"), ultimate power rests in the child who brought the ball. He is the only one who cannot be cut out of the bargaining lest he pick up his ball and go home.

133. This movement away from close scrutiny of facts surrounding impasse is discussed and documented more fully in the Legal Background Section of this note. *See supra* part III.

134. *Mountain Valley*, 655 A.2d at 354. *See supra* text accompanying note 102.

135. *See* Dannin, *supra* note 25, at 67.

136. Joseph J. Costello & Stacy K. Weinberg, *Toledo Blade And Colorado-Ute: When is Bargaining to Impasse Not Enough?*, 9 LAB. LAW. 127 (1993).

B. Distorting the Goals of Alternate Dispute Resolution

Ex ante ADR policies[137] may be adopted because they are generally of mutual benefit to contracting parties or parties who have some other relationship.[138] These mutual benefits include reduced costs because of less formal, extra-judicial procedures which call for less legal advice and expense.[139] Another benefit generally ascribed to ADR procedures is the less adversarial, and as a result, less acrimonious environment these procedures create. Such cooperative systems can be less deleterious to an ongoing professional or commercial relationship than the grind of litigation.[140] Consider the opinion of one ADR expert who stated that "[f]iling a lawsuit can indeed be a hostile act. Our expression 'to be slapped with a lawsuit' or 'hit with a lawsuit' conveys the sense of combat and aggressiveness inherent in legal action."[141] ADR, on the other hand, offers the absence of fault-finding, plus the experience of working with one's opponent toward a settlement.[142] Such practices serve to "save face" for both parties and help to preserve the relationship.[143]

The idea of ADR as a collective, cooperative means of saving money and reducing animosity between disputants has been turned on its head in *Mountain Valley*. ADR can become simply another way to bury your opponents' lawyer with paperwork and pre-trial obligations. Since neither the Board nor the court will inquire into the actual substance of the mediation, arbitration, or factfinding process, a party who has resolved that its position shall prevail has no incentive to work cooperatively. The fact that the locus of the conflict is a mediation clinic or a lawyer's office instead of a courtroom cannot in and of itself derail the conflict.

In the informal land of out-of-court mediation, no judge is available to compel discovery or to threaten to hold the party in contempt.[144] The absence of a judge can be liberating or comforting to parties who have chosen ADR. In compulsory ADR schemes like that ordered by the Maine Act, however, the judge's absence can simply cause the dispute to enter the court system when one disputant senses the need for the power of a court.[145]

This lack of an authoritative third party limits ADR by its very definition. Decisions such as *Mountain Valley*, however, imply that parties cannot resort to an authoritative third party even when proceeding in court. This "lawless"

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137. Ex ante policies provide for ADR before disputes arise. The policy set by Maine statute in *Mountain Valley* was such a policy.

138. STEVEN SHAVELL, ALTERNATIVE DISPUTE RESOLUTION: AN ECONOMIC ANALYSIS 2 (1992).

139. *Id.*

140. *Id.*

141. PETER LOVENHEIM, MEDIATE, DON'T LITIGATE 22 (1989).

142. *Id.*

143. *Id.*

144. Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 41 (1987).

145. *See Id.*

deference to a party's invocation of impasse allows the cooperative spirit which gave rise to ADR protocols to be vitiated by those unwilling to bargain in good faith. Ironically, these ADR processes which have been implemented to encourage understanding and cooperation between parties in dispute have been transformed into a means by which powerful management negotiators can dictate their terms.

The court in *Mountain Valley* refused to acknowledge that even a long negotiation which included ADR is useless absent good faith and, therefore, no indication of a legitimate impasse according to *Taft*. Instead, the court allowed such superficial considerations to legally define the underlying substance of the negotiation. In cases where such outward appearances belie a lack of impasse within, courts will misread impasse and allow a last best offer to be wrongly thrust upon one party. Whether this was the case or not in *Mountain Valley* is unclear. This uncertainty, which is the result of inadequate factfinding throughout the judicial process, should be of greatest concern to those who wish to see fair treatment of both parties to a labor negotiation.

VI. CONCLUSION

The reluctance of courts to unduly interfere in the private negotiations between labor and management is based upon the noble idea that courts should react to disputes rather than institute their own theory on how to avoid them. In the courts' abdication of any real factfinding standards for establishing the existence of impasse, however, courts like the Maine Supreme Court in *Mountain Valley* have restricted labor negotiators in their attempts to liberalize the process. Instead, courts should resolve to establish factfinding standards that allow them to find impasse only when the external indicia of impasse truly demonstrate a hopeless deadlock. Such a resolution will certainly require a more rigorous analysis of private negotiations. The alternative to this rigorous analysis is a regime in which heavy-handed employers, not the courts, hold the power to determine the existence of impasse. Courts should resist this preference for might over right.

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