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The Obligation to Bargain in Good Faith

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THE OBLIGATION TO BARGAIN IN GOOD FAITH

by
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IT MAY be predicted with a reasonable degree of confidence that two of the most important questions involved in the duty to bargain litigation of the sixties will be:

1. To what extent will the new issues which are likely to arise be subject to mandatory bargaining?—a new phase of an old question, in which "job security"[1] and "internal union affairs"[2] are likely to be in the forefront.

2. Insofar as such demands are held to be subject to voluntary bargaining, what role will the government play?—which, in turn, involves an analysis of the *Borg-Warner*[3] and *Insurance Agents'*[4] cases.

That the above questions are likely to receive primary attention in the years immediately ahead is not to say that all other questions will be unimportant. By way of example, roving reconnaisance parties will surely continue to probe the front with respect to kinds of information which must be furnished in bargaining,[5] and conclusions as to whether a given attitude or approach to collective bargaining constitutes "good faith" will always have to be drawn.[6] Nevertheless, the important policy question appears to be what role the government is going to play in shaping collective bargaining, and that question resides within the suggested framework.

An elaborate history of the origin and development of the good faith bargaining requirement would contribute little to the present analysis. A brief history is, however, both warranted and necessary.

I. A Look at the Past

Though the Wagner Act was introduced in the 74th Congress without subsection 5 of Section 8, the language was added by the

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[1] Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960).

[2] Allen Bradley Co. v. NLRB, 286 F.2d 442 (7th Cir. 1961).

[3] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1957).

[4] NLRB v. Insurance Agents' Int'l Union, AFL-CIO, 361 U.S. 477 (1960).

[5] Sylvania Elec. Products, Inc. v. NLRB, 48 L.R.R.M. 2313 (1st Cir. 1961).

[6] International Typographical Union, AFL-CIO v. NLRB, —U.S.—, 81 Sup. Ct. 855 (1961).

Senate Committee after Lloyd K. Garrison, chairman of the old National Labor Board, insisted that it was necessary in order to make the right of self-organization effective.[7] Even so, the legislative history of the subsection leaves considerable doubt as to what the members of Congress had in mind. Senator Walsh assured his colleagues that the Act would only lead employee representatives to the door of their employer, without going beyond it,[8] but at the same time expressed confidence that "the employer will deal reasonably with his employees."[9]

The National Labor Board, in making its first official attempt to define the "right" thus conferred, decided that it involved an implicit reciprocal duty in employers to bargain,[10] and that this duty involved something more than a bare requirement that the employer meet and confer with employee representatives.[11] "True collective bargaining involves more than the holding of conferences and the exchange of pleasantries. . . . While the law does not compel the parties to reach an agreement, it does contemplate that both parties will approach the negotiations with an open mind and will make a reasonable effort to reach a common ground of agreement."[12]

Whatever doubts remained with respect to the above were laid to rest with the passage of the Taft-Hartley Act. A new section, 8(d), was made to read:

> 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 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. . . .[13]

At the same time 8(b)(3) imposed upon labor organizations a duty to bargain corresponding to that of the employer.[14]

Having decided that the law required the parties to do more than meet, in order to fulfill the good faith bargaining requirement, the

[7] The duty to bargain had not been originally included. Hearings on S. 1958 Before the Senate Committee on Education and Labor, 74th Cong., 1st Sess., pt. 2, at 137 (1935).

[8] 79 Cong. Rec. 7659-60 (1935).

[9] *Ibid.*

[10] National Lock Co., 1 N.L.B. 15 (1935); Hall Baking Co., 1 N.L.B. 83 (1934).

[11] S. Dresner & Son, 1 N.L.B. 26 (1934); Edward G. Budd Mfg. Co., 1 N.L.B. 58 (1933).

[12] Connecticut Coke Co., 2 N.L.B. 88-89 (1934).

[13] Labor Management Relations Act (Taft-Hartley Act) § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

[14] Labor Management Relations Act (Taft-Hartley Act) § 8(b)(3), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958).

board and the courts could not escape a further definition of what constituted good faith.[15] "Good faith" bargaining could hardly exist in a vacuum. The parties had to be bargaining about something. The act said that the union represented the employees with respect to "wages, hours, and other terms and conditions of employment."[16] Suppose the bargaining demand could not reasonably be said to fall within that classification? Or suppose it did, but to comply would result in the violation of some other law? These were problems which the NLRB could not avoid, and the result was a classification system which categorized bargaining demands as illegal, voluntary, or mandatory. Illegal demands were disposed of with relative ease. If, for instance, the union sought a type of union security outlawed by the Taft-Hartley Act, the employer could refuse to bargain without being guilty of an unfair labor practice.[17] But the difference between voluntary and mandatory subjects, and the results which should flow from such a distinction, were not always clear. As early as 1939, the NLRB held that an employer could not insist that the union organize the employer's competitors before an agreement was signed, because this was not within the area of bargaining required by the above language.[18] In 1940 the Board ruled that an employer's proposal that a union post a performance bond was outside the area of mandatory bargaining and could not be insisted upon as a condition precedent to the agreement.[19] These rulings were subsequently sustained by the courts.[20]

[15] In its early decisions under the Wagner Act, the NLRB decided that "good faith" in bargaining meant a sincere desire to reach an agreement—though this definition was variously phrased. Highland Park Mfg. Co., 12 N.L.R.B. 1238 (1939); Atlas Mills, 3 N.L.R.B. 10 (1937). The bargainer's state of mind was the decisive factor, but mental state had to be inferred from totality of conduct. Affirmative and negative guideposts were soon set up. An employer must actively participate in the negotiations, Highland Park Mfg. Co., *supra;* Scandore Paper Box Co., 4 N.L.R.B. 910 (1938), not just listen and reject union proposals. Gagnon Plating & Mfg. Co., 97 N.L.R.B. 104 (1951). He must also make counter-proposals when demands of the union were not satisfactory to him. J. H. Rutter-Rex Mfg. Co., 86 N.L.R.B. 470 (1949); Weiner, dba. Benson Produce Co., 71 N.L.R.B. 888 (1946). On the negative side, the employer could not engage in stalling tactics, Stanislaus Implement & Hardware Co., 101 N.L.R.B. 394 (1952), *enf. granted,* 226 F.2d 377 (9th Cir. 1955), could not suddenly shift his position when agreement was near, NLRB v. Nesen, 211 F.2d 559 (9th Cir. 1954), could not reject provisions routinely placed in most contracts—such as recognition or arbitration clauses, Reed & Prince Mfg. Co., 96 N.L.R.B. 850 (1951), *enf. granted,* 205 F.2d 131 (1st Cir.), *cert. denied,* 346 U.S. 887 (1953), or withhold agreement on trivial matters, such as the use of company bulletin boards. Certain types of conduct, such as refusal to sign an agreement once reached, were held to be so clearly inconsistent with good faith as to be per se violations of the act. NLRB v. Highland Park Mfg. Co., 110 F.2d 632 (4th Cir. 1940).

[16] See note 13 *supra.*

[17] NLRB v. National Maritime Union of America, 175 F.2d 686 (2d Cir. 1949).

[18] George P. Pilling & Son Co., 16 N.L.R.B. 650 (1939), *enf. granted,* 119 F.2d 32 (3d Cir. 1941).

[19] Jasper Blackburn Products Corp., 21 N.L.R.B. 1240 (1940).

[20] NLRB v. Dalton Tel. Co., 187 F.2d 811 (5th Cir. 1951); and NLRB v. Darlington Veneer Co., 236 F.2d (4th Cir. 1956).

On the other hand, "wages, hours, and other terms and conditions of employment" were held to include such items as Christmas bonuses,[21] the rental of company-owned houses,[22] the price of meals furnished by the employer,[23] and free-time for coffee breaks during working hours.[24]

Mandatory subjects, said the Board, could be bargained to an impasse without being guilty of an unfair labor practice, but voluntary subjects, which were outside the statutory language, could not. This was the general status of the law when the *Borg-Warner*[25] case came before the Supreme Court in 1958. And it is to that case, and the analytical framework which it provides for the disposition of future cases, that we must now turn.

II. The Borg-Warner Framework

Shortly after the UAW was recognized as the bargaining agent for the Wooster Division of Borg-Warner, in 1952, it presented bargaining demands. The Company, in turn, submitted counter-proposals, two of which called for: (1) a "ballot" clause, calling for a pre-strike vote of employees (union and non-union) as to the employer's last offer, and (2) a "recognition" clause which excluded the international, which had been certified, and substituted the local. The NLRB held that insistence upon either of these clauses amounted to a refusal to bargain, and ordered the company to cease insisting upon either clause as a condition precedent for accepting a collective bargaining agreement.[26] The Supreme Court agreed with the Board on both counts.[27]

From the very first, the union made it clear that the ballot clause was wholly unacceptable to it; however, the company nevertheless insisted. A strike ensued, which was ultimately settled by an agreement containing both of the controversial clauses. Prior to the signing of the agreement the International filed unfair labor practice charges, contending that insistence by the company on inclusion of these clauses constituted a refusal to bargain. The Trial Examiner specifically found that neither side was guilty of bad faith, but, nevertheless, concluded that the company was guilty of a *per se* unfair labor practice. He reasoned that both of the clauses in contention were outside the scope of mandatory bargaining, and that

[21] NLRB v. Niles-Bement-Pond Co., 199 F.2d 713 (2d Cir. 1952).
[22] NLRB v. Bemis Bros. Bag Co., 206 F.2d 33 (5th Cir. 1953).
[23] Wayerhauser Timber Co., 87 N.L.R.B. 672 (1949).
[24] Fleming Mfg. Co., 119 N.L.R.B. 452 (1957).
[25] 356 U.S. 342 (1957).
[26] 113 N.L.R.B. 1288.
[27] 356 U.S. at 342.

the company's insistence upon them over the union's opposition amounted to a refusal to bargain as to mandatory subjects of collective bargaining.

Though the Supreme Court ultimately sustained the NLRB, four of the justices thought the ruling on the ballot clause was wrong. In large part this was because of a deep-seated feeling that Congress intended "to assure the parties to a proposed collective bargaining agreement the greatest degree of freedom in their negotiations and to require the Board to remain as aloof as possible from regulation of the bargaining process in its substantive aspects."[28]

Most of the criticism of the *Borg-Warner* decision has been directed at its alleged interference with the scope of collective bargaining. In the actual case the realities of bargaining were that the Borg-Warner company was the stronger of the two antagonists. Thus, the union refused to discuss the ballot clause, the company simply sat tight, weathered a month-and-a-half strike, and then obtained the contract it wanted—including the ballot clause. Absent any interference by the NLRB or the courts, the company achieved what it wanted in bargaining. It did this while continuing to engage in what the Trial Examiner found was good faith bargaining. The Board's decision, sustained by the Supreme Court, had the effect of changing the bargaining results, for it ordered the company to cease and desist from insisting upon inclusion of the ballot proposal in the contract. Viewed from the vantage point of sound collective bargaining, was this a good or a bad result? There will be a temptation to answer this question on the basis of whose ox is being gored. Thus, company representatives may be inclined to feel that the result is quite outrageous, while unions may be entirely satisfied. It is not difficult to demonstrate that this is hardly an adequate basis for reaching a conclusion. Take an example which has recently been in the news. The UAW has been complaining that at the very time that Ford insists upon the necessity for holding the line on wage increases it has been passing out liberal bonuses to its executives.[29] Suppose in bargaining the UAW took the position that the new contract must contain a clause in which the company agreed to refrain from giving any bonuses to executives during the life of the new contract. Presumably such a bargaining demand would be legal, in the sense that there is no reason why the company could not agree to such a clause if it so desired. At the same time the demand could hardly be said to fall within the mandatory bargain-

[28] *Id.* at 356.
[29] No. 412 CBNC Part 1, March 17, 1961, p. 1.

ing area, since it would have nothing directly to do with "wages, hours, and other terms and conditions of employment." A reasonable argument could be made by the UAW that it could not be expected to exercise restraint on the wage front at the same time that the company passed out handsome bonuses to executives. Therefore, the union would not necessarily abandon a good faith bargaining posture by insisting upon inclusion of the clause in the contract. Could the union bargain to an impasse on this issue? Under the majority rule in *Borg-Warner* it could not, for insistence upon a non-mandatory subject would, *per se,* constitute a refusal to bargain. Under the minority rule, such insistence would not necessarily be an unfair labor practice—the decision would presumably hinge on a look at other factors before giving the final answer. Would industry representatives be outraged by application of the majority's decision to this set of facts? Would labor people be pleased with it?

The point of this analysis is, of course, that quite apart from the voluntary-mandatory dichotomy, which will be discussed at greater length elsewhere, the *Borg-Warner* rule does have the effect of restricting bargaining. In the actual case the company had the power, while bargaining in good faith on a legal matter, to achieve its bargaining demand. The Board and the Supreme Court would not let it do so. In the hypothetical example, the UAW might have achieved its bargaining objective, while bargaining in good faith on a legal demand. The *Borg-Warner* rule could prevent it from doing so. It can be said that any other rule would simply place a premium on bargaining power, and is, therefore, undesirable. This may be true, but exactly the same criticism could be made with respect to subject matter in the mandatory category, and in such a case neither the Board nor the courts would interfere. In fact, the essence of the American labor-management policy is freedom to exert economic pressure on one another. Rarely is the strength of the parties in perfect balance. Therefore, the policy contemplates sheer bargaining power as one of the principal determinants of a settlement. Of course, it can be argued that even if this is so, bargaining power ought to be confined to the limits of mandatory subject matter. Otherwise, the base for industrial strife is unduly broadened. So long as it is clear that the *Borg-Warner* rule has the effect of imposing government regulation over what might otherwise qualify as good faith collective bargaining, a judgment as to the desirability of the rule is perhaps better withheld pending further examination of the mandatory subject matter category.

III. Bargaining Issues of the Future

Bargaining demands which are already known, or are appearing on the horizon, make two things clear: (1) the Board and the courts are going to have to go through a searching re-examination of what constitutes a proper subject for mandatory bargaining, and (2) insofar as such subjects are held to be non-mandatory, the implications of the *Borg-Warner* rule are going to have to be faced.

The *R.R. Telegraphers* case[30] illustrates the kind of issue which may be expected to arise with increasing frequency in the period immediately ahead. In that case the Northwestern Railroad sought to abandon some of its stations. The plan would necessarily result in the loss of jobs for some of the station agents and telegraphers who were members of the union. The union thereupon sought to negotiate a collective bargaining agreement which would include the rule that no position in existence on a certain date could be abolished or discontinued except by agreement between the carrier and the union. The district court thought that the contract proposal related to "rates of pay, rules, and working conditions"; the circuit court of appeals said that this conclusion was "clearly erroneous"; however, the Supreme Court agreed with the district court. In doing so it said: "In the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment."[31] Four of the justices, however, did not agree. They said that the union's demand was not a lawfully bargainable subject, that the carrier could not lawfully accept it, and that a strike to force its acceptance would be one to force a violation of the law.[32]

This decision is of particular interest because of the present emphasis in collective bargaining on job security. Technological changes are altering historic employment patterns, with a general exodus from production to service industries. In 1961, blue-collar jobs for men dropped by 1,300,000 but white-collar jobs rose by 600,000.[33] Approximately 400,000 railroad jobs have been abolished in the last five years, and the unions fear that mergers now under discussion will add another 200,000 to this total.[34] More steel was poured in 1961 by 460,000 production workers than 540,000 workers had produced ten years earlier, and 200,000 aircraft workers were dropped in the shift from planes to missiles.[35]

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[30] 362 U.S. 330 (1960).
[31] 363 U.S. at 336.
[32] *Id.* at 355.
[33] New York Times, April 6, 1961, p. 18, col. 8.
[34] New York Times, April 6, 1961, p. 18, col. 7.
[35] New York Times, April 7, 1961, p. 16, col. 3.

In an effort to protect their members, unions have devised a wide assortment of bargaining demands. These demands range from insistence that no plant be moved without the consent of the union, to guarantees against plant closings, to rigid retention of employees and preservation of wage rates despite any changes which may take place, to transfer rights including guarantees against loss in the sale of the employee's home or cancellation of his lease. Several agreements along such lines have already been reached.[36] One involved the American Cable and Radio Corporation and the Communications Workers of America.[37] This contract provided that no worker shall be laid off or downgraded as a result of technological change. If fewer employees are required as a result of automation, the company is obliged to place the dislodged workers in other jobs carrying an equivalent title and pay rate. Which, if any, of these demands are within the mandatory bargaining requirements of the Act, and what will be the result of holding that they are voluntary? If the dissent in the *R.R. Telegrapher's* case is right (and the analogy is not perfect because of other legislation in the railroad field), many of the above demands of unions might be said to be in the "voluntary" category. Yet, these are among the significant bargaining issues of the period ahead. Unions will be derelict in servicing their members if they do not put forth demands designed to protect job security.[38] If bargaining demands having to do with job security are not within the mandatory bargaining area of "wages, hours, and terms and conditions of employment," the net result will be that one of the most important bargaining problems of the period will be outside the main stream of the very legislation which was designed to encourage collective bargaining. Presumably there is nothing illegal about such demands; therefore, if they are not mandatory, they must be classified as voluntary. The agreements already cited indicate that many management representatives will willingly bargain over such issues. Others may not. What then? Does the *Borg-Warner* rule mean that unions, by insisting, will be guilty of a *per se* unfair labor practice even though the demands are legal, are advanced in the utmost good faith, and are clearly related to the basic needs of the membership? Finally, if such demands are non-mandatory, and will result in an unfair labor practice charge if pushed to an

[36] No. 416 CBNC Part 1, May 12, 1961, p. 1.

[37] New York Times, June 19, 1961, p. 18, col. 3.

[38] Moreover, "the fact that trade unions may restrict the rate at which new machinery and processes are introduced does not necessarily mean that the product of industry is being limited, as employers, left to themselves, may make changes at a rate faster than the optimum." Slichter, Union Policies and Industrial Management 5 (1941).

impasse, will collective bargaining legislation be serving its basic purpose?

There is another line of cases, represented by *Allen Bradley Co. v. NLRB,*[39] which seems destined for the Supreme Court, and which may clarify the duty to bargain picture. In those cases[40] the union threatened to, and did, fine members who crossed the picket line during a strike. When bargaining rolled around in 1959 the Company demanded that one of the two following alternative clauses be included in the contract:

> Neither the Company nor the Union nor its members will interfere with, restrain or coerce by discipline, discharge, fine or otherwise, any employee in the exercise of his rights guaranteed by Section 7 of the Labor-Management Relations Act, including the right to refrain from any or all of the specified activities.
>
> *Or*
>
> Neither the Company nor the Union nor its members will interfere with, restrain or coerce by discipline, discharge, fine or otherwise, any employee in the exercise of his right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of his own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or his right to refrain from any or all such activities.[41]

In submitting these proposals the Company stated that it was open to discussion as to the phraseology, but that it would stand firmly on the principle set forth in the clauses. The Union took the position that this was not a proper subject for collective bargaining because it pertained to internal union affairs. The Company clearly bargained in good faith in all other respects. When the Company insisted upon inclusion of clauses like the one set forth above, the Union filed unfair labor practice charges. Relying principally on the *Borg-Warner* case, the NLRB held for the Union.[42] The circuit court refused to enforce the Board's order on the ground that this case was distinguishable from *Borg-Warner* in that the clauses in question were a subject of mandatory bargaining.

One need only go back in history a bit to illustrate the dubiety of the distinction between the non-mandatory ballot clause in *Borg-Warner* and the mandatory discipline clause in *Allen Bradley.* In 1948 Allis-Chalmers and its employees suffered a costly strike at the Company's West Allis plant. The local union leadership, then

[39] 286 F.2d 442 (7th Cir. 1961).
[40] *E.g.,* Local 248, UAW v. Wisconsin Bd., 105 N.W.2d 278 (1960).
[41] 286 F.2d at 444.
[42] 127 N.L.R.B. No. 8 (1960).

dominated by Harold Christoffel, who was commonly believed to be a Communist, engaged in the most outrageous ballot-stuffing practices in calling the strike.[43] After several years of continuing conflict, Christoffel was dislodged and the local union placed under an Administrator from the International Union. Thereafter in 1950, the parties signed a contract which contained the following "democratic processes" clause:

> The said elections shall be conducted by secret ballot by the Union on the Company's premises. The Company shall furnish suitable facilities. Members losing time from work in voting shall be paid at average earned rate. A voting schedule shall be arranged in accordance with the practices of the National Labor Relations Board in effect on the date of signing this agreement.[44]

The purpose of the clause was obviously to prevent a repetition of the 1948 experience. Both parties desired this. Suppose they had not. Suppose the Company had simply insisted on such a provision in bargaining. Would it have been guilty of an unfair labor practice because this was not a mandatory bargaining subject? If so can one easily distinguish the *Allen Bradley* case? If, in that case, as the circuit court said, "The purpose of the clauses proposed here was to permit employees to work both for their benefit and for that of the employer,"[45] did the democratic processes clause have a different purpose?

There are cases, of course, in which the employer quite clearly interferes with the internal processes of the union. But there is a gray area, particularly as it relates to the procedures for calling a strike, and any continuation of work during the strike, in which it is pretty hard to say that contractual clauses do not relate to working conditions. What more basic working condition is there than whether there is going to be any work at all?

Until it is overturned or modified, *Borg-Warner* must be regarded as the law. Critics may feel that it represents an unduly restrictive interpretation of the phrase "wages, hours, and terms and conditions of employment," and that it places the weight of government behind the *status quo*. The danger in an approach having these dual characteristics is that collective bargaining will not remain viable. And if the history of collective bargaining demonstrates anything, it is that change and adjustment are essential to its life cycle.

At least two alternative routes away from *Borg-Warner* are

[43] Allis-Chalmers Workers' v. Wis. E.R.B., 8 L.R.R.M. 1148 (1941).

[44] 1950-55 Collective Bargaining Agreement between the Allis-Chalmers Mfg. Co. and Local 248, UAW, Art. II, Sec. G.

[45] 286 F.2d at 445.

available. The first lies in the direction of liberalizing the interpretation of the "wages, hours, and terms and conditions of employment" phrase. The end result then more nearly becomes *Allen Bradley* than *Borg-Warner*. The price of this approach is enlargment of the mandatory bargaining area, with accompanying governmental pressure towards such bargaining. This may displease Congress which, at the time of the Taft-Hartley amendments in 1947, fairly clearly thought the NLRB was intervening too much in telling the parties what they must bargain about.[46] Such a ruling would doubtless hasten the inclusion of marginal subjects in contracts, for if a subject is once brought into the mandatory bargaining area it becomes more difficult to resist some kind of a compromise without engaging in an unfair labor practice. Liberalization of the scope of mandatory bargaining could, of course, be accompanied by maintenance of the present *Borg-Warner* rule with respect to voluntary subjects. For those who believe in maximum flexibility in the realm of collective bargaining this approach might be thought to combine the worst feature of the present rule with error in exactly the opposite direction. In other words, to expand the mandatory bargaining area is to extend the government's influence over subjects about which the parties *must* bargain. To maintain the *Borg-Warner* rule is to use the government's influence *against* good faith bargaining on voluntary subjects.

A second route away from *Borg-Warner*, assuming the courts want to take it, is to interpret the phrase "wages, hours, and terms and conditions of employment" conservatively, but find that going to an impasse on voluntary subjects of bargaining is not, *per se*, an unfair labor practice. The principal opponents of this view may be those who fear the power of strong unions over weak managements, or vice versa. Of the two, management opponents may be the more vociferous for fear of further inroads into the so-called management prerogatives.

IV. Bargaining Tactics

The *Insurance Agents*'[47] decision, in which union harassing tactics such as the refusal to solicit new business, reporting late at district offices, engaging in "sit-in" mornings rather than doing customary duties, etc., were held not to be inconsistent with good faith bargaining on the part of the union, was not a great surprise.[48] The fact

[46] H.R. Rep. No. 245, 80th Cong., 1st Sess. 19-20 (1947).

[47] 361 U.S. 477 (1960).

[48] Previous cases have suggested the likelihood of such a result. *E.g.*, Textile Workers Union of America, CIO v. NLRB, 227 F.2d 409 (D.C. Cir.), *cert. granted*, 350 U.S. 1084 (1955), but *vacated* 352 U.S. 864 (1956). Much of the comment which the case has

that unions may now engage in harassing tactics without committing an unfair labor practice has naturally caused speculation as to what tactics the employer might use with like immunity.[49] However, the long run importance of the *Insurance Agents'* case, it is submitted, has to do with neither the harassing tactics, as such, nor the question of whether a *per se* rule (that a partial strike could not be evidence of an unfair labor practice) was established. The important question relates to the role which the government is going to play in collective bargaining. Note with care some of Mr. Justice Brennan's language in the majority opinion:

> Congress [at the time of the passage of the Wagner Act] was generally not concerned with the substantive terms on which the parties contracted. . . . And in fact criticism of the Board's application of the "good faith" test arose from the belief that it was forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor practice. . . . Since the Board was not viewed by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining into Section 8(d) of the Taft-Hartley Act.[50]

> The same problems as to whether positions taken at the bargaining table violated the good-faith test continue to arise under the Act as amended [by the Taft-Hartley Act]. . . . But it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective agreements.[51]

> It is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the over-all design of achieving industrial peace. . . . Discussion conducted under that standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take. The mainstream of cases before the Board and in the courts reviewing its orders, under the provisions fixing the duty to bargain collectively, is concerned with insuring that the parties should have

evoked has been directed at one of the two following questions: (1) what other tactics may the parties, particularly the employer, use without being guilty of an unfair labor practice, and (2) will the Frankfurter dissent ultimately come to be the law in such cases?

[49] There have been few cases so far which test the point, and there is little to be gained by re-stating other analyses of the general problem which have already appeared. Green, *Employer Responses to Partial Strikes: A Dilemma?*, 39 Texas L. Rev. 198 (1960); Mittenthal, *Partial Strikes and National Labor Policy*, 54 Mich. L. Rev. 71 (1955). The 9th Circuit has suggested in the *Great Falls Employers' Council* case, 277 F.2d 772 (9th Cir. 1960), that "what is sauce for the goose may also be sauce for the gander."

[50] 361 U.S. at 485.

[51] *Id.* at 487.

wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.[52]

Why is the above language so important? Because it is basically inconsistent with the approach which the same court took in the *Borg-Warner* case. And which of the two approaches the court takes in the future is of great importance to the collective bargaining process.

Assume, if you wish, that the illegal, mandatory, and voluntary categories into which the NLRB and the courts have so long divided bargaining demands are now too well established to be abandoned. Assume also that the company's ballot demand in *Borg-Warner* was, as the court said, a voluntary bargaining subject. Did this necessarily mean that if carried to an impasse the demand was an unfair labor practice? Doesn't the court say in the *Insurance Agents'* case that Congress was not concerned with the substantive terms on which the parties contracted? And that Section 8(d) was a check on a trend which Congress thought it saw in the Board to force the acceptance of demands made in bargaining? By saying that the ballot demand was voluntary and could not be carried to an impasse, the Court, in effect, forced the company to withdraw a demand. Is there a difference between forcing one party to accept a demand, and forcing another party to withdraw a demand insofar as the degree of governmental interference is concerned? If Congress did not want the Board to force bargaining, is there any more reason to believe that it wanted the Board to prevent bargaining, so long as such bargaining was legal and in good faith? Didn't the Court's decision in *Borg-Warner* arbitrate a substantive solution which had been reached in bargaining? Wasn't Section 8(d) used to control the settling of the terms of the collective bargaining agreement? Is *Borg-Warner* reconcilable with the mainstream of cases before the Board and in the courts, which is concerned with insuring that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences?

Placed side-by-side the two cases look like this: *Borg-Warner* said that the company could not carry a voluntary bargaining demand to an impasse, even though the demand was perfectly legal and it was bargained in good faith. Allowing the company to carry the issue to an impasse might prevent a settlement (though in fact it had not), but the other alternative was governmental interference with the bargaining process. Of the two alternatives, the court seemed

[52] *Id.* at 488.

to feel that the latter was preferable. The *Insurance Agents'* case dealt with harassing tactics employed by the union in support of a mandatory bargaining demand. The conduct was legal, and the union bargained in good faith. Allowing the union to continue the tactic might have the effect of forcing the employer to subsidize his own strike—a result which on-the-surface seems to be inconsistent with our theory of collective bargaining. The alternative was government interference with the bargaining process. Of the two alternatives, the court seemed to feel it was better not to interfere. The incongruity of the two results shows up in a hypothetical case which combines the two fact situations. Suppose in the insurance case the agents had used the same harassing tactics in support of a voluntary bargaining demand. The Board would then find itself in the dubious position of tolerating the harassing tactics because the Supreme Court had told it to give the parties wide latitude in bargaining, but then restraining the union from insisting in good faith on a legal demand because it was in the voluntary category.

V. Conclusion

The classification of bargaining demands into illegal, mandatory, and voluntary categories is now probably too well established to be upset. And there is no particular reason why it should be. There is little or no argument about the illegal category. Congress certainly meant that there was a limit to subjects about which the Board could order the parties to bargain. The serious question that is left is whether the Board or the courts should intervene to prevent an impasse over a voluntary subject when the bargaining is being conducted in good faith. The essence of the argument presented here is that so long as the parties are in good faith, and the demand is legal, the Board and the courts should keep their hands off. Even if this is done there will remain a difference between mandatory and voluntary bargaining subjects in that the government will not step in to require the parties to bargain about the latter. But neither will it prevent them from doing so, by ordering one party not to go to an impasse. The risk that such an approach will broaden the base for industrial strife will be more than compensated for by allowing the parties maximum flexibility to adjust to changing times and conditions.