The Ateneo Law Journal is published four times during the academic year by the student body of the Ateneo College of Law.

Unsigned and uninitialed writings are by members of the Editorial Board.

Subscription rates: ₱4.00 per issue; ₱14.00 per year. Foreign rates: $1.50 per issue; $5.00 per year.

ATENEO LAW JOURNAL

GOOD FAITH IN COLLECTIVE BARGAINING *

*Manuel S. Tiaoqui***

WHAT CONSTITUTES SUFFICIENT COMPLIANCE WITH THE DUTY TO FURNISH INFORMATION

Compliance with the duty regarding the disclosure of wage data is not as simple as handing over to the union in neatly typed sheets the information it has requested. Other circumstances frequently exist which modify the degree or form of disclosure. The employer may not have all the information the union requests; the information may be so voluminous that the time factor or expenses handicap the employer; or the union may be insisting that its own men should be the ones to check the data, to mention a few instances. When one or more of these circumstances exist, in what light should the degree or form of disclosure of bargaining information by the employer be interpreted, the union claiming that the information disclosed is not sufficient to enable them to bargain intelligently?

In the *Tex-Tan Inc.*[49] case, the employer had utilized a complex time study method to establish piecework rates to standard time rates for various jobs. The union requested certain information so as to be able to understand the employer's method of fixing rates. The employer did furnish certain information, but this information was insufficient. In spite of a series of requests and conferences the union still did not have the information it needed to analyze the employer's method. In response to one request, the employer offered to allow the union access to all its records with

* Last of two parts. The first part appeared in the March 1964 issue.

** LL.B., ATENEO DE MANILA, 1961; M.C.L., U. OF PENNSYLVANIA, 1963.

[49] 134 NLRB No. 23 (1961).

permission to copy any material it desired. The union declined on the ground that only the employer could collect and organize the needed material in an understandable form. The employer refused to do this due to the high cost. However, the employer was courteous and cooperative to a union time-study engineer who was brought in to make a spot check of the time-study method, and it consistently offered to include a clause in the contract to allow later on the checking of its rates, as it was anxious to consummate the contract and effectuate new rates for modernized jobs.

The Board agreed with the trial examiner's finding that the employer had not unlawfully refused to furnish information requested by the union, since the employer's offer to give the union access to its records, its willingness to allow checking of rates after the contract was executed, and its cooperation with the union time-study engineer indicated that a refusal to furnish more information was not done in bad faith.

The Board's decision seems to indicate that the employer had already fulfilled the obligation the law requires of him under the circumstances. In order to fulfill this obligation, the law does not compel him to go beyond the circumstances in which he finds himself in. In effect, the employer has *reasonably* complied with the mandate of the law and this is all the law requires of him.[50]

Once more the decisions are passing into the subjective realm of the law. Although it was not even intimated, the Board in effect considered the totality of the acts and circumstances of the situation in arriving at its conclusion.

Needless to say, this has many pitfalls. As shown in this instance, the union was stymied by the complexity of the data which only the employer could unravel. Still the employer's reasons for not giving the information were excusable to the Board. To a certain extent the employer could deliberately bring this about. But then in the future, if the Board finds this situation to unduly hamper the union in bargaining intelligently, it may compel the employer to provide the data in spite of its complexity, perhaps

[50] J.I. Case Co., 118 NLRB 520 (1957). The Board held that a request for wage information though voluminous was not unduly burdensome on the employer since the records were collected in centralized files and all that is necessary was for the employer to make reasonable arrangements with the union for obtaining the requested data.

sharing costs with the union. This is part of the evolution of the law.

Furthermore this rationale is in consonance with the underlying crux of the Truitt doctrine with respect to both the majority and minority rules regarding good faith bargaining.

Justice Black speaking for the majority said:

> Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.

On the other hand Justice Frankfurter speaking for the minority relied on the totality of the conduct of the parties as determinative of a good faith finding. These different approaches to good faith bargaining fitted into this bargaining situation.

In *Yakima Frozen Foods*,[51] the trial examiner found the employer to have bargained in bad faith by refusing to furnish the union with information to substantiate its plea that its financial condition did not warrant a wage increase.

The Board, in rejecting this finding, relied on the following facts. It noted that the respondent offered the union its most recent balance sheet; that it permitted verification of such balance sheet by a licensed accountant or a C.P.A.; and that the respondent offered to submit its books to a full audit in respondent's office by a licensed public accountant or a C.P.A. designated by a union, provided the union paid the cost of the audit. These offers were never changed or withdrawn.

The union's reply was:

> We would not agree to obtaining a C.P.A. and we would not direct questions to your auditors. We are not obliged to do this. We are not willing to agree to your stipulation because we don't have to. We agree that they are not unreasonable but we will not agree to them. The union insists on being present when the books are audited.

The Board found:

> Under the Truitt principle, the obligation to furnish substantiating evidence does not "automatically" follow a claim of inability to pay, nor is the employee obliged to substantiate the claim; it is enough if the employer *attempts* to substantiate it. (emphasis supplied)

We hold on the facts presented that the Respondent satisfied his obligation under the Truitt doctrine. The offer that the Respondent made to

[51] 130 NLRB 1269 (1961).

permit his books and records to be audited was a reasonable one. The conditions that the Respondent imposed on audit cannot be said to have been unduly burdensome or restrictive on the union. And nothing that the Respondent said or did, with respect to the offer, or the events which preceded the offer, demonstrates that the Respondent, was not acting in good faith.

Does this decision show a crack in the doctrine requiring the disclosure of financial data by the employer, the issue of the employer's inability to satisfy a wage increase having been raised? The Board here in effect says that the rule requiring the disclosure of financial data is not absolute, quoting quite appropriately the Truitt case. The employer may now be excused from this obligation if it " attempts to substantiate its position."

It should be noted that the union thought that its position was absolute. It even conceded the reasonableness of the employer's stand. Apparently, it believed that since the employer's inability to pay had been raised, their right to receive financial data or to dictate the terms of its disclosure, was absolute.

This decision may be the foundation of what we may for the moment call, the "reasonableness of the employer's offer rule." It is noted however that the reasonableness of the employer stems in part from the unreasonableness of the union.[52]

In *Federal Dairy Company Inc.*,[53] the employer claimed financial inability to grant a wage increase with no disclosure of proper financial data.

The Board found as follows:

> Respondent contends that it in fact offered adequate information to support its 'inability to pay plea'. The record we find does not support this contention. According to the credited evidence (there was a great deal of confusion as to the correct transcript, the Board relying on the Trial Examiner's version) the record shows only that at a meeting with the Federal and State conciliators . . . Respondent offered to permit a check of its books by any outside accountant whom the conciliators chose. The union declined the offer. Respondent's counsel then said to the union, 'We'll not give you the records, the CPA papers, and you have no right to them." In these circumstances, like the Trial Examiner, we find Respondent did not meet its obligation to furnish the union, upon request, and in good faith, with information to substantiate its plea of 'inability to pay.'

Does this case square with the *Yakima Frozen Foods* case, *supra?* Did not the employer offer to have the conciliators name an outside accountant to check its books? It seems the Board did not give much merit to this sole factor. The employer it seems should not have slammed the door to the possibility of disclosure of financial data. It could have said: "we believe this offer is a reasonable one. The union is free to avail itself of the information sought through these means at any time it wishes to." The employer, however, practically withdrew its offer as evidenced by the counsel's remarks. This could have been a basis for the Board's conclusion.

In *Albany Garage*[54] the court found the offer of the following information sufficient:

> In this connection, we note specially that as soon as they (the employers) closed their books for the year ending Dec. 31, 1957, the Respondents voluntarily furnished the union with a financial statement for that year, together with a comparative sales and profit statement for the years 1956 and 1957; that no question was ever raised regarding the actual accuracy of the financial information submitted to the union; that the statements furnished were accepted as adequate by the bank with which Respondent's were doing business with, by the Bureau of Internal Revenue, and by Respondent's stockholders; that the Respondent's had furnished the union with the same type of information during negotiations in the preceding years, and the union never rejected the information as inadequate.

Waiver

The defense of waiver by the union of its right to bargaining information has been asserted now and then by the employer. In the *Berkline Corp.* case,[55] this issue was squarely resolved by the Board. While negotiating for a new contract, the union asked the employer if he had any written shop rules. The employer replied that he saw no need to codify the company's rules since this would merely create confusion. The union representative agreed that it would not be necessary for the employer to reduce his rules into writing.

A year later, the parties were bargaining for a new contract. The union then requested the company's shop rules once more,

[52] NLRB v. Truitt, 351 U.S. 149 (1955). "In any event, the Board has heretofore taken the position in cases such as these that 'it is sufficient if the information is made in a manner not so burdensome or time consuming' . . . And in this case the Board has held *substantiation* of the company's position requires no more than 'reasonable proof'."

[53] 130 NLRB No. 85 (1961).

[54] 126 NLRB 417 (1960).

[55] 123 NLRB No. 59 (1959).

apparently to enforce a grievance over the present contract. The request was denied.

The trial examiner found that the union was entitled to written shop rules: (a) to administer its current agreement which had two more months to run (b) to enable the union to bargain intelligently with respect to its new contract.

On point (a) the Board disagreed with the Trial Examiner that there must be a *quid pro quo* for a waiver of information. While some reciprocity may be indicative of a waiver, it is not indispensable for one. A union may relinquish orally its right to such information and it did so in this instance by agreeing that the employer did not have to codify its rules.

On point (b) the Board said:

> While we might not in a different situation require that a union specify the reason for seeking information i.e., whether it was sought for purposes of administration of the current contract (only) or negotiations for future contracts (only)—we believe, that where as here, the union has waived its right to the information for purposes of administering the current contract, the employer is entitled to know whether the information is sought for that reason or for a reason not covered by the waiver.

Since no reason was given by the union and evidence indicated that the request was for the administration of the current contract, the denial was justified.

The majority conceded to the dissenter that the information sought would aid intelligent bargaining. But this fact, the Board found, does not preclude a union from waiving the information voluntaritly, nor must it receive something in return for the waiver. Having waived, it must abide by its decision.

The majority considered an oral waiver sufficient. It need not be explicit either. In their footnote, the Board said: "To find a waiver, it is not necessary that the term 'waiver' itself be used." This case should alert unions to their conduct during bargaining negotiations. The impression one receives is that the union was not aware that it was making a waiver in this case.

Anyway, the majority construed the waiver to be limited to the '56-'57 contract, more particularly to the administration of the contract. Had union indicated that they would use the information specifically to aid them in bargaining for the '57-'58 contract, the logical inference is that the Board would have required the employer to give a written set of shop rules.

Policing the Contract

It was earlier noted that the necessity for information could arise out of three possible stages. The following cases will show the need for information for the post-generation stage: the policing or administration of the contract. After all, the concessions the union may win in the conference table will be empty victories if the employer could evade them during the life of the contract.

In the *J.I. Case Co.*[56], the union formally requested the employer for certain time studies of certain jobs. The employer complied to the extent of orally explaining it but refused to give it in writing so the union's time study experts could study it. Its request for job value data and labor grade data was denied.

The employer's defense was that the requested information pertained to neither a pending grievance nor to a request for negotiation under the contract.

The court first held that time study data, job value information and labor grade data are all necessary and important considerations in the company's wage structure.

The court continued:

> The contention that the Union's right to data is limited to pending wage negotiations overlooks the fact *that collective bargaining is a continuing process* which among other things . . . . involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of the employee rights already secured by the contract. (court's emphasis)
>
> The union not only has the duty to negotiate collective bargaining agreements but also the statutory obligation to police and administer the existing agreements. The provisions in the contract that the agreements, "disposes of any and all issues subject to collective bargaining, except with respect to grievances . . . ." does nothing more than foreclose the union from bargaining during the life of the contract about matters not covered therein. This clause does not affect that union's right and duty to administer the contract.

The court eloquently but forcefully showed *why* it is necessary to police the contract after its consummation. It spoke out

[56] 253 F2d 149 (1958).

quite forcefully in defense of the union's "right and obligation" because if the union is not vigilant in the administration of its contract rights, many unscrupulous employers will seek to avoid its contract obligations in one form or another. Thus the courts will require the employer to disclose such data as will be necessary for the union to police and administer the contract.

In the *Hercules Motor Corporation case*[57] the union filed a grievance claiming that certain standard hour rates were too low and requested that they be raised. The employer studied the grievance and found it had no merit. The union requested that its own man be permitted to study the employer's data pertaining to the grievance, which was denied. The employer took the position that the union was not entitled to the data sought because its purpose was to protest the fairness of the hour rates set by the employer while under the contract the union only had the right to question whether the hour rate was fixed in accordance with the employer's practice which was in effect on the day of the execution of the contract. At any rate, the employer suggested the grievance be brought to arbitration as provided in the contract. The union chose to file an unfair labor practice charge instead.

The issue which arose was whether or not the union could protest. If it could protest, which would depend on the interpretation of the contract, it would be entitled to the information sought in order to police the contract.

The Board first said that since the contract itself provided the machinery for setting the dispute, namely arbitration, it would not interfere. Turning to the data issue, it said:

> This is not a case where a union simply sought and was denied information which was relevant to its task as bargaining agent in negotiating a contract, or adjusting a grievance. In this case . . . the union sought information to support a grievance over a matter which the Respondent maintained could not be the subject of a grievance under the contract, namely, whether certain rates fixed by Respondent were fair and equitable. There thus arose a dispute between the parties as to the interpretation of their contract, the issue dividing them being whether the contract permitted the union to grieve over the equity of rates established by Respondent. This was a dispute for whose resolution the contract specifically provided machinery and the Respondent properly insisted that it be settled within the agreed upon grievance procedure. Under the contract, it was a dispute which had to be settled, and (settled) in the union's favor before the union could grieve over the equity of the rates. Manifestly, the information which, the union sought, and to which our (dissenting) colleague says it was entitled, could have no bearing upon the resolution of this dispute over contract interpretation. And we consider, therefore, that the precedents cited in the dissent are inapplicable to facts such as these.

[57] 136 NLRB 145 (1962).

Member Fanning dissenting noted:

> It seems clear to me that the union in this case could not adequately fulfill its statutory duty to represent these employees in collective bargaining without the best evidence of the nature and validity of the grievance.

The Board quite correctly concluded that the request of the union was improper under the circumstances. The union was seeking information to solve a 'grievance' which according to the company it had no right to grieve over in the first place. The union first had to find out whether it could grieve or not.

Suppose the union had submitted the matter to arbitration as directed by the contract and the arbitrator says the union is entitled to grieve and so it files a grievance. Is it now entitled to the information?

Since there is now an existing grievance and in the light of the ruling in the *J.I. Case Co.* case that time study data is wage data, it would seem that the union is entitled to the information in order to properly police the contract.

The rationale of the Board's decision in this case seems to be that a union has no right to request for information to settle a supposed grievance when it has not been determined whether it is entitled to press the grievance in the first place.

In a recent decision of the NLRB General Counsel,[58] the company and the union were parties to a collective bargaining contract which provided a three step grievance procedure for resolving disputes relating to piece rates. The company established a new piece rate for a certain operation following time studies. The union filed a grievance concerning the new rates and was allowed to make its own time study which confirmed the new standard. Subsequently, the union requested arbitration of its grievance. The company requested copies of the union time study for use in its arbitration brief, but the request was denied. The company filed an unfair labor practice charge against the union.

The General Counsel concluded that, under the particular circumstances, including the fact that the union's time study con-

[58] CCH NLRB 9878 (1961).

firmed the accuracy of the standard established by the company, thus negating a finding that the union was relying on such study to support its bargaining position, insufficient basis existed for a finding that a refusal to furnish copies of the study to the company violated the union's bargaining position.

In this case the union may not use the information. But does that preclude the employer from using it? The information is relevant to the grievance. It would seem that an employer has a right to this information though prejudicial to the union just as the union has a right to some information the disclosure of which may be prejudicial to the employer. After all the whole purpose of the rule requiring the disclosure of data is to aid both parties in administering the contract intelligently. As the court in the *J.I. Case Co.* said, "collective bargaining is a continuing process." In this case, with the corroborative finding of the union itself, any dispute will be quickly settled instead of a prolonged wrangling between the parties.

A Superior Good

While negotiating for a renewal of a recently expired contract, a union called a strike in support of its bargaining demands in which 200 of 225 employees took part. The company hired permanent replacements for virtually all the strikers, subsequently stating that it doubted the union's majority but would continue to bargain without waiving its position on the matter. The union later requested information during a bargaining session, including names and addresses of the replacements. The company gave all the information except the names and addresses of the replacements, stating that it feared for their safety. The strike had involved mass picketing and violence against working employees, and a state court injunction had been obtained by the company based on such conduct. Shortly thereafter, the company filed an election petition and the union filed this charge based on the nondisclosure of the data asked.

There being no unlawful conduct on the part of the employer, the General Counsel concluded that the employer's fear for the safety of the replacements constituted sufficient basis for the nondisclosure of the data asked.[59]

[59] CCH NLRB 10,171 (1961).

This case excellently illustrates an exception to the obligation to divulge bargaining information. Assuming that the information was relevant (which it patently was not), the safety of the replacements overrode other considerations.

Expenses

In *Tree Fruits Labor Relations Committee*,[60] the union did not offer to share the costs for compiling the wage data it requested from the employer. However, the employer never asked for such a sharing of costs or indicated that they would provide the information if the expenses involved were shared by the union. From these facts the Board concluded that the employer could not use non-sharing of expenses as a defense for not disclosing the data requested.

This case imposes on the employer the obligation to ask the union to share the costs of compiling the data it had requested. From the reasoning of this case and other dicta of the Board, there is no doubt that the employer may exercise this prerogative. The proportion to be borne by each, however, has not yet been settled.

Good Faith Bargaining on Contract Terms: The Problem It Presents

The bargaining conduct of the parties is highly relevant in determining whether they have bargained in good faith or not because this conduct may be determinative of whether an agreement will be reached or not. This conduct has become extremely multifarious. One particular category is the approach of the parties regarding the presentation of the terms of the contract to one another. Even this has branched off to such aspects as withdrawal of terms previously offered adopting inconsistent positions regarding contract terms, and dilatory tactics regarding these terms.

This section of the paper cannot be confined strictly to discussions of factual situations where the sole issue is the bargaining conduct and approach of a party regarding the contract terms. Since human activity is so complex, it is quite difficult to find a precise case which focuses on this point only. In practically all cases where the employer is found to have been in bad faith re-

[60] 121 NLRB 58 (1968).

garding the negotiation of the terms of the contract, some other unfair labor practice was also committed by him.

Issue

Section 8(d) of the Taft-Hartley amendment defines the duty to bargain.[61] However, the U.S. Congress[62] felt that "such obligation does not compel either party to agree to a proposal or require the making of a concession."

Faced with this section of the law, suppose this simple bargaining situations transpires: the union asks the employer (after recognition) for a conference to thresh out a contract between the company and its employees. The company agrees and at the first meeting the union presents the employer with a proposed contract. The company asks to study it and at the next meeting categorically rejects every item of the contract. The union asks the employer to submit a counterproposal. The employer refuses. The union modifies its proposals but still the company refuses to agree to them without stating its position in return. Suppose the employer submits a counterproposal or a contract and insists that this alone be the basis of an agreement?

In either instance, has the employer fulfilled its duty to bargain in good faith? It could claim that it is merely exercising its statutory right not to agree to any proposal or submit a concession.

The purpose of the law is the execution of a contract between the parties. If a party deliberately frustrates this in the course of his bargaining, the law deems him to be in bad faith and to have committed an unfair labor practice. In the aforecited example did the employer frustrate the purpose conduct and in this respect show its bad faith?

The answer depends on the evaluation of a party's intention through his bargaining conduct. This is extremely difficult be-

[61] 61 STAT. 136, 29 U.S.C. Sec. 141.

[62] In 1935, during the congressional debates, Senator Walsh remarked that Sec. 8(5) embodies the "incontestably sound principle" formulated in Houde Engineering Corp., 79 CONG. REC. 7571 (1935), referring to 1 NLRB [old] 35 (1934).

The principle expressed by the old Board expressed the bargaining concept that an employer had no obligation "to negotiate in good faith with his employees' representatives; to match their proposals with counterproposals, if unacceptable; and to make every reasonable effort to reach an agreement".

cause this area of good faith is very subjective. Unlike other aspects of collective bargaining, such as unilateral changes in working or economic conditions refusal to disclose relevant bargaining information or refusal to sign a contract, the intent of the parties is much harder to determine, or, better still, to presume, because the Board has formulated more rigid criteria in judging these types of activities.

The problem is all the more compounded, for good faith requires a party to bargain sincerely and make every reasonable effort to come to an agreement yet the very same section asserts that the duty to bargain does not require the acceptance of a proposal or the making of a concession.[63]

The Necessity of Justifying a Fixed Bargaining Position

The court in the case of *NLRB v. George Pilling*,[64] a typical yet important case regarding counterproposals, openly came out in favor of one of the bargaining norms earlier discussed: the justification of one's bargaining conduct. This norm should not be minimized because it is premised on intelligent bargaining. The justification of an act is the answer to an important question: can you prove that you were bargaining in good faith?

The respondent Pilling, in this case, was the only one who had authority to bind the company to any contractual terms. In an earlier bargaining conference, respondent's attorney, although disclosing his lack of authority, agreed tentatively on several points raised by the union. At the next meeting, Pilling attended and as the tentative agreement was read item by item, he was asked whether he would agree and in each instance answered 'no'. At no time did he explain his views or make any counterproposals. Several months elapsed. During this period Pilling sought to undermine the union through unilateral grants of economic con-

[63] See Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1416 (1958). Also NLRB v. Ins. Agent's Int'l, 361 U.S. 477 (1960). "Obviously there is tension between the principle that the parties need not contract on any specific item and to deal with each other in a serious attempt to resolve differences and reach a common ground."

In discussing the point that counterproposals need not be submitted under the Act, I do so on the assumption that a substantive counterproposal is equivalent to agreeing to a proposal or submitting a concession. This flows from my understanding that while a counterproposal of itself is not prohibited by the Act, an empty one would be indicative of sham bargaining while a substantive counterproposal may be equivalent to an agreement. (See Puchinelli Packing, 118 NLRB No. 73 (1957).

[64] 119 F2d 32 (1941)

cessions. In the meantime, the union representative sought to renegotiate with the employer and finally succeeded. In one such conference respondent said he would deal with the union and only the union's demand for a preferential shop or check-off clause furnished the only serious obstacle to an agreement between the parties. When asked to submit an alternative to the preferential shop, Pilling did not do so. The succeeding conferences met with the same result. In the subsequent action for unfair labor practice brought by the union for the employer's refusal to bargain, the court said:

> Bargaining presupposes negotiations between parties are carried on in good faith. The fair dealing which the service of good faith calls for must be exhibited by the parties *in their approach and attitude* to the negotiations *as well as* in their *specific treatment of the particular subjects or items* for negotiation. For such purpose there must be common willingness among the parties to discuss fully and freely their respective claims and demands and, when these are opposed, *to justify them on reason.* When the preferred support fails to persuade or if, for any cause, resistance to the claims remain, it is then that compromises come into play. But, agreement by way of compromises cannot be expected unless the one rejecting a claim or demand is willing to make a counter-suggestion or proposal. And, where that is expressly invited but is refused, in each circumstance the refusal may go to support a want of good faith and hence, a refusal to bargain. (emphasis supplied)

On the limited aspect of counterproposals the court felt that when a party opposes the contractual proposals of another, it should justify its opposition with a good reason. This is particularly relevant. With this criterion, an employer through its simple rejection of proposals can no longer talk a union to death, stymie a weak union that does not have the power to strike, or rely on the vague ground that the proposals sought violated company policy.[65] The burden of good faith shifts to the employer. The whole purpose of collective bargaining is to come to some agreement. The employer by not giving any counterproposals frustrates any agreement. It has frustrated the end of the law, so the law now requires it to give a reason, a justification, for the stand it has adopted. After all, when intelligent persons bargain collectively, they do so with some reason. The requirement of justification requires the bargainer to disclose this reason, to explain why he acted in the manner it did. If the reason is valid, the Board will uphold the legality of his acts, and if invalid, or if no reason is given then a legitimate presumption arises that the party bargained with an intention contrary to the act. Also if the party asking for the reason finds them valid, he can modify his proposals to suit those reasons.

The court, however, did not limit itself to the requisite of mere justification. It further said that if the employer's justification fails, then the parties should be prepared to compromise. This criterion is particularly troublesome. Not only is it determinative of a substantive requirement of the law but it may even be going against the express mandate of the law that no concessions need be made by either party.

It would have seemed better had the court just said that by giving counterproposals the parties would come to an understanding of each other's position and because of this, perhaps compromise, modify or withdraw their proposals, and leave it at that. However, the court's rationale may merely be a forerunner of the "give and take" requirement of later cases.

The *Hartcourt Co. and International Printers* case[66] is a corollary to the *Pilling* case. Here the employer and the union had agreed on practically all issues except a ten cents-an-hour wage increase and a union shop agreement. For several months the union raised the point of a union shop which the employer rejected. It appears that an impasse had been reached on this point. At the last two conferences, the union offered to rewrite their union shop clauses but the result was still a standard clause.

> The union said: "Unless you come to an agreement (on the union shop) the (boys) will not return to work."
>
> The employer replied: "Suit yourself."
>
> The Board found.
>
> The duty to bargain implies only an obligation to discuss the matter in question in good faith with a sincere purpose of reaching an agreement. It does not require that either side agree or make concessions. The Respondent, therefore, was under no obligation to accept the union's demands for a union shop or make a counterproposal.

In contra distinction to the *Pilling* case, the employer here stood fast on only one particular item. The fact that the employer and the union agreed on other terms of the contract indicates the sincerity of his intentions regarding the negotiations.

[65] Montgomery Ward & Co., 37 NLRB 100 (1941). The Board relying on the *Pilling* case required justification for the company's bargaining conduct.

[66] 98 NLRB 892 (1952).

The Board's language in this case regarding agreement on contract terms is one of strict conformity with the wordings of section 8(d). Unlike its other rulings which showed a marked tendency towards some concession, this ruling squarely stands against it.

What Would Constitute Justification

It was earlier discussed that an employer should stand ready to justify its inability to submit terms or counterproposals which would facilitate an agreement. The case of *Division 1142 v. NLRB*[67] illustrates how such a justification was made by an employer. The company and the union had employed an unbroken record of harmonious and successful bargaining. There had never been a strike and the company had always advised the union of its financial status. When the parties met to negotiate a new contract, the union asked for a general wage increase. The company pleaded extreme financial penury, candidly disclosing its financial position by throwing open its books. At the next conference, the employer offered as a counterproposal a slight wage increase which the union rejected as being discriminatory between the classes of employees. The union struck.

The court said:

> Appellant's (the union's) argument on this point tacitly equates refusal to bargain in good faith and refusal to recede from an announced position. In many instances such argument might be persuasive, but that is not the case here. At the start of negotiations, the company had stated it was financially unable to pay increased wages. There is no suggestion that the company's position was not taken in good faith and the Trial Examiner found that the general counsel had failed to prove otherwise.
>
> The Board found that the company had sincerely attempted to reach an agreement with the union, and we think the record before us furnishes substantial evidence to *support* that conclusion. The union's extreme demands-increases of 100 percent in some aspects — the company's insecure financial position, its long record of cooperation, the previously good personnel relations, and the company's continuation, even during the strike, of a voluntary program of retirement were among the factors which were surely entitled to weight. (emphasis supplied)

The court found that the employer had sincerely attempted to reach an agreement. The whole bargaining conduct enumerated by the court amounted to a justification of the employer's firm

[67] Division 1142 v. NLRB, 294 F2d 264 (1961).

stand. It should be noted that the union sought to find bad faith out of one conduct in relation to the total conduct of the employer which had been demonstrated as one of reasonableness and that the union itself was instrumental for the lack of an agreement between it and the employer.

Since the submission of counterproposals has greatly enhanced the possibility of agreement, the Board has looked favorably on their submission. Bargaining, however, pre-supposes the possibility of an agreement. When this objective is lost because of the conduct of a bargainer, the other bargainer is relieved of that conduct of him to achieve the bargaining objective. The rule regarding counterproposals follows suit. When its submission has become a futile gesture, *viz.*, the purpose it seeks is lost or unattainable, a bargainer is relieved of whatever "obligation" he may have to submit counterproposals.

This futility must, however, depend upon the bargaining conduct of the other party. This point was sharply illustrated in the early case of *Central Minerals Co.*[68] The Board remarked:

> In view of the total situation . . . The respondent failed to make a reasonable and sincere effort to reach a collective agreement with the union . . . However, we wish to point out . . . obiter, that absent the factors comprising the total situation as outlined above, we would *not* have found that the respondent's failure to make detailed and specific counterproposals in itself consituted bad faith, for the union's ultimatum — "we have one contract" and "You can take it or leave it"—would have relieved the respondent of that duty since the union's position made it clear that specific counterproposals would be unavailing.

The need for the counterproposals became futile because the union would come to an agreement only on its own terms. Its submission would not have helped the bargaining any. After all, collective bargaining, as the terms implies, is a mutual endeavour on the part of both parties.

In *NLRB v. Florida Citrus Canners Cooperative*[69] several meetings to formulate a contract took place between union and management from April till December, 1957. On the nights of December 12 and 13 disastrous freezes occurred in the Florida citrus belt. On December 18, management (the court found) came to the meeting to ask for a suspension of negotiations in order to reappraise its situation because of the freezes. The union refused to listen

[68](?)

[69] 288 F2d 630 (1961).

to any statements made by the company, stating that the freezes were not a factor which would be considered in negotiations. Furthermore, unless the company agreed to a contract or gave assurances of agreeing to a contract by 4:00 o'clock that afternoon, a strike was inevitable. Confronted with the union's strike threat, the respondent's general manager made no request for a delay in negotiations.

The court said:

"The Examiner and the Board reached the conclusion that Walker (company manager) should have made his plea for suspension or negotiations, but we see no reason why the should have done so in view of Wingate's (union representative) declaration that freezes or no freezes, the Respondent must, within two hours commit itself to a contract. The doing of a useless and futile thing is no more required in collective bargaining between employer and labor union than in other activities.

The court differed from the Board's interpretation of the facts, the former finding no bad faith on the employer's part. It seems the union wanted to take advantage of the freezes in getting a contract from the employer. However, in doing so, it placed before the employer an unreasonable ultimatum which instead of making the employer capitulate, merely resulted in breaking off the negotiations. Obviously, no inteligent counterproposals leading towards a contract could be given within a few hours notice unless the company was willing to capitulate to the union's demands. The unreasonableness of the union's ultimatum justified the employer's failure to ask for an extension of bargaining.

Bargaining to an Impasse

Each bargainer will insist that this position is the "legitimate" one. When bargaining reaches the point when neither side wishes to recede from its "legitimate" position, the Board may state that bargaining has reached an 'impasse'. At this point a state or federal mediator may be called in to help the parties come to an agreement, or the dispute may be submitted to arbitration. The important point is that no agreement has been reached not because the parties did not wish to come to an agreement but because the circumstances prevented an agreement.

Once again the paradox of good faith becomes apparent when it is considered that these circumstances which prevented the agreement were created by the parties. A feasible answer is that as long as the parties do not deliberately obstruct an agreement, the parties may bargain to an impasse.

In the *Matter of Collins Baking Co.*,[70] the Trial Examiner found bad faith on the employer's part by (1) refusing to bargain with the union concerning union security provisions and (2) refusing to submit counterproposals with respect to other terms and provisions contained in the union's original demand.

At the very first meeting the union chief announced his firm determination to achieve some form of union security. The company's president expressed as firm a determination to insist upon an open shop contract. From that day on and throughout all the subsequent conferences, neither party receded from its fixed position on this issue. Nevertheless, at the close of the first conference, the respondent company accepted the union's proposed contract for consideration and discussion with its attorney.

The Board found, in spite of the Trial Examiner's conclusion, that the company's president had explained to the union chief his reason for not agreeing to a union shop. It was based on Alabama law which forbade the closed shop agreement and he had posted pertinent provisions of the statute on the plant's bulletin board. In view of this the Board concluded that the union was aware of the reason for the position of the employer with respect to union security and thus had ample oportunity to meet the respondent's arguments. On the second issue the Board said:

While it is true that each remained adamant, neither party was obliged to agree to the other's demand or position. Mere refusal to accede to a demand or to recede from a position is not of itself a refusal to bargain . . . We believe, and we find, that the parties had reached an impasse on the union security issue, and that they did not bargain further because each realized that neither would surrender, nor be able to persuade the other to abandon, its position.

The Board considered the fact that after the first bargaining conference, where the employer agreed to consider the union's proposals, the union never asked directly or indirectly that the respondent discuss any issue other than union security. It was clear that, except for the first day's reference to the proposed agreement, the parties never left the subject of union security or referred back to the other terms of the contract throughout all

[70] 90 NLRB 895 (1950), enf. 193 F2d 484 (1951).

the conferences. In effect, the employer never refused to make any counterproposals, for he was too busy over the issue of a union shop. The need for counterproposals never arose.

The Board should perhaps have brought to the attention of the parties the fact that both of them were instrumental in the failure to arrive at some agreement. The union and the employer immediately locked horns on a single issue, albeit an important one. In doing so, they overrode other considerations pertinent to collective bargaining. Neither of them sought to discuss other contract terms like working conditions or economic benefits. Thus, the possibility of an *impasse* had been maximized.

They both took fixed positions and each made known to the other that neither one would budge from it. That flexibility, or open-mindedness which is required in collective bargaining was immediately eliminated. The possibility of losing face became acute or perhaps each thought that the other would consider flexibility as a sign of weakness. The parties could simply have stated their positions without further qualifications and let the bargaining situation mould the rest of the negotiations.

A Pre-Determined Stand

It would be rather inaccurate to claim that negotiations should only serve to crystallize the labor policies of a union or an employer: that it merely serves as a convenient forum to discuss each other's views on conditions of employment.[71] The term "collective bargaining" denotes, in common usage as well as in legal terminology, negotiations looking toward a collective bargaining agreement. And the initial attitude which a bargainer adopts regarding this collective agreement will greatly determine its fulfillment or not. Thus, it becomes necessary to "pierce the veil of bargaining activity" to determine whether a party bargains with an "open mind" or a "pre-conceived determination not to enter into an agreement".[72]

In *In re David Cohen (Gay Paree)*,[73] only two bargaining conferences were held before the union filed charges for refusal to bargain. At the first conference Cohen (the employer) was present and made this remark: "Well you voted for the union. I don't know why you did not because you are not going to get anything as a result of it."

On the contract terms Cohen stated that: (1) he would hire and fire as he saw fit, remaining the sole judge on this matter; (2) that no raise would be granted and that he would be the sole judge of earnings and piece rates; and that while he would discuss such points with the union, he would neither 'take the union's advice nor submit any dispute to arbitration; and (3) that he would not bargain on a vacation, health, and welfare plan.

At the second conference only Cohen's lawyer was present. While he agreed on some union proposals he substantially rejected, without any counterproposals, the subject matter raised by his client at the first conference. At the end of the conference, Cohen's lawyer said to the union representatives: "This is the contract we offer you. If you want it, take it. If you don't want it, go ahead and strike." The Board finding a lack of good faith said:

> The record is clear that the respondent did meet with the union and discussed various proposals submitted by the union. But such conduct by the Respondent did not necessarily satisfy its bargaining obligation, for the real question is whether or not the Respondent was dealing in good faith or engaged in mere surface 'bargaining' without any intent of concluding an agreement on a give-and-take basis. Of course the Act does not compel agreement, but it does require that both parties enter into negotiations and bargain in good faith in an effort to reach such agreement.
>
> We agree . . . that the respondent engaged in negotiations *with a predetermination not to make a concession* to the union and *to reserve to itself the unilateral power* to decide matters of earnings, grievances and other conditions of employment. This attitude is incompatible with a bona fide endeavour to reach an *understanding* with the chosen representatives of employees and manifests the negotiation of the collective bargaining envisaged by the Act. (emphasis supplied)

Cohen's activity clearly belied his intentions. It was clearly one of hostility to the union. Furthermore, it was quite obvious that the employer sat down at the conference table with the notion that it was the union that had to adjust its position regarding certain definite contract items, while he would not budge from his stand. The statement of his lawyer in effect said: "We will enter into a contract on our terms only." The Board wisely pointed out that no possible understanding could result from such an attitude.

The Board's reasoning, however, seems to demand of the em-

[71] Matter of St. Joseph Stock Yards Co., 2 NLRB 39 (1936).
[72] Globe Cotton Mills, 6 NLRB 461 (1938).
[73] 91 NLRB 1363 (1950).

ployer more than a flexible or an open mind. It says that good faith requires an intent to come to an agreement on a give-and-take basis. The employer does not have to give something in order to get something from the union statutorily. A converse rule would make concessions as the premium for an agreement. The Board comes quite close to saying this.

The core of the Board's decision was its condemnation of the employer's "predetermination not to make a concession". A literal interpretation of this phrase conveys the thought that the employer must be ready to give or must give a concession. Would this not be violative of section 8(d) of the LMRA? It is submitted that granting a concession is for all practical purposes equivalent to agreeing to a contract. For instance, suppose only a wage increase separates the bargaining parties from an agreement. The Board tells the employer: "Give the wage increase." Due to this mandate he increases the wages and a contract is signed. In effect, if a concession has to be made, an agreement has been forced on the employer.

A better decision would have found that the employer engaged in negotiations with "a pre-determination not to come to an agreement". The employer here, by determining beforehand the terms of the contract entered into negotiations with a mind "hermitically sealed" to any understanding with the union, and without this understanding no agreement could possibly materialize. This follows logically for the union and the employer each formulated contract terms favorable to themselves alone. Bargaining seeks to equalize the terms between the parties. This is the give-and-take *compatible* with the Act for it is a give-and-take *voluntarily* given. If a party refuses to allow the other some leeway in formulating the terms of the agreement, the latter party will refuse to accede to the terms of the agreement because most likely the terms are prejudicial to him, since only the first party had a hand in drafting it. The effect is no agreement, and in most likelihood a strike will occur, resulting in industrial strife which may affect even the community. Hence, the Board's conclusion that this "is incompatible with a bona fide intention to reach an agreement."

The recent case of *California Girl, Inc.*[74] brings into focus once more the issue of a pre-determined stand regarding contract terms. At the first bargaining conference, the union, instead of coming forward with a contract, suggested improvements in five specified categories. At the next meeting the company negotiator replied with an emphatic "No" to each of these proposals made by the union.

The company negotiator replied in the same manner inspite of a modification by the union of its demands and that she (a woman negotiator) had no counterproposals to make. The Trial Examiner found:

> . . . . . the significance of the flat rejection of all union proposals in the five stated categories, even when those proposals were scaled down and liberalized, is that this rejection was decided upon before there had been any discussion whatever on any of the proposals. Without hearing the union's arguments, without knowing the scope and extent of the union's demands, she and her employer-client had decided to reject everything and give nothing.

The Trial Examiner's analysis of the employer's conduct is the proper premise for understanding the meaning of the phrase 'a pre-determined stand' and still be compatible with the statutory section that no agreement need be made. The employer here did not enter the conference room to bargain or negotiate as the meaning which these words ordinarily convey, but to reject any and all proposals made by the union. Bargaining presupposes that one will consider the opposing party's terms and weigh its merits in relation to one's own contract terms. The Act sanctions failure to agree but it condemns *preventing* an agreement.

That the employer prevented an agreement is shown clearly by a cross section of the statements made by its negotiator during the conference:

> Union: Have you come prepared to negotiate a wage increase?
> Selvin: I have come prepared to say that we're not going to give any wage increase. Not as yet . . . . These are a few people in an island of a larger group of people. A general wage increase to these people (the employees represented by the union) would leave the other people (the rest of the employees) very dissatisfied and very unhappy . . .
>
> Union: These (our) people are in a separate unit.
>
> Selvin: That is correct.
>
> Union: And the conditions of employment affecting them are not similar or the same as those affecting any other people employed by the company and have to be treated on the merit and all I can think is you've prepared to do nothing about it.
>
> Selvin: No, I've come to negotiate it and reject it.

The fact is . . . .

Union: You've come to reject it. What are you going to negotiate, your rejection?

Selvin: We've rejected it. We have listened to the proposals and we discussed it and whether or not we want to do it, we've decided we don't.

How could anyone bargaining with an open mind say that he is prepared to negotiate when irrespective of the negotiations he would reject the other party's proposals? The union's answer admirably demolished whatever substance the employer's position had. The employer's answers hardly made any sense *vis-a-vis* the logic of the union's questions.

The Trial Examiner however made a rather 'brinkmanship' conclusion of law which merits attention:

> While the Act does not require that either party yield to the other's proposals, there must at least be a *capacity* and *potentiality for yielding* and a willingness to reach accord in a manner mutually beneficial or there can be no bona fide collective bargaining. (emphasis supplied)

It is submitted that this criterion falls within the statutory limits of Section 8(d). A capacity and potentiality for yielding cannot be strictly equated with a mandate to agree. As long as the employer *retains the freedom* not to agree, the law has been observed. This criterion may serve to exert "the strongest possible pressure" on the employer, but he is still free to agree or not, and this is all the Act requires.

Unreasonable and Unrealistic Contract Terms

The labor movement has gone a long way from its struggling days of the early nineteenth century. Unions now have experienced legal counsel and research staffs to help them formulate contract terms. The employer can no longer adopt a condescending attitude towards them but must treat them collectively as equal partners in an economic endeavor. Thus, when the employer approaches the bargaining table demanding patently unreasonable and unrealistic contract terms, no self-respecting union that wants to retain its members will ever agree to such terms. This approach of the employer runs counter to good faith because it minimizes the possibility of an agreement.

In the *Vanderbilt Products Inc. vs. NLRB*[75] case, the employer designated as its bargaining representative a newly engaged lawyer, unskilled, as he himself conceded, in labor matters. The union asked at several meetings that money matters, i.e., pensions, wages, insurance, etc. be discussed. Petitioner's attorney, acting on company's instructions, first required agreement, before further negotiations could be had, on a completely open shop with no union membership however restricted; no maintenance of membership or check off; absolute employer right to discharge or layoff without restriction or seniority limitation; and a five-year term for the contract. At the last meeting the company lawyer said: "Unless I get this in writing, unless I get you to agree to this first, there can be no other discussions."

The Board felt that the employer violated the Act by his outright refusal to consider or even discuss the union's economic demands, which were proper subjects of bargaining unless the union first agreed to the company's demands. It said that the duty to bargain extends to good faith consideration of all proper subjects of collective bargaining, and not only those which at any given moment constitute the employer's demands.

On appeal, the court agreed with the Trial Examiner's and the Board's finding that "no self-respecting union" would ever accept such conditions. The court relied on *NLRB vs. Reed and Prince Mfg.*, which quoted as follows:

> It is difficult to believe that the company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining.

The Board before the appeal stressed the fixed bargaining position of the employer. If there is any minimum good faith requirement, it is that of willingness to discuss contract terms of the other party. The employer sought to limit the parties' consideration of its proposals only refusing to consider other legitimate bargaining subjects, not because the union refused to discuss them, but because the union refused to agree to them automatically. Again the employer's position is an "on-my-own-terms-only" type of bargaining. The Board felt that good faith required the employer to discuss at least other legitimate bargaining subjects, apparently on the sound thesis that the possibility of agreement is more proxi-

[75] 297 F2d 833 (1961).

mate if the parties had discussed all relevant points, leading furthermore to intelligent bargaining between the parties.

The court on appeal, however, took a different approach. Part of the court's *rationale* seems to be that good faith precludes the making of preposterous offers or conditions by a party which he knows the other will never accept. Insistence on these indicates that the party offering such proposals may be engaging in stalling tactics or merely indicates that he has no desire to enter into any form of agreement. Likewise, by emphasizing it as a factual situation, the court emphasized that no intelligent bargaining could materialize if the negotiator was not a competent one. If the negotiator here had more experience, he could have at least shown to the employer the untenability of its position.

The second part of the court's rationale quite realistically points out that no self-respecting union could accept such important contract terms as they were because they were so clearly prejudicial to the union. The employer never even indicated what he would give in return to the union if the latter accepted its terms. Furthermore, that "feeling out" of each other's position which usually exists during the preliminary talks was eliminated. If the employer had assumed a more flexible position, the union might have agreed to a package proposal. The employer did not even afford the union a chance to present its position. There was, as the court said, "no basis for discussion."

A Desire To Reach an Agreement

A person's intent regarding negotiations cannot be glossed over because of the difficulty involved in determining it. Rather it should be emphasized because it is quite obvious that it is the intent of the bargaining parties which will maximize, minimize or preclude an agreement.

In *Fitzgerald Mills Corporation*[76] the union's proposal sought a considerable number of changes in the prior contract including substantial increases in economic benefits. The employer's counterproposal was the old contract, deleting certain beneficial terms to the employees, resulting in a radical departure in its terms as to be *predictably* unacceptable to the union.

The union, in effect, put aside its own proposal and all discussion at the meeting was based upon the employer's 'counterproposal' with the union stating its position with respect to each item. The union also receded from its original position and made a great many progressively lesser requests but the employer at all times maintained an uncompromising attitude, rejecting the union's requests without explanation or discussion.

Agreement reached on any provision was really by reason of the union's acceptance of the employer's terms as it stood. The employer's representatives made no concessions prior to the strike, except to state that they would recommend that a union representative be permitted to enter the plant to investigate grievances and the parties *might* be able to resolve two pending grievances. The Board said:

> While an employer is not obligated to make any concessions, it is required to make a reasonable effort to reach an agreement. Failure to do little more than reject proposals is indicative of a failure to comply with the statutory requirement of good faith bargaining. It is apparent from the above facts, considered in the context of the entire course of bargaining, that the respondent in fact did virtually nothing more than reject the union's proposals. At no time did it make a genuine effort to reconcile the differences between it and the union, contrary to its obligation to approach the bargaining table with an open mind and through the give and take of negotiations attempt to reach an agreement.

As the Board said, bargaining requires "a reasonable effort to reconcile differences." The Board's criteria requires at least a discussion of the other party's proposal. It also requires an explanation for the rejection of these proposals if unacceptable. This the employer did not do. The union on the other hand was willing to meet the employer more than half-way. It showed *its effort*, its desire, to come to an agreement. There is that reasonableness, which though difficult to define, is apparent from an appreciation of the union's conduct. Furthermore, a union cannot approach the bargaining table and walk away with nothing to show its members much less leave the bargaining room with a contract worse than the existing one. *The employer sought to do so in this case.*

The Board emphasized the ambiguous stand of the employer, namely that it would *recommend*, etc. and that it *might* etc. It seems to indicate that by adopting such a bargaining posture, the employer merely sought to tempt the union to reduce its demands in the belief that the employer would give something in return, but winds up receiving nothing or a concession not equivalent in value to what it gave up. It may be argued that this is merely a

[76] 133 NLRB 877 (1961).

part of the employer's bargaining tactics, but when appraised with its other conduct, which the Board also noted, it reveals that negative approach so uncharacteristic of good faith bargaining.

Sham Bargaining on Contract Terms

A contract without substance is merely a useless piece of paper to the union. Many an employer seek to achieve this form of agreement. The proposal they submit usually is an existing contract re-worded to change the form but not its terms. The employer will bargain long and hard on what it has already given the union in order to fulfill its duty to bargain. Some of them even refuse to incorporate statutory provisions as part of the contract, all the while seeking to shift the onus of bad faith on the union. Two cases will illustrate why the Board has considered this activity as sham bargaining on contract terms.

In *St. Cloud Foundry and Machine Co.*,[77] the employer and the union had seven meetings. During these conferences the union made known its willingness to compromise its demand on wages and modify its proposals regarding union security. It asked the employer for counterproposals in order to appreciate the latter's stand on the terms of the contract. The Board agreed with the Trial Examiner's succinct appraisal of the employer's intention:

> It is true that after 10 months of meetings, during which time the union several times modified its proposals, and continuously requested that counterproposals be submitted to it, the Respondent finally handed the union a list of its counterproposals. A review of such counterproposals, however, reveals that Respondent merely set forth in writing what it had been articulating at the meetings. The sum and substance of the counterproposals is an attempt by Respondent *to make it appear* it was making concrete proposals to the union's demands, where in truth and in fact such proposals were no more than sham gestures without substance. (emphasis supplied)

Good faith does not require an agreement but it does require frankness from the bargainers. If a party cannot grant a concession it should say so and give a reason for its inability. If it cannot submit a counterproposal it should be open about it and once more justify this bargaining attitude. However, to make it appear that one is willing to present terms which would modify the existing contract but in reality is no modification of its original stand is tantamount to deceit. All the motions this party goes through during negotiations can be classified in no other way than as a pretense, specially after ten months of fruitless bargaining.

In the *Señorita Hosiery Mills case*,[78] the union submitted two contract drafts which extensively covered all aspects of employment. The employer's reply was that the drafts were "not generally adaptable" and submitted a cursory counterproposal. The union unsuccessfully sought to get the employer to broaden the base of negotiations by combining their proposals for discussion. The employer maintained that his counterproposals exhausted the subject matter required for an agreement and insisted that the discussion proceed along this framework. He asserted he was complying with the law regarding certain working conditions while the other working conditions sought by the union were 'superflous' since they were already in effect.

The Trial Examiner found that the fact that certain proposed provisions by the union which are otherwise acceptable, merely express what the law requires, or reflect what the employer is already doing, constitutes no excuse for refusing to incorporate such provisions in a contract. The employer's counterproposal was as the union found 'useless' since it imposed obligations on the union only, binding the employer to no working conditions, committing himself only to union recognition. The Trial Examiner felt that if an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related requests and he makes no serious proposal meeting the union at least half-way, it may be concluded that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union.

The Trial Examiner further said:

> The motivation which would seem all too apparent from the record was to prevent any agreement which would enable the union to emerge with some semblance of dignity. The calculated rejection of clause after clause involving no monetary detriment or managerial embarrassment to respondent, and its rejection of even the innocuous preamble . . . is explainable only on the basis of the respondent's refusal to accept the union in the role of an equal in the bargaining relationship.
>
> . . . Understandably, the (employer) may honestly feel that some economic demands may be too onerous for it. But it is quite another thing to shut the door to frank disclosure and to the wholesome 'give and take' process contemplated by the bargaining obligation.

[77] 130 NLRB 911 (1961).

[78] 115 NLRB No. 212, (1956).

The employer in this case could not say that he had bargained in good faith because whatever he conceded to the union he did so because the law specifically required him to do so. Furthermore, although he conceded those mandatory terms and other terms already in effect, he refused to incorporate them into the contract although they would not have caused him monetary detriment or managerial embarrassment. Evidently this type of petty bargaining will not result in the fulfillment of the purpose of the law.

BOULWAREISM

A very interesting and quite significant innovation in collective bargaining has been introduced by General Electric and has been labeled *Boulwareism.*[79] It challenges and transcends certain good faith criteria developed so far, more particularly, the area of submitting counterproposals during collective bargaining.

After a severe management defeat in collective bargaining, GE instituted this new concept in collective bargaining. Instead of starting off on an extreme position and through a process of give and take arrive at an acceptable contract, GE would submit what it considered to be a 'fair' contract to the union and would not consider any other terms as a basis for agreement than that contract.

In arriving at the terms of the contract, GE would initiate a massive undertaking to study and gather information on all relevant aspects of employment, taking into consideration past union proposals and through a study of employee wants and complaints, similar to a market research on consumer wants. GE then would undertake a massive informational campaign on different medias to show the 'fairness' of its position. This stream of information is more particularly directed to GE employees.

[79] *"Boulwareism": Legality and Effect*, 76 HARV. L. REV. 807 (1963). This program was named after Lemuel Boulware, a GE vice-president who authored it.

It was the bargaining policy of GE that no amount of counterproposals or modification in bargaining would change its position, or even the threat of a strike or an actual strike. It maintained, however, that it would consider new information in the formulation of its position while bargaining.

In 1958, the union suffered a setback under this concept of management bargaining and in 1960 was determined to recoup its losses even at the expense of a strike. The company maintained its position, the union struck, resulting in failure. Defeated at the bargaining table, the union attacked the cause of its defeat, *Boulwareism,* with an unfair labor practice charge.

Let us assume that GE has submitted a fair contract. The contract offers a substantial wage increase; the pension, insurance plans and hours of work are the best in the industry and so on. The company has undertaken to give the employees voluntarily the economic benefits they really want. The company can thus argue that it has fulfilled the ultimate purpose of labor legislation, the improvement of the economic needs of the employees according to the living standards of the community. The purpose of the law has been accomplished, the section of the law regulating the company's bargaining should no longer be applicable to it.

The basic norms of good faith bargaining will inevitably be levelled against GE. First, the "open mindedness" so characteristic of good faith bargaining is absent. The company, it will be argued, has entered the bargaining room with a mind "hermetically sealed" to all proposals except on its own. The union will charge that the company has offered them a "take it or leave it" contract. What more could be characteristic of bad faith?[80]

It seems, however, that GE's best defense is that very section of the law which may prescribe the bargaining conduct it has assumed. Section 8(d) states that ". . . such obligation (the duty to bargain) does not require a party to agree to a proposal or require the making of a concession . . ." GE has submitted what it considers as an "objectively fair" contract according to the best means for formulating a contract as are available. It has justified its position regarding the terms of the contract. Instead of the delay and wrangling which exist in the "inch for inch" bargaining, it has completely disclosed its position and it cannot accept proposals or modifications because there is "no reason" for counter-

[80] NLRB v. Montgomery Ward & Co., 133 F2d 676 (1953).

proposals or modifications. Making allowances exists in that type of bargaining where parties start on extreme positions, prepared to bargain to an acceptable contract through some give and take. It can assume no other position for it has made "honest proposals."[81]

Furthermore, the company can rely on jurisprudence finding good faith bargaining in spite of a fixed bargaining position on the part of the employer. GE cannot be accused of refusing to come to an agreement, for it is submitting and willing to come to an agreement and a good one at that. It may be argued that it wants to come to an agreement only on its own terms. Could it not be countered that those "terms"[82] actually include union proposals for the company has merely anticipated them and incorporated those terms as part of its offer? GE could argue that "on my terms" bargaining applies to an employer who absolutely refuses to give the union anything, or refuses to concede normal economic benefits expected in the industry or worse still, reduces those benefits, all arbitrarily. *NLRB v. Insurance Agents*[83] allows the bargaining parties to exercise the full measure of their bargaining power, as long as the parties are willing to come to an agreement. The union cannot claim that the terms are in substance insulting that it cannot submit them to their members without losing face.

It would seem that the company has fulfilled its statutory bargaining duty. But has it? Is the intention (the ultimate criterion of good faith) of the company purely to ameliorate the economic conditions of the employer?

GE had sat at the bargaining table with its mind closed to the possibility of a compromise. The whole strength of its bargaining position depends upon this premise. The end result of this position is to completely undermine the union's very existence. If through the lapse of time the employees come to accept the futility of going on strike or exerting economic pressure on the employer, the usefulness of the solidarity of the union is lost. The union officials lose prestige and power to represent the employees. The union is thus deprived of its rule in shaping the terms of the employment contract and assumes an insignificant role in regulating employer-employee relationship.

[81] NLRB v. Truitt, 351 U.S. 149 (1955).
[82] Market research methods were to be used to determine the economic benefits and psychological satisfaction desired by the employees from their jobs. *Supra*, note 79.
[83] 361 U.S. 477 (1960).

The Harvard Law Review[84] suggests that good faith requires the employer to engage in bargaining with a mind open to compromises although the employer need not make a concession. It realizes the difficulty of determining such a situation and suggests that if an employer openly and categorically announces his refusal to accept any changes in its proposed contract (as GE has done), then this is the indicia needed to determine its pre-bargaining state of mind. The Board could then require the employer to desist from such a policy resulting in the crumbling of the pillars of Boulwareism.

Relying on NLRB v. Katz,[85] where the Court said:

> The Board *is* authorized to order the cessation of behaviour which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion . . .

the Harvard Law Review goes on to say:

> This would seem to indicate that there are certain obstructions so inimical to collective bargaining that they cannot be countenanced even if there exists a desire to reach an agreement. General Electric's conduct, unlike the union's in Insurance Agent's is not just a weapon used to make its good faith bargaining posture stronger; *it is a negotiation of collective bargaining since it defeats the moderating function of the process of negotiation.* (emphasis supplied)

These arguments are powerful and logical. In turn these are premised on the concept of collective bargaining as formulated by the Harvard Law Review[86] which is as follows:

> Collective bargaining requires that the parties exchange their ideas in the expectation that the give and take of negotiations may result in the modification of their positions; entering negotiations with a mind closed to compromise defeats this expectation.

It is submitted that this is the normal concept of collective bargaining but it cannot be accepted as the only concept in which collective bargaining can be comprehended.

This concept of collective bargaining assumes that the parties enter into negotiations with extreme positions. This was not the case with GE. The "give and take" of bargaining assumes that there is something to give and something to take. It recognizes that parties come to the bargaining table with extreme positions.

[84] *Supra*, note 79.
[85] NLRB v. Katz, 369 U.S. 736 (1962).
[86] *Supra*, note 79.

The article's concept seems to sanction this conduct as the only proper bargaining conduct.

Also, this apprehension of collective bargaining suggests that a party has to be prepared at the very least to concede his position. Both the congressional intent and the very letter of the law preclude this interpretation. It is correct that a party should not have a pre-bargaining state of mind closed to an *understanding* with the union, but this is different from the idea that a party has to be prepared to *compromise.*

It is submitted that the employer is required to have a pre-bargaining state of mind which is open to compromise only if the employer knows that he cannot justify his position. This is extremely difficult to prove, but can perhaps be shown by proof on the part of the union of the non-justifiability of the employer's position. If the employer fails to rebut the union's proof, the law would recognize what has all along been bad faith on the part of the employer, his refusal to come to an agreement.

Perhaps a dichotomy may be possible between compromise and understanding. It is submitted that while an employer is not required to compromise, good faith requires understanding on his part. In the GE case, it was earlier indicated (according to GE) that if the union could disclose information which the employer failed to use in formulating its contract terms and this is relevant to the contract terms, GE was willing to modify the portion of the contract affected by this information. The employer by modifying the contract pursuant to this information is not compromising because if it had known the information it would have made use of it, but is endeavouring to come to an understanding with the union, so as to consummate an agreement between them.

It should be taken into consideration that in cases which strongly intimate that the employer should be prepared to make a concession, the factual situation reveals that the employer refused to make even a token concession or those 'normal economic desires' of a union. GE, however, made a reasonable offer to the union. Its sin, if any, is not that its terms were unreasonable, or that it took an adamant stand in collective bargaining, but through a "legitimate" act (I conclude) it practically destroyed the accepted concept of collective bargaining and with it the whole *raison d'etre* of a union.

It is submitted that there is in effect a conflict of two legitimate interests. Lawful bargaining power vis-a-vis union existence. In balancing the interests of the two, a greater good will be maintained if the latter is upheld and it is for this reason that the employer should be compelled to desist from stating in advance its refusal to compromise.