

1962

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George A. Bartlett

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Recommended Citation

George A. Bartlett, *Labor Law-The Duty to Bargain under Federal Law*, 27 Mo. L. REV. (1962)
Available at: <https://scholarship.law.missouri.edu/mlr/vol27/iss1/14>

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Comments

LABOR LAW—THE DUTY TO BARGAIN UNDER FEDERAL LAW

INTRODUCTION

The recent decision of the United States Supreme Court in *NLRB v. Insurance Agents' Int'l Union*,¹ has focused attention upon the use of economic weapons by labor and management during the collective bargaining period. There, union members, insurance agents for Prudential, engaged in harassing tactics during the bargaining period, such as slowdowns and refusals to do specific work. On the basis of these activities the National Labor Relations Board found the union had violated Section 8(b)(3) of the Labor Management Relations Act² by refusing to bargain with the employer. The Court of Appeals for the District of Columbia refused enforcement of the Board order and the Supreme Court affirmed the court's decision. The case was not a difficult one on its facts or procedure and there was unanimity on the Court that the Board order should be denied enforcement. However, two divergent opinions were written which contain broad ramifications which may cause difficulties in future considerations of the duty to bargain. Mr. Justice Brennan, speaking for six members, reasoned that it was beyond the statutory power of the Board to predicate the 8(b)(3) violation solely upon the union's unprotected harassing tactics. In a separate opinion Mr. Justice Frankfurter, joined by Justices Harlan and Whittaker, contended that the tactics might be grounds for finding a refusal to bargain if the activity evidenced a subjective lack of good faith; these Justices would have remanded the case for a possible determination to this effect.

I. SURVEY OF THE DUTY TO BARGAIN PRIOR TO THE TAFT-HARTLEY ACT

The federal labor law prior to 1935 did not encompass a policy of free collective bargaining as envisioned by the Wagner Act.

During World War I the National War Labor Board evolved a duty to bargain best illustrated by its directive to the Western Cold Storage Company. The company was directed to meet with shop committees "to take up differences that still exist in an earnest endeavor to reach an agreement on all points at issue. . . ."³

1. 119 N.L.R.B. 768 (1957), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1960). The case will herein be referred to as the *Prudential* case.

2. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958).

3. *Amalgamated Meat Cutters v. Western Cold Storage Co.*, National War Labor Board Docket No. 80 (1919).

Section 301 of the Transportation Act of 1920 imposed a duty on the carriers to "exert every reasonable effort" to avoid "interruption of operations."⁴ Under the National Industrial Recovery Act⁵ and Public Resolution 44,⁶ duties to bargain were imposed to aid in raising wage rates during the depression.⁷ It should be noted that in all of these instances public policy required a rapid and often forced solution of the differences between the parties. Absent was the free collective bargaining contemplated by the National Labor Relations Act.

A. *Legislative History of the 1935 Act*

The duty to bargain concept in federal labor law⁸ received its major impetus by the enactment of Section 8(5) of the National Labor Relations Act of 1935: "It shall be an unfair labor practice for any employer . . . to refuse to bargain with the representatives of his employees, subject to the provisions of section 9(a)."⁹ By making refusal of an employer to bargain an unfair labor practice, the statute had the effect of imposing an affirmative duty to bargain. The simplicity of the statutory requirement belies its difficult problems.

The meaning of the statutory duty may best be ascertained with reference to the background against which it was enacted. Section 8(5) was but a part of a comprehensive federal labor policy established by the 73d and 74th Congresses to promote industrial peace.¹⁰ Although the immediate aim of the act was to relieve depressed economic conditions, its policy envisioned a statute which would function and endure beyond the immediate economic crisis.¹¹ Free collective bargaining was one method selected by the draftsmen to aid in achieving industrial peace. As stated by Mr. Chief Justice Hughes:

The theory of the act is that free opportunity for negotiations with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not seek to compel.¹²

4. "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute . . ." 41 Stat. 469 (1920).

5. 48 Stat. 195 (1933).

6. 48 Stat. 1183 (1934).

7. Cf. *Houde Eng'r Corp.*, 1 N.L.R.B. (old) 35 (1934).

8. See generally, Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807 (1959); Delony, *Good Faith in Collective Bargaining*, 12. U. FLA. L. REV. 378 (1959).

9. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(5) (1958).

10. "Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. . . ." National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

11. See statement of Senator Wagner in introducing the act at 78 CONG. REC. 3443 (1934).

12. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). The *Jones & Laughlin* case upheld the constitutionality of the act. See also *Terminal R.R.*

Although free collective bargaining was the keystone of the act the explicit duty of section 8(5) was not a part of the original scheme presented to Congress.¹³ Senator Robert F. Wagner, the act's sponsor, felt that the duty of an employer to bargain was to be implied from the right of employees to bargain, for a failure to bargain would therefore be an interference with that right.¹⁴ However, Francis Biddle, chairman of the old National Labor Relations Board, suggested to the Senate Committee on Education and Labor that an explicit duty to bargain be enacted because of the disagreement and confusion which had existed with respect to the employer's duty to bargain collectively.¹⁵ Mr. Biddle's proposal, section 8(5), was adopted and remained unchanged in the act as passed.¹⁶

Mr. Biddle's conclusions, that there had been disagreement and confusion as to the duty to bargain, were correct, but section 8(5) did not end the confusion. The legislative history of section 8(5) discloses varied and oftentimes directly contrary statements as to the meaning of the duty to bargain.¹⁷ At one extreme is the oft-quoted statement of Senator David I. Walsh, the chairman of the Senate committee:

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into and the bill does not seek to inquire into it.¹⁸

Senator Wagner at one point presents the contrary view:

Just what the duty to bargain collectively implies was clearly set forth by the present National Labor Relations Board in the Houde Engineering Corporation case. . . . There the Board said: "Without the duty the right would be sterile. . . . The incontestably sound principle is that the employer is obligated by the statutes to negotiate in *good faith* with his employees' representatives; to match their proposals if unacceptable, with counter proposals; and to make every reasonable effort to reach an agreement."¹⁹

Ass'n of St. Louis v. Brotherhood of R.R. Trainmen, 318 U.S. 1, 6 (1943), where the court stated:

The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.

13. S. 2926, 73d Cong., 2d Sess. (1934).

14. *Hearings Before the House Committee on Labor on H.R. 6288*, 74th Cong., 1st Sess., at 16 (1935).

15. *Hearings Before the Senate Committee on Education and Labor on S. 1958*, 74th Cong., 1st Sess., at 79 (1935).

16. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (1958).

17. See Smith, *supra* note 8, at 1084-89.

18. 79 CONG. REC. 7660 (1935).

19. 79 CONG. REC. 7571 (1935).

Other statements could be taken from the legislative history in an attempt to shed light upon the scope of the bargaining duty; however, the only definite conclusion which can be reached from these declarations is that section 8(5) was not extensively considered.²⁰ The basic question left largely unanswered by the legislative history was the extent to which the National Labor Relations Board was to intervene in negotiations between employers and unions. The view represented by the Walsh statement would have the Board lead the parties to the bargaining table and do no more; the Wagner declaration, on the other hand, might seem to give the Board a role in dealing with the substantive terms of the bargaining agreement. Between these positions lies a wide expanse of other possible interpretations.

B. *The Duty to Bargain in the Courts: 1935-1947*

Since no clear delineation of the duty to bargain was made by Congress nor were there any definitive precedents under prior acts, the scope of the duty was left to the Board and to the courts. Faced with divergent views in the legislative history, the Board and the courts likewise came to varied results.

In its first annual report the Board characterized its interpretation of the duty to bargain as being based essentially upon the good faith intent of the employer.²¹ But the NLRB continued, in many respects, the policy of the old Board in requiring certain procedures to be followed looking toward the conclusion of a reasonable agreement.²² Although a lack of good faith bargaining was probably apparent in most of the cases in the latter class, it wasn't necessarily the gravamen of the findings.²³

The split within court decisions follows the same lines. The *Jones & Laughlin Steel Corp.* case²⁴ indicates that the means of collective bargaining are to be left to the parties with little government intervention in the process. Representative of the other extreme is the *H. J. Heinz* case²⁵ which seems to indicate that as a matter of law the act requires the reduction of a bargaining agreement to written form. The views indicate the split opinion as to whether the NLRA compelled joint participation or left joint participation to evolve without additional legal sanctions after creating opposing concentrations of economic power.²⁶

But to say that the Board and court decisions can be classified into one of the two categories is an oversimplification. By a cursory reading of the cases one can glean various legal tests for finding a refusal to bargain. Subjective, good faith, reasonable man, objective and per se are examples of terminology used. Which approach was followed has been highly dependent upon the type of activity alleged to be a refusal to bargain.

20. See Smith, *supra* note 8.

21. 1 NLRB ANN. REP. 85-86 (1936).

22. *E.g.*, Atlas Bag & Burlap Co., Inc., 1 N.L.R.B. 292 (1936).

23. *Cf.* Ward, *The Mechanics of Collective Bargaining*, 53 HARV. L. REV. 754 (1940).

24. NLRB v. Jones & Laughlin Steel Corp., *supra* note 12.

25. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941).

26. Cox, *supra* note 8.

When the employer refused to deal with representatives of his employees,²⁷ to discuss the normal subjects of collective bargaining²⁸ or to reduce an agreement to writing,²⁹ no other reasonable inference than a determination not to bargain could be inferred from the activity. The history of collective bargaining in the United States simply indicated that without these prerequisites, collective bargaining would be ineffective.³⁰

Certain other activities, although not destructive of the collective bargaining process in all instances, were highly indicative of themselves that something was "rotten in Denmark." When an employer cut wages and refused to give financial data to justify the wage cut, the NLRB found a refusal to bargain.³¹ Likewise, when the employer changed wage rates without consulting the union representatives, the Board found an evasion of the duty.³² In these and similar circumstances, the activity itself indicated very strongly that the employer had no intent to bargain. But since factual circumstances might alleviate that inference, the Board found it necessary to look to the factual circumstances of the particular case to determine the bargaining intent.³³

After the parties had sat down at the bargaining table, the Board found it more difficult to ascertain whether the employer had an intent to bargain.³⁴ By remaining adamant on proposals and not making counterproposals the employer could effectively stall negotiations.³⁵ To look through shams in this area the "good faith" test came to be extensively used.³⁶ But even here, the failure to adopt certain contractual provisions that were adopted generally by most employers was held to be a refusal to bargain; this conclusion was reached without resort to either the "good faith" test or the employer's intent.³⁷

II. THE DUTY TO BARGAIN; THE TAFT-HARTLEY ACT TO THE PRUDENTIAL DECISION

The Taft-Hartley Act was enacted against this background of varying approaches to the duty to bargain. It is apparent that the majority of the Members

27. *NLRB v. Lettie Lee, Inc.*, 140 F.2d 243 (9th Cir. 1944).

28. *Cf. National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940).

29. *H. J. Heinz Co.*, *supra* note. 25.

30. *Cf. statement by the Court in Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944), that "bargain collectively" as used in the act "has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."

31. *Pioneer Pearl Button Co.*, 1 N.L.R.B. 837 (1936).

32. *Great So. Trucking Co. v. NLRB*, 127 F.2d 180 (4th Cir.), *cert. denied*, 317 U.S. 652 (1942).

33. *M. H. Birge & Sons Co.*, 1 N.L.R.B. 731 (1936).

34. *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939).

35. *NLRB v. Express Publishing Co.*, 111 F.2d 588, 589 (5th Cir. 1940), *modified and rev'd on other grounds*, 312 U.S. 426 (1941).

36. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 685 (9th Cir. 1943).

37. See *Scripto Mfg. Co.*, 36 N.L.R.B. 411, 426 (1941) (demand for a performance bond); *Cf. NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004 (3d Cir. 1941).

of the 80th Congress were satisfied neither with many of the Board's views³⁸ nor with the nonapplicability of the statutory duty to unions.³⁹ The result of this was the enactment of sections 8(d)⁴⁰ and 8(b).⁴¹

By indirection the NLRB had, of its own accord, already formulated a duty to bargain applicable to unions. In the *Matter of Times Publishing Co.*⁴² case, the Board held that the charge that an employer had not bargained in good faith could not be sustained where the union had also refused to bargain in good faith. But section 8(b)(3) was necessary to impose any affirmative sanctions on a union. It did this by making it an unfair labor practice for a labor organization or its agents:

[T]o refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of 9(a).⁴³

A cursory investigation of the legislative history⁴⁴ and the decided cases⁴⁵ would seem to indicate that the duty imposed by section 8(b)(3) was the exact equivalent of 8(a)(5). But to make such a statement may be an oversimplification. Although the same requirements of section 8(d) (discussed below) are imposed on both, it should be remembered that each party enters the bargaining room with different responsibilities, a different catalog of pressure devices and differing aims and objectives. Illustrative of these distinct positions is the authority to conclude an agreement. While it is presumed that the management negotiator has such power,⁴⁶ the employee representative may have to refer the agreement back to the union members for approval.⁴⁷

As mentioned, the other major enactment of the 80th Congress was section 8(d) which sets out the requirements of the duty to bargain for both management and labor. It reads in part as follows:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect

38. The statement by the House Committee Report on the Hartley bill is an example of this opinion: "Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make." H.R. REP. NO. 245, 80th Cong., 1st Sess. 19 (1947).

39. 93 CONG. REC. 613 (1947).

40. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

41. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958).

42. 72 N.L.R.B. 676 (1947).

43. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958).

44. S. REP. NO. 105, 80th Cong., 1st Sess. 22 (1947); H. CONF. REP. NO. 510, 80th Cong., 1st Sess. 43 (1947).

45. National Maritime Union, 78 N.L.R.B. 971, *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950); Chicago Typographical Union, 86 N.L.R.B. 1041, *enforced*, 193 F.2d 782 (7th Cir. 1951), *aff'd*, 345 U.S. 101 (1953).

46. NLRB v. A. E. Nettleton Co., 241 F.2d 130 (2d Cir. 1957); Atlanta Broadcasting Co., 90 N.L.R.B. 808 (1950), *enforced*, 193 F.2d 641 (5th Cir. 1952); *But see* Lloyd A. Fry Roofing Co. v. NLRB, 216 F.2d 273 (9th Cir. 1954), *modified order enforced*, 220 F.2d 432 (9th Cir. 1955).

47. NLRB v. New Britain Mach. Co., 210 F.2d 61 (2d Cir. 1954).

to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .⁴⁸

Whether this section is a codification of existing law and, if so, to what extent, constitutes the major problem of interpretation.

It is clear that some Members of Congress were extremely unhappy with the duty to bargain concept as it had been interpreted by the Board.⁴⁹ The Hartley bill which passed the House defined the requisites of collective bargaining by setting forth a clearly objective standard.⁵⁰ The House committee report interprets the proposal as follows:

The committee therefore takes the question out of the realm of speculation, guess work, and, too often, bias and prejudice, and provides that "free

48. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958). The sixty day notice provisions, also a part of section 8(d), are set out *infra*, note 134.

49. See note 38, *supra*.

50. In the provision which passed the House there was a proposed amendment of the original NLRA in section 2(11) that the terms "bargain collectively" and "collective bargaining" as applied to any disputes between an employer and his employees or their representative, mean compliance with the following minimum requirements:

(A) If an agreement is in effect between the parties providing a procedure for adjusting or settling such disputes, following such procedure.

(B) If no such agreement is in effect, complying with the following procedure:

(i) receipt of any proposal or counterproposal of the other party;

(ii) discussion of such proposal and any counterproposal at a conference with the other party held at a time mutually agreeable to the parties or, in the absence of such an agreement, within a reasonable time after such receipt;

(iii) continued discussion of the matters in dispute at not less than four separate additional conferences with the other party held within the thirty-day period following the initial conference, unless agreement is sooner reached;

(iv) if agreement is reached, putting such agreement in writing;

(v) if agreement is not reached by the end of such thirty-day period, complying with the requirements of clause (vi) before authorizing, conducting, or participating in any lock-out or strike in connection with the dispute;

(vi) . . . [this clause specified certain procedures to be followed before the initiation of a strike or lock-out].

Such terms shall not be construed as requiring that either party reach an agreement with the other, accept any proposal or counterproposal either in whole or in part, submit counterproposals, discuss modification of an agreement during its terms except pursuant to the express provisions thereof, or discuss any subject matter other than the following . . . [detailing the standard subjects of negotiation].

H.R. 3020, 80th Cong., 1st Sess. (1947).

opportunity for negotiation" that the Supreme Court said the act should bring about.⁵¹

The Senate version, which was substantially enacted into law, had no definition of collective bargaining, but rather set out the requirements of section 8(d). This section retained the subjective standard,⁵² rather than disposing of it entirely; but it did impose the explicit requirements of meeting at reasonable times, negotiating in regard to mandatory subjects of bargaining, signing written contracts and giving notice of desired changes in contracts sixty days prior to termination. The Senate committee report and the House Conference Committee report in discussing and interpreting section 8(d) concentrate attention on the sixty day notice provision and the phrase, ". . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."⁵³ Little indication is given that, by the addition of this provision, Congress intended to change other existing precedents interpreting the duty to bargain.⁵⁴

In the *Prudential* case the majority opinion cites⁵⁵ with approval virtually all of the leading post-Taft-Hartley Supreme Court cases interpreting the duty to bargain. Normally little could be made of this procedure, but when the cases take varied approaches, it indicates sanction of the different legal rationales being applied according to the activity involved. Although different approaches are taken, there is accord in these decisions that interpretation of the law must progress upon a case by case approach. But for purposes of analysis and examination, and to see more clearly the status of the duty to bargain concept prior to the Supreme Court's *Prudential* decision, the following breakdown is made.

A. *The Subjective Standard—The Good Faith Requirement*

Although "good faith" terminology has at times been used as an attempted panacea⁵⁶ by the Board to validate other rationales, this test inquires into the subjective intent of the bargaining party. This is in contrast to the per se approach where the Board looks primarily for the occurrence of a particular activity in finding a refusal to bargain. From the earliest decisions of the Board, "good faith" has been utilized in looking through shams and devices to determine whether there was bargaining with a sincere desire to reach agreement.⁵⁷ The concept received explicit codification in section 8(d) of the Taft-Hartley Act which requires the

51. H.R. REP. NO. 245, 80th Cong., 1st Sess. 20-21 (1947).

52. *NLRB v. American Nat'l Ins.*, 343 U.S. 395, 404 (1952).

53. S. REP. NO. 105, 80th Cong., 1st Sess. 24 (1947); H. CONF. REP. NO. 510, 80th Cong., 1st Sess. 34 (1947).

54. 13 NLRB ANN. REP. 59 (1949).

55. *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, rehearing denied, 337 U.S. 950 (1949); *NLRB v. American Nat'l Ins. Co.*, *supra* note 53; *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

56. *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768, 770-71 (1957); *Textile Workers*, 108 N.L.R.B. 743, 746-47 (1954).

57. 1 NLRB ANN. REP. 86-87 (1936).

parties to "confer in good faith with respect to wages, hours and other terms and conditions of employment. . . ."

In the leading case of *NLRB v. American Nat'l Ins. Co.*⁵⁸ the Supreme Court was faced with a major post-1947 interpretation of the good faith standard. In that case the employer had requested a comprehensive management functions clause. The Board attempted to label such a request as a per se violation of the duty to bargain, without reference to the subjective intent of the employer. The Supreme Court, however, reversed and required the Board to make an explicit finding of a lack of good faith prior to finding an 8(a)(5) violation. The Court through Mr. Chief Justice Vinson stated:

The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.⁵⁹

This statement has come to be a rather classic definition of the good faith requirement in the duty to bargain. Even the *Truitt*⁶⁰ decision which follows a virtual per se approach relied upon the statement to some extent.

In *American Nat'l Ins. Co.*, the Court drew heavily upon the legislative history of section 8(d) to give credence to its definition of good faith.⁶¹ It even went so far as to rely upon the legislative history of the House bill which proposed the objective standards of collective bargaining.⁶² But this reliance would seem reasonable in the light of the subsequent history of section 8(d) where particular attention was given to proposals and counterproposals, *i.e.*, "but such obligation does not require either party to agree to a proposal or require the making of a concession. . . ." The Senate had in mind particularly the making of concessions and agreeing to proposals when it lifted up the good faith standard and gave it special recognition in section 8(d).⁶³

It is clear from this decision that in finding refusals to bargain from dealings at the bargaining table, the "good faith" standard is to have increased application. The decision strongly follows the principle enunciated in the *Jones & Laughlin*⁶⁴ case that the mechanics at the bargaining table are to be left largely to the parties with little interference by the Board. In fact the Court stated:

The Act does not compel any agreement whatever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement.⁶⁵

58. 343 U.S. 395 (1952).

59. *Id.* at 409.

60. *NLRB v. Truitt Mfg. Co.*, *supra* note 55.

61. 343 U.S. at 404.

62. H.R. REP. No. 245, 80th Cong., 1st Sess. 19 (1947).

63. S. REP. No. 105, 80th Cong., 1st Sess. 24 (1947).

64. 301 U.S. 1 (1937).

65. 343 U.S. at 402.

Continuing the Court states:

Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position.⁶⁶

Using the rationale of this decision, an explicit finding of lack of good faith at the bargaining table is a condition precedent to a finding of a refusal to bargain based upon the bargaining negotiations.⁶⁷ But where the demands are illegal ones⁶⁸ or where insistence upon a non-mandatory subject of bargaining to an impasse will result in no bargaining upon mandatory subjects,⁶⁹ the Board applies a statutory per se standard rather than the good faith one. Also it must be said that when demands have been so sweeping as practically to preclude any effective bargaining, the Board has not adhered strictly to the subjective standard.⁷⁰ This would seem reasonable, however, in light of the fact that no other reasonable inference could be drawn from such conduct, than that it was not in good faith.

To require a truly subjective standard and appraise accurately the state of mind of a bargaining party is extremely difficult. As the House committee of the 80th Congress noted when it proposed rejection of the good faith standard:

The possibility of error and injustice when three members, none of whom are psychiatrists, undertake to do this is very great, as can be seen from decisions of the Board itself.⁷¹

But the standard evolved is not one which requires the finding of a *mens rea* in the criminal law sense. Rather it requires looking at the "facts of a particular case in the light of practices worked out over the years by management and labor and accepted by them"—a process closer to the reasonable man standard of tort law.⁷²

Evolving a legal test to express the good faith standard is a difficult task. Courts have variously defined it. In *NLRB v. Reed & Prince Mfg. Co.* the good faith standard is defined by enunciating its opposite, that is, as a "desire not to reach an agreement. . . ."⁷³ Professor Archibald Cox, now Solicitor-General of the United States, has submitted the following as a definition of the good faith standard:

66. 343 U.S. at 404.

67. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Houston Chronicle Publishing Co.*, 211 F.2d 848 (5th Cir. 1954).

68. *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782 (7th Cir. 1951), *aff'd on other grounds*, 345 U.S. 100 (1953) (demand for closed shop).

69. *NLRB v. Wooster Div. of Borg-Warner Corp.*, *supra* note 55.

70. *R. L. White v. NLRB*, 255 F.2d 564 (5th Cir. 1958).

71. H.R. REP. NO. 245, 80th Cong., 1st Sess. 20-21 (1947).

72. See Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1435-37 (1958); Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807-32 (1959); Delony, *Good Faith in Collective Bargaining*, 12 U. FLA. L. REV. 378, 421 (1959); Comment, *The Good Faith Requirement in Collective Bargaining*, 43 VA. L. REV. 77, 97 (1957).

73. 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); see also *NLRB v. Stonislaus Implement & Hardware Co.*, 226 F.2d 377 (9th Cir. 1955); *NLRB v. Herman Sausage Co.*, 275 F.2d 229, *rehearing denied*, 277 F.2d 793 (5th Cir. 1960).

The employer (or union) must engage in negotiations with a sincere effort to reach an agreement and must make an earnest effort to reach common ground, but it need make no concessions and may reject any terms it deems unacceptable.⁷⁴

Another type of subjective approach, and one particularly reflected in the earlier cases, is the rationale which the *Prudential* majority opinion refers to by citing the *Phelps Dodge* case.⁷⁵ Where there is a sham or device it has been held that the Board is not without power to look through what on its face appears to be a bona fide effort at collective bargaining. Although the *Phelps Dodge* case dealt with an 8(3) charge that the employer had discriminated by refusing to hire union men, the legal principle enunciated there has had wide application in the field of labor relations. In an opinion by Mr. Justice Frankfurter, the Court stated:

But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaption of means to end to the empiric process of administration.⁷⁶

Aside from the actual negotiations, an ingenious party by a variety of devices could evade the duty to bargain.⁷⁷ In earlier cases the attempts were more flagrant, whereas currently they are more refined. Subcontracting,⁷⁸ shut-downs,⁷⁹ transfer of operations to other plants,⁸⁰ the use of independent contractors,⁸¹ and the use of subsidiaries⁸² are operations that lend themselves to subterfuge possibilities. But in each of these situations before a refusal to bargain charge can be enforced, the Board must adduce substantial evidence to show that there was an intent to evade the duty to bargain.⁸³

Illustrative of the handling of evasion attempts in the duty to bargain area is *NLRB v. Somerset Classics*.⁸⁴ Somerset was engaged in job-lot sewing and completion of dresses for Modern. The two companies had interlocking ownership. When union organizers appeared outside the Somerset plant, a shop forelady and a company officer intimated that the plant might close if union efforts continued.

74. Cox, *supra* note 72, at 1417.

75. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

76. *Id.* at 194.

77. *Omaha Hat Corp.*, 4 N.L.R.B. 878 (1938); *NLRB v. Somerset Shoe Co.*, 111 F.2d 681 (1st Cir. 1940).

78. *Jays Foods, Inc.*, 129 N.L.R.B. No. 70 (1960); *NLRB v. Brown-Dunklin Co.*, 287 F.2d 17 (10th Cir. 1961).

79. *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1954); *Barbers Iron Foundry*, 126 N.L.R.B. 30 (1960).

80. *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957); *But see Mt. Hope Finishing Co. v. NLRB*, 211 F.2d 365 (4th Cir. 1954) (transfer for economic reasons).

81. *Cf. Teamsters Local 310 v. NLRB*, 280 F.2d 665 (D.C. Cir. 1960); see *Houston Chronicle Publishing Co.*, *supra* note 68.

82. *NLRB v. Somerset Classics, Inc.*, 193 F.2d 613 (2d Cir. 1952).

83. *Houston Chronicle Publishing Co.*, *supra* note 67; *But see NLRB v. Coats & Clark, Inc.*, 231 F.2d 567 (5th Cir. 1951), which gives "amplification and modification" to the rule of that case.

84. 193 F.2d 613 (2d Cir. 1952).

Subsequent to the union organizer's claims of majority representation and request for bargaining, Modern's shipments to Somerset came to a halt and Somerset was forced to shut down. The Board looked through the situation and found that the employer had violated 8(a)(1), (3) and (5). The court of appeals enforced the Board order because the evidence "point[ed] far too strongly toward the existence of a concerted plan to thwart the union's ambitions."⁸⁵

In both of these situations, activities at the bargaining table and devices away from it, the Board looks to the party's intent to determine whether there is a sincere desire to bargain.

B. *The Board's Per Se Approach*

Since early in the Board's history there has been a tendency on its part to follow what is known as the per se approach and to hold certain activities to be violative of the duty to bargain without ascertaining actual intent.⁸⁶ Many of these activities could be explained in no other way than that the employer did not desire to bargain with the union.⁸⁷ Because of this and the policy of giving deference to administrative expertise⁸⁸ the courts enforced the findings and rulings of the Board. With these decisions as precedent, there came to be ingrained into the law established doctrines that certain activities would be held refusals to bargain with little reference to actual intent.⁸⁹ Some decisions such as the *Heinz*⁹⁰ case held that certain activity as a matter of law was a refusal to bargain. In other situations the Board "intervened" in the "guise of good faith."⁹¹ The gamut of these approaches has been generalized as being per se.

With the enactment of section 8(d) the power of the Board to enlarge the areas of its administrative rulings became limited by a statutory standard more explicit than the simple one of refusing to bargain. The per se approaches which the Board and the courts used in finding refusals to bargain from refusing to meet at reasonable times,⁹² to bargain about the normal subjects of bargaining⁹³ or to sign written agreements on the completing of negotiations⁹⁴ were given explicit statutory effect in section 8(d).⁹⁵

85. *Id.* at 615.

86. See Ward, *The Mechanics of Collective Bargaining*, 53 HARV. L. REV. 754 (1940).

87. See *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941).

88. *Superior Engraving Co. v. NLRB*, 183 F.2d 783 (7th Cir. 1950), *cert. denied*, 340 U.S. 930 (1951).

89. For example note the reliance of the Court in *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 225 (1949), upon *May Dep't Stores Co. v. NLRB*, 326 U.S. 376 (1945).

90. *H. J. Heinz Co. v. NLRB*, *supra* note 87.

91. See note 38 *supra* and materials cited note 53 *supra*.

92. *NLRB v. Lettie Lee, Inc.*, 140 F.2d 243 (9th Cir. 1944).

93. This is simply a reiteration of the provisions of § 9(a) requiring bargaining on the mandatory subjects.

94. See *H. J. Heinz Co. v. NLRB*, *supra* note 87.

95. See Delony, *supra* note 72, at 391.

But there remained certain areas in which the Board had previously proceeded on a type of per se approach which received no mention in section 8(d). What was to happen to them? Would the legal standards in those areas remain the same or would the good faith rationale be extended to cover those activities?

Two areas are of particular note: (1) the duty to furnish information and (2) unilateral action during the bargaining period. Landmark decisions have been handed down in each area by the Supreme Court since 1947, but the ramifications and the exact legal standards for each are far from clear.

In the *Truitt* case⁹⁶ Mr. Justice Black, speaking for the majority, laid down what was essentially a per se rationale for dealing with the "duty" to furnish information although he expressly denied doing so.⁹⁷ In that case the union had demanded a ten cents an hour increase and the company had offered two and one-half cents. The company stated that it couldn't afford a larger increase or it would have to go out of business. The union demanded financial records to back up the company claims and was refused. The Board found a violation of section 8(a)(5) on the basis of the refusal to furnish information; the court of appeals denied enforcement; and the Supreme Court upheld the Board's finding. The Court stated:

Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of accuracy.⁹⁸

This type of reasoning would seem to indicate that the concept of good faith bargaining has certain prerequisites with little regard for the bargainer's intent. Although not setting down a definitive legal standard, the *Truitt* decision is indicative of an intent, by both the NLRB and the Supreme Court, to give more emphasis to the activity itself rather than upon whether it reflects an intent not to bargain with a sincere desire to reach an agreement.

In *Truitt* the Court relied heavily upon earlier precedents going back to the *Pioneer Pearl Button* case⁹⁹ decided by the Board in its first year of operation following the enactment of the Wagner Act. From this "settled" law it discerned a precedent for requiring an employer who pleads financial inability to furnish information to back up his claim of poverty.¹⁰⁰

Following *Truitt*, and using it and *Universal Camera*¹⁰¹ as authority, the Court

96. NLRB v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956).

97. *Id.* at 153.

98. *Id.* at 152-53.

99. 1 N.L.R.B. 837 (1936).

100. It should be noted that subsequent Board practice has not enlarged the scope of this decision. In *Pine Industrial Relations Comm., Inc.*, 118 N.L.R.B. 1055 (1957), *aff'd*, *International Woodworkers v. NLRB*, 263 F.2d 483 (D.C. Cir. 1959), the Board refused to require the employer to furnish information when the defense was not one squarely on financial inability to pay.

101. *Universal Camera Corp. v. NLRB*, 340 U.S. 374 (1951), which held that for findings of the Board to be enforced, they must be supported by substantial evidence on the record considered as a whole.

in a subsequent per curiam decision upheld a Board finding of a refusal to bargain on the basis of a company refusal to furnish wage and payroll information.¹⁰² The Court merely said:

The Board acted within its allowable discretion in finding that under the circumstances of this case failure to furnish the wage information constituted an unfair labor practice.¹⁰³

It would seem fairly clear therefore that the *Truitt* decision has been embedded into the annals of American labor law, although the *Prudential* case indicates that *Truitt* may be the high water mark for decisions of its type under the present act.

Prior to the enactment of the Taft-Hartley Act, unilateral changes in wages, hours or other conditions of employment by the employer without consultation with the bargaining agent of the employees was consistently held to be a refusal to bargain.¹⁰⁴ Unilateral action has also been found as the basis for an independent 8(1) violation.¹⁰⁵ Early unilateral action cases grew out of an almost outright refusal to meet and treat with unions, activity which was in effect directly contravening the statutory language of section 9(a), requiring recognition of certified bargaining representatives. Application of the unilateral action theory to find a refusal to bargain was also used where the company was obviously trying to evade the purposes of the act. For instance in *Inland Lime & Stone Co. v. NLRB*,¹⁰⁶ when the employer announced a vacation rule two days before bargaining was to begin when that was to be the major topic of bargaining, the court of appeals stated:

This action was more than merely tactless. It evidenced a wilful and deliberate contempt for the whole plan of collective bargaining. It was fairly inferable that the employer, by this action, intended to humiliate the Union representatives and discredit them in the eyes of their fellow employees.¹⁰⁷

Then in 1945 the Supreme Court decided one of the leading cases in this area, *May Dep't Stores v. NLRB*.¹⁰⁸ There the employer sought authority of the War Labor Board for a general wage increase applicable to some 5,000 employees including a small group for whom a bargaining representative had been certified by the NLRB. Although such action was publicly announced to the employees, it was not taken up with the bargaining agent of the small group. Proceeding on a per se approach the Board found and the Supreme Court affirmed a finding of a violation of section 8(1):

102. *NLRB v. F. W. Woolworth Co.*, 352 U.S. 938 (1956).

103. *Ibid.*

104. On unilateral action generally, see Bowman, *An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 VAND. L. REV. 487 (1955); Lang, *Unilateral Changes by Management as a Violation of the Duty to Bargain Collectively*, 9 Sw. L.J. 276 (1955).

105. *May Dep't Stores v. NLRB*, 326 U.S. 376 (1945).

106. 119 F.2d 20 (7th Cir. 1941).

107. *Id.* at 22.

108. 326 U.S. 376 (1945).

Such unilateral action minimizes the influence of organized labor. It interferes with the right of self organization by emphasizing to the employees that there is no necessity for organized labor.¹⁰⁹

The "concurring in part" opinion pointed out that the Board made no finding that in this unilateral action there was an intent to interfere. However, it should be noted that the unilateral action was the basis for an 8(1) violation and only derivatively affected the 8(5) finding later in the opinion. This could explain the difference in approach, although this distinction has often been overlooked in subsequent decisions.¹¹⁰

The legislative history of the Taft-Hartley Act makes no mention of the *May Dept Stores* decision and in fact does not discuss unilateral action relative to the enactment of section 8(d).¹¹¹ It would seem therefore that section 8(d) was not meant to alter the existing law in regard to unilateral action and the duty to bargain.

In the leading post-Taft-Hartley decision on unilateral action as a refusal to bargain, the Supreme Court in *NLRB v. Crompton-Highland Mills*,¹¹² approved the decision of the Board in finding an 8(a)(5) violation, but the exact legal rationale of the Court is hard to discern. During negotiations the company had offered a counter-proposal of a one to one and one-half cent an hour increase, but the bargaining reached an impasse on December 19. Then on January 1 the company unilaterally instituted a two cents an hour increase without consulting the union. Mr. Justice Burton, speaking for the Court, stated:

The need for this order depends in part upon the Board's finding that the action by the employer, on January 1, 1946, taken so soon after the meeting of December 19, 1945, showed that "the respondent was not acting in good faith during the negotiations, and is manifestly inconsistent with the principle of collective bargaining." 70 N.L.R.B. at page 207.¹¹³

The interpretation of this decision has been varied. One need only look at the two opinions in the *Prudential* case. The majority opinion deems it an essentially per se approach,¹¹⁴ whereas the separate opinion states that it applies the good faith rationale.¹¹⁵ The Board itself has tended toward the per se view.¹¹⁶

109. *Id.* at 385.

110. See note, 71 HARV. L. REV. 502, 508-09 (1958).

111. See NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 2 Vols. (1948).

112. 337 U.S. 217, rehearing denied, 337 U.S. 950 (1949).

113. *Id.* at 225.

114. "For example, an employer's unilateral wage increase during the bargaining processes tends to subvert the union's position as the representative of the employees in matters of this nature, and hence has been condemned as a practice violative of this statutory provision." 361 U.S. at 485.

115. "The *Crompton-Highland* decision rested not on approval of a per se rule that unilateral changes of the conditions of employment by an employer during bargaining constitute a refusal to bargain, but upon the inferences of a lack of good faith which arose from the facts, among others, that the employer instituted a greater increase than it had offered the union and that it did so without con-

Although in some instances it can be said that the courts apply the good faith standard in regard to unilateral action, good faith is not really a critical part of a refusal to bargain finding. Just as with a refusal to furnish information, the gravamen of the offense is not a lack of good faith, but the activity itself, although in most cases in both of these areas an element of actual bad faith could be found.

The courts in these areas have been disposed to follow pre-Taft-Hartley precedent and require little more of the Board than prior to the 1947 revisions.¹¹⁷ It would seem therefore that section 8(d) has been interpreted to encompass these situations of per se findings rather than requiring application of the subjective standard. Before any definite conclusions are reached, though, it should be reiterated that the per se and the good faith standards as they have been applied are not clear and definable, but are phrases used to encompass a wide variety of overlapping standards.

C. *The Statutory Standard*

The Labor Management Relations Act requires the bargaining parties to measure up to certain standards regardless of individual intent and imposes upon the Board the duty to enforce the standards. Section 8(a)(5) and 8(b)(3) violations may be found either by direct violations of the requirements¹¹⁸ or by acts which, though not direct, of necessity contravene the statutory provisions.¹¹⁹ It is beyond the scope of this comment to catalogue extensively the various decisions on activities which directly violate or contravene the statutory provisions of the act; rather a brief discussion of sections 8(d) and 9(a), upon which these are based, will suffice to illustrate the approach.

Section 8(d) requires the parties to meet at reasonable times, to sign a written agreement, to bargain "with respect to wages, hours, and other terms and conditions of employment" and to follow certain procedures prior to the expiration of a contract.¹²⁰ Section 9(a) requires bargaining between the employer and the "exclusive bargaining representative" selected by a majority of the employees.¹²¹

Section 9(a), although changed to an extent by the Taft-Hartley Act in regard to the presentation of grievance procedures, is in other respects unchanged.¹²² An outright refusal to bargain with the bargaining representative certified by the

sulting the union." 361 U.S. at 509. See also *NLRB v. Katz*, 289 F.2d 700 (2d Cir. 1961) (good faith standard applicable to unilateral action).

116. See 14 NLRB ANN. REP. 75 (1949).

117. See cases cited notes 89 and 99 *supra*.

118. See *NLRB v. Harris-Woodson Co.*, 179 F.2d 720 (4th Cir. 1950) (statute held to require employer to bargain with certified representative even if local changes international affiliation).

119. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

120. 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).

121. *Ibid.*

122. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 46 (1947).

Board would patently be a refusal to bargain.¹²³ It is also a refusal to bargain by demanding, after rejection by the other bargainer, that terms of employment of employees in another unit be included under the bargaining agreement.¹²⁴ A refusal to deal with a union because of an alleged loss of majority may also be a refusal to bargain under the doctrine which requires a Board certification to be honored for a reasonable time.¹²⁵ Attaching conditions not in the nature of tentative proposals to the commencing of negotiations may be held to violate directly the statutory bargaining requirement.¹²⁶ A refusal to bargain over subjects of bargaining held to be mandatory by the Board and the courts has consistently been deemed an unfair labor practice regardless of the intent of the parties.¹²⁷

By way of statutory interpretation the Supreme Court has held that a refusal to bargain may be predicated upon "insistence" to an impasse on non-mandatory subjects of bargaining with the resultant effect of being unable to bargain as to mandatory subjects.¹²⁸ In the *Borg-Warner* case,¹²⁹ cited with approval in the *Prudential* decision, the company insisted on a "ballot" clause calling for a pre-strike secret ballot and a "recognition" clause which would recognize the local UAW union rather than the International which had been certified by the Board. The Court affirmed the Board's 8(a)(5) finding and stated, relying on *American Nat'l Ins. Co.*,¹³⁰ that when the parties are bargaining, neither is required to yield; however, the Court classified these as non-mandatory subjects of bargaining and commented:

We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.¹³¹

Although this case could perhaps be classified as a Board determination of a per se violation such as the *Truitt* decision, the Court bases its decision more upon statutory interpretation rather than purporting to give the Board broadened administrative power.

In requiring the parties to meet at reasonable times and to sign written con-

123. *Scobell Chem. Co. v. NLRB*, 267 F.2d 922 (2d Cir. 1959); *NLRB v. Scott & Scott*, 245 F.2d 926 (9th Cir. 1957); *NLRB v. United States Cold Storage Corp.*, 203 F.2d 924 (5th Cir.), *cert. denied*, 346 U.S. 818 (1953).

124. *Douds v. International Longshoremen's Ass'n*, 241 F.2d 278 (2d Cir. 1957).

125. *Brooks v. NLRB*, 348 U.S. 96 (1954).

126. *American Laundry Mach. Co.*, 76 N.L.R.B. 981 (1948), *enforcement granted*, 174 F.2d 124 (6th Cir. 1949) (per curiam).

127. *Allen Bradley Co. v. NLRB*, 286 F.2d 442 (1961) (employer demand for provision limiting union's right to discipline or fine its members for exercise of rights guaranteed by the NLRA); *Richfield Oil Co. v. NLRB*, 231 F.2d 717 (D.C. Cir.) *cert. denied*, 351 U.S. 909 (1956) (stock purchase plan); *W. W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949) (group insurance plan); *Inland Steel v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (pension plan); see also *Local 24, Int'l Bhd. of Teamsters, AFL-CIO v. Oliver*, 362 U.S. 605, *rehearing denied*, 363 U.S. 858 (1960) (sub-contracting).

128. *NLRB v. Wooster Div. of Borg-Warner Corp.*, *supra* note 119.

129. *Ibid.*

130. 343 U.S. 395 (1952).

131. 356 U.S. at 349.

tracts if agreement is reached, section 8(d) is but a codification of the law as developed under the Wagner Act.¹³² Section 8(d) reiterates substantially the mandatory subjects of bargaining under 9(a).¹³³ One other field where refusals to bargain are predicated upon statutory interpretation is the notice provision requirement of section 8(d).¹³⁴ If a party to a contract desires to alter an existing contract, the statute requires that that party give notice that it desires to terminate or modify the contract a least sixty days prior to its expiration date. Failure to do this or comply with the other procedural provisions relative to notice is deemed a refusal to bargain.¹³⁵ The courts have interpreted these provisions rather strictly with a view to restricting the finding of unfair labor practices.¹³⁶

D. *The Use of Economic Pressures and the Duty to Bargain*

In 1954 the Board definitively entered into a new area of enforcement. In the *Personal Prods.* case¹³⁷ the Board held that slow downs and harassing tactics

132. See cases and materials cited notes 92-95 *supra*.

133. See cases cited note 127 *supra*.

134. "Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification; (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications; (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

135. *E.g.*, *International Harvester Co.*, 77 N.L.R.B. 242 (1948); *cf.* *United Elec., Radio & Mach. Workers v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956).

136. See *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, *rehearing denied*, 351 U.S. 980 (1956).

137. *Textile Workers*, 108 N.L.R.B. 743, *enforced in part, set aside in part*, 227 F.2d 409 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 864 (1956).

sponsored by the union were violations of the union's duty to bargain. The harassing tactics consisted of refusals to work overtime and on special schedules and the practice of taking extended rest periods. This all came at a time following extended negotiations and at the employer's peak season of sales. In holding the activities violative of the duty to bargain, the Board stated:

We think it clear that such unprotected harassing tactics were an abuse of the Union's bargaining powers—"irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest"—which impaired the process of collective bargaining that Congress intended not only to encourage but protect.¹³⁸

However, the court of appeals reversed this ruling and reasoned:

There is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants. . . . [N]o inference of failure to bargain in good faith could have been drawn from a total withholding of services, during negotiations, in order to put economic pressure on the employer to yield to the Union's demands. As a simple matter of fact . . . no such inference can be drawn from a partial withholding of services at that time and for that purpose.¹³⁹

Thus were enunciated the positions which culminated in the *Prudential* case.¹⁴⁰

Prior to the *Personal Prods.* case the Board had become increasingly wary of certain union pressures.¹⁴¹ In the *Phelps Dodge Copper Prods. Corp.* case,¹⁴² the union sought to implement its bargaining position by directing employees to slow down production and refuse to do overtime work. Because of these activities, the employer refused to bargain and the union filed 8(a)(5) charges with the Board. The Board sustained the position of the employer and stated that the economic pressures "negated the existence of honest and sincere dealing in the Union's contemporaneous request to negotiate." Subsequently the holding was reaffirmed in *Valley City Furniture Co.*¹⁴³

Subsequent to the *Personal Prods.* case the Board refused to heed the warning

138. 108 N.L.R.B. at 746-47.

139. 227 F.2d at 410.

140. It should be noted that Mr. Justice Frankfurter's separate opinion in the *Prudential* case takes a middle ground.

141. Cf. *International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, *rehearing denied*, 336 U.S. 970 (1949) (harassing tactics held unprotected to the extent, at least, of allowing state regulation).

142. 101 N.L.R.B. 360 (1952).

143. 110 N.L.R.B. 1589 (1954). Although these cases are on the other side of the problem and seem to relieve the employer of the duty to bargain when the union engages in harassing tactics, the basic rationale in finding that the union's action negates the existence of sincere collective bargaining is equally applied in the instance where the union tactics are held to constitute a union refusal to bargain. Since both opinions in the *Prudential* case disapproved of the existing Board approach applied to find a union refusal to bargain, it is difficult to see how the per se rationale in *Phelps Dodge Copper Prods. Corp.* on essentially the same problem can have a continuing validity. See Comment, *Employer Responses to Partial Strikes: A Dilemma?*, 39 TEXAS L. REV. 198, 206-07 (1960).

of the Court of Appeals for the District of Columbia. In the *Boone County* case¹⁴⁴ and in the *Prudential* decision the Board again attempted to label particular economic weapons as inconsistent with the duty to bargain. In each case the Court of Appeals for the District of Columbia refused to enforce the orders.

In the *Boone County* case¹⁴⁵ the union sponsored a strike following the decision of an arbitrator that two employees were not entitled to shift seniority. The Board in reliance upon its decision in *Personal Prods.* reasoned that all unprotected activity which occurs within the bargaining context is indicative of a refusal to bargain in good faith. The union petitioned the court for review to set aside the Board order and the petition was granted. Although disapproving the Board's theory, the court set aside on the different ground that there was no breach of contract involved.¹⁴⁶

E. The Prudential Decision

In the *Prudential* case¹⁴⁷ the district agents in thirty-five states for the Prudential Insurance Company had been covered since 1949 by bargaining agreements with the Insurance Agents' International Union. In January 1956 the parties began bargaining on a new contract since the old one would expire in March; however, bargaining continued for six months until a new contract was agreed upon on July 17, 1956. Although the negotiations were prolonged, there is nothing in the record to disclose that they were not conducted in good faith other than the complained of use of harassing pressure tactics.

After the expiration of the old contract the union inaugurated its previously announced threat of "Work Without a Contract" if agreement had not been reached prior to the old contract's termination. This program consisted of harassing slow-down tactics designed to bring pressure to bear upon the employer.¹⁴⁸

The employer filed an unfair labor practice charge with the Board. The trial examiner considered himself bound by the court of appeals decision in the *Personal Prods.* case and did not find a refusal to bargain; however, the Board adhered to its decision in *Personal Prods.* and found an 8(b)(3) violation. The Board followed the per se approach.¹⁴⁹ The Board's approach, although in some degree analagous

144. International Union, United Mine Workers, 117 N.L.R.B. 1095 (1957), *set aside*, 257 F.2d 211 (D.C. Cir. 1958); see also Amalgamated Lithographers of America, Local 12, 124 N.L.R.B. 298 (1949) (harassing conduct violative of section 8(b)(3)).

145. *Ibid.*

146. The court of appeals reasoned that the strike was not against the agreement and not an attempt to modify it, but rather an attempt to obtain what the agreement permitted them to seek. But it should be noted in regard to this point that by an equally divided court, the Supreme Court, 361 U.S. 459, 464 (1960), affirmed a decision contra on this point, *United Mine Workers v. Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958).

147. 361 U.S. 477 (1960).

148. See description of practices, *id.* at 480-81.

149. The language of the Board might be conducive, at particular points, to a good faith construction. However, in its entirety the case reveals a strong per se approach.

to the per se rationale approved in the *Truitt*¹⁵⁰ decision, is much stronger. In *Truitt* the Court, although looking primarily at the action of refusing to furnish information, also took into account the facts of the particular case. Here, the union's intent at the bargaining table was irrelevant.

The Court of Appeals for the District of Columbia and the Supreme Court both rejected the Board's approach. Although two divergent opinions were written by the Supreme Court, there was unanimity that the Board's approach was wrong. It would seem that a rejection of the Board rationale was the only logical conclusion that could have been reached.¹⁵¹ The opinions are of extreme importance as indicative of the course of future decisions.

The majority opinion by Mr. Justice Brennan for himself and five other Justices not only rejects the Board approach, but also proceeds to hold the good faith legal standard inapplicable to the situation.¹⁵² The opinion's approach is analogous to that of the *Borg-Warner* case.¹⁵³ In both cases section 8(d) in terms neither approved nor prohibited the Board's action. By statutory implication though the Court in *Borg-Warner* said the section 8(d) requirement of bargaining in regard to mandatory subjects could not be accomplished if demands for non-mandatory subjects took bargaining to an impasse. Here the Court said that the collective bargaining contemplated by section 8(d) would be ineffective if the Board by indirection was allowed to place sanctions upon the major motive force to the making of agreements, *i.e.*, economic pressures. It reasoned that economic pressures have always been part and parcel of free collective bargaining,¹⁵⁴ and then it examined the Wagner and Taft-Hartley Acts and found no intent to change this policy. Rather the opinion sees good faith bargaining and the use of economic pressures existing "side by side" and holds that both must remain inviolate under our present statutory scheme of free collective bargaining.¹⁵⁵

The opinion indicates that no probative inference can be drawn from the use of economic pressures alone as indicative of lack of good faith. In this the majority would seem to be sound, especially since it is the legislature and not the

150. 351 U.S. 149 (1956).

151. See Comment, 62 W. VA. L. REV. 410 (1960).

152. "Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons. . . . But the truth of the matter is that at the present stage of our national labor relations policy, the two factors—necessity for good faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree to one's terms—exist side by side." 361 U.S. at 489.

153. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, *supra* note 119.

154. *Cf. Vegelahn v. Guntner*, 167 Mass. 92, 104, 44 N.E. 1077, 1079 (1896) (dissenting opinion by Holmes, J.):

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a free and equal way.

155. See note 152 *supra*.

Board which circumscribes certain union pressures. The Wagner Act contemplated the use of economic pressures as the basic motive power to the reaching of agreements. Sections 7¹⁵⁶ and 13¹⁵⁷ were enacted to give protection to certain economic pressures to insure that unions would have some weapons at their disposal. It was not intended that a doctrine of *expressio unius* should be applied here to hold that activities not protected were therefore prohibited; rather those activities were simply without Board protection.¹⁵⁸ By the enactment in 1947 of the 8(b)(4)¹⁵⁹

156. 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

157. 61 Stat. 151 (1947), 29 U.S.C. § 163 (1958).

158. A possible alternative rationale in the *Prudential* case would have been for the Court to have held the slowdown tactics to be protected by either section 7 or 13 of the LMRA and therefore not subject to regulation by the Board. Section 7, protecting "concerted activities," and section 13, stating, "Nothing in this Act . . . shall diminish the right to strike," were a part of the original NLRA. However in early decisions the Supreme Court held that protected activities did not include a sitdown strike, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), a breach of contract, *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1949), or an activity unlawful under another statute, *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942). Apparently these exceptions were made implicit in the statute by re-enactment in 1947. See H.R. REP. No. 510, 80th Cong., 1st Sess. 38 (1947). Another section, perhaps relevant to the present problem, is section 501(2) added by the Taft-Hartley Act which defines "strike" as follows: "The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees." 61 Stat. 161 (1947), 29 U.S.C. § 142 (1958).

In *International Union, U.A.W. v. Wisconsin Employment Relations Bd.* (the *Briggs-Stratton* case), 336 U.S. 245, *rehearing denied*, 336 U.S. 970 (1949), the Court held in a five to four decision that the stratagem of repeated work stoppages was not protected by the LMRA so as to preclude regulation by a state labor board. (Justices Douglas and Black in one dissent contended that section 13 should be read in conjunction with section 7 so as to preclude regulation by the state board.) Mr. Justice Brennan in *Prudential*, 361 U.S. at 493, n. 23, explicitly leaves open the question as to whether the activities are protected so as to preclude Board action and assumes *arguendo* that they are unprotected. He notes, however, that the approach taken in *Briggs-Stratton* to state-federal preemption is "no longer of general application." He further states that *Briggs-Stratton* decided that the section 501(2) definition of strike had reference only to 8(b)(4) violations or in the alternative that section 13 was not an inhibition on state power; however he states that "perhaps this element of the *Briggs-Stratton* decision has become open also . . ." Mr. Justice Frankfurter contends that the section 50(2) definition does have reference to section 13, but that the 1947 addition of the clause—" . . . or to affect the limitations or qualifications on that right"—negates any expansive effect on section 13 and rather gives the Board the right to place a "limitation" that the union will use economic weapons in good faith. 361 U.S. at 510-13.

After this decision the status of slowdowns and partial strikes as protected or unprotected activity is very unclear. The holding in *Briggs-Stratton* is certainly undermined, and certain activities heretofore thought to be unprotected may be found to be protected either by section 7 or section 13 or both. It is submitted that at least partial strikes which are less disruptive than total strikes, *Cf. Honolulu Rapid Transit Co.*, 107 N.L.R.B. 1547 (1954) (week-end public transit strike held to be a partial strike and therefore unprotected), may be held to be protected activity.

For commentaries on protected activities and the *Prudential* case, see Com-

provisions relative to secondary boycotts, Congress did not alter its basic policy of the free use of pressure devices, but instead only prohibited secondary boycotts. Likewise there is a similar congressional intent in the Labor-Management Reporting and Disclosure Act of 1959 with the tighter secondary boycott provision¹⁶⁰ and the addition of section 8(b)(7)¹⁶¹ to regulate recognition picketing. These congressional enactments evidence a purpose to outlaw only certain pressure tactics rather than giving the Board a broad roving power to outlaw others by direction or indirection.¹⁶²

Mr. Justice Frankfurter takes issue with the majority opinion and contends that a subjective standard should be applied to the union conduct. Consequently he would remand the case for a Board determination as to whether there was a lack of good faith on the part of the union. In his opinion he contends that harassing activities should be utilized as evidence along with all other evidence to determine if the totality of the party's conduct evinces a lack of good faith.¹⁶³ If the majority opinion means that the Board in investigating a refusal to bargain charge is precluded from any consideration of the economic pressures in context, then Mr. Justice Frankfurter's point would seem to be well taken. But the majority opinion would seem to be limited to a holding that the Board may not draw inferences from economic pressures alone, nor may it predicate its finding largely upon such pressures. It would seem doubtful if the majority intended to preclude consideration of harassing tactics used for no greater purpose than to gain a total view of the situation and buttress other evidence of conduct indicative of a lack of good faith to which such pressures have a direct relation.

Not only does the majority opinion indicate that the Board may not predicate a refusal to bargain upon union pressures, but neither may it predicate such a finding on management ones.¹⁶⁴ In the past lock-outs have generally been held to be unfair labor practices; however, in most instances these have been 8(a)(1) or (3) violations rather than 8(a)(5).¹⁶⁵ The theory is that they interfered with or discriminated in regard to rights of organization and collective bargaining as guaranteed in section 7 of the act. However, in some instances the Board has found 8(a)(5) violations.¹⁶⁶

ment, *supra* note 145. On partial strikes generally, see Mittenthal, *Partial Strikes and National Labor Policy*, 54 MICH. L. REV. 71 (1955); Kelsay, *Partial Strikes*, 6 N.Y.U. ANN. LAB. CONF. 281 (1953).

159. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4) (1958).

160. 73 Stat. 542 (1959), 29 U.S.C. § 158 (1958).

161. 73 Stat. 544 (1959), 29 U.S.C. § 160 (1958).

162. 361 U.S. at 498.

163. 361 U.S. at 508.

164. "It is quite another matter, however, to say that the Board has been afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful." 361 U.S. at 498. (Emphasis added.)

165. *Cf.* NLRB v. Local 449, Teamsters Union, AFL, 353 U.S. 87 (1957) (defensive lock-out to union whipsaw strike held to be justified and therefore no 8(a)(1) or (3) violations).

166. See generally on lockouts, Daykin, *Legality of Lockouts Under the Taft-Hartley Act*, 9 LAB. L.J. 136 (1958); Meltzer, *Single-Employer and Multi-Em-*

With the *Prudential* decision now on the books, further findings of 8(a)(5) violations on the basis of lock-outs may be greatly limited. Precluded in the future would seem to be the rationale of an 8(a)(5) finding as in *Quaker State Oil Ref. Co. v. NLRB*.¹⁶⁷ There the company and union were in the process of negotiation and there was no threat of strike action. One day after the contract expired, the company locked out one of its plants for what was contended to be protective plant measures. The Board found, though the lock-out was for the purpose of bringing economic pressure, 8(a)(1), (3) and (5) violations. In affirming the finding of the Board, the court quotes from the Board opinion in regard to the refusal to bargain charge:

In addition, the Board has held that such conduct subjects the union and the employees they represent to unwarranted and illegal pressure and creates an atmosphere in which the free opportunity for negotiation contemplated by Section 8(a)(5) does not exist. . . . We further find that such conduct was the antithesis of good faith bargaining contemplated by Section 8(a)(5).¹⁶⁸

This is the exact type of reasoning which the Board employed in the *Personal Prods.* and *Prudential* decisions, so its validity would seem to be greatly weakened.

Following the Supreme Court decision in the *Prudential* case, the ninth circuit in *NLRB v. Great Falls Employers' Council, Inc.*¹⁶⁹ held the rationale of the *Prudential* case equally applicable to an employer unfair labor practice and quoted extensively from the decision to back up its refusal to grant not merely an 8(a)(5) enforcement order, but rather an 8(a)(1) and (3) order. That decision seemed to give blanket approval to the use of economic pressures by management. This may be too broad, but its decision, *a fortiori*, would seem to preclude the finding of an 8(a)(5) violation on the basis of the use of economic pressure alone.

But even though lock-outs used for purely economic pressure reasons may not be violative of the duty to bargain, it is certainly too broad a statement to say that lock-outs may never be the basis for a finding of an 8(a)(5) violation. Whenever the lock-out takes on discriminatory aspects or an anti-union motivation, there is an entirely different case. It is doubtful that the *Prudential* case has any effect upon the rationale utilized in such cases as *Somerset Classics*.¹⁷⁰ Where there is a device to evade treating with a union, a finding of a refusal to bargain may also be justified on the broader basis of refusing to "meet at reasonable times."¹⁷¹

ployer Lockouts Under the Taft-Hartley Act, 24 U. CHI. L. REV. 70 (1956); Koretz, *Lockout Revisited*, 7 SYRACUSE L. REV. 263 (1956); Koretz, *Legality of the Lock-out*, 4 SYRACUSE L. REV. 251 (1953).

167. 270 F.2d 40 (3d Cir. 1959); see also *Dalton Brick & Tile Corp.*, 126 N.L.R.B. 473 (1960).

168. 270 F.2d at 44.

169. 277 F.2d 772 (9th Cir. 1960).

170. 193 F.2d 613 (2d Cir. 1952).

171. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

CONCLUSION

In its most narrow sense, the *Prudential* decision merely precludes the application of a strict per se approach by the NLRB in holding unprotected union economic pressures to be violative of the duty to bargain.¹⁷² On this both opinions are in accord. It is also probable that the decision precludes drawing inferences of bad faith from the use of economic pressures and basing an 8(b)(3) violation either directly or indirectly thereon. It remains to be seen, however, if the Board can utilize the use of unprotected economic pressures by the union as evidence in conjunction with other union activities to predicate a finding of a lack of good faith bargaining.

The wide sweep of the opinion would also seem to preclude a similar Board approach to employer economic pressures being found as refusals to bargain under section 8(a)(5). But decisions in this area will be more difficult because of the fine line which must be drawn between activities which are purely to bring economic pressure and those which have as their aim an anti-union motivation.

In the closing paragraph of the majority opinion there is a reiteration of the contention that if regulation of economic pressures is to be had it must be by congressional rather than judicial action. The finality of its tone would indicate that the Court will be extremely leery of any Board attempts to proscribe economic pressures by direction or indirection. Sections 8(b)(4) and 8(b)(7) now stand as regulations upon union activities. It would seem that if the national policy demands any further regulation of specific pressures, an objective standard or some other explicit directive would have to be adopted.

As to the decision's effect upon the broad concept of the duty to bargain, it would seem to leave intact the existing decisions of the Supreme Court since it cites a wide gamut of them with approval. The decision may be indicative of a Court resolve to look more closely at the statutory history and rely more upon statutory interpretation to determine the extent of the Board's administrative power to find refusals to bargain. The Court, by striking down a per se approach developed in the post-Taft-Hartley era, seems to be telling the Board that the *Truitt* decision was the high water mark of the per se approaches, and only in those areas where precedents were well established prior to the Taft-Hartley codification of the duty to bargain in section 8(d) will the Court allow the continued utilization of a per se approach. But before any definite conclusions are reached, it should be remembered that in the area of duties to bargain the Court has repeatedly indicated that it is going to follow a case by case approach.

GEORGE A. BARTLETT

172. See *Electrical Workers, IUE*, 127 N.L.R.B. No. 174 (1960) (intermittent work stoppages not violative of 8(b)(3)).