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Labor Law: The Duty of an Employer to Negotiate in Good Faith

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COMMENTS

LABOR LAW: THE DUTY OF AN EMPLOYER TO NEGOTIATE IN GOOD FAITH.

An obligation to bargain collectively is imposed on both employer and employee representatives by the National Labor Relations Act (NLRA),[1] §8(a)(5)[2] and §8(b)(3),[3] respectively. These provisions make it an unfair labor practice for either party to refuse to participate in collective bargaining. Compliance with this duty to bargain cannot be achieved by simply conferring about the terms and conditions of employment. Rather, the NLRA imposes a further obligation on the parties, for §8(d) defines collective bargaining as:

> 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, ... (emphasis added).[4]

Whether a party's conduct is consistent with the statutory standard is determined by the National Labor Relations Board (NLRB), subject to review by the federal courts.[5] A precise standard for a "good faith" test is lacking, however—quite probably because of the

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1. National Labor Relations Act, 39 Stat. 449 (1935), *as amended*, National Management Relations Act, 61 Stat. 136 (1947), *as amended*, Labor Management Relations Act, 29 U.S.C. §§141 *et seq.* (1970) [hereinafter cited NLRA].

2. NLRA §8; 29 U.S.C. §158:
   (a) It shall be an unfair labor practice for an employer—
   (5) to refuse to bargain collectively with the representatives of his employees, ...

3. NLRA §8; 29 U.S.C. §158:
   (b) It shall be an unfair labor practice for a labor organization or its agents—
   (3) to refuse to bargain collectively with an employer . . . .

4. Congress (through the Taft-Hartley amendments) attempted to promulgate an objective standard by which the courts and the Board could determine whether a party had refused to bargain. The House of Representatives proposed a lengthy and detailed objective test for determining what constituted good faith in collective bargaining. H.R. Rep. No. 245, 80th Cong., 1st Sess. 19 (1947). The proposed Senate bill, which was subsequently passed almost verbatim did not include such an objective test, but had the same basic effect since it precluded the Board from determining the merit of the position of the parties. *See* House Comm. of Conf. Rep. No. 510, U.S. CODE CONG. & AD. NEWS, 80th Cong., 1st Sess. 1140 (1947). The requirements of §8(d) of the Taft-Hartley amendments, that the parties "confer in good faith," were almost identical in wording to those of the Supreme Court in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). THE DEVELOPING LABOR LAW, Ch. 11 (C.J. Morris ed. 1971).

5. NLRA, §10(e), (f); 29 U.S.C. §160(e), (f).

conflicting policy factors and the very nature of the concept itself.[6]

The Board may not "sit in judgement upon the substantive terms of the collective bargaining agreements";[7] but, at the same time, it cannot be content with the mere surface motions of the parties and, therefore, must look into the reasonableness of the position taken by an employer in the course of contract negotiations.[8] Thus, freedom to contract without government intervention must exist beside a statutory mandate—overseen by the Board and the courts—to negotiate in an atmosphere which will foster responsible dialogue and result in fair terms of employment.

In addition to these often conflicting considerations, the subjective nature of "good faith" causes further problems in Board and court determinations. Each negotiating party must make a sincere effort to reach agreement.[9] Since parties would not be expected to declare "insincere efforts" openly, a determination of bad faith must be based on external objective manifestations of such subjective intent.

> A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitutes the raw facts for reaching such a determination.[10]

Because of the difficulty in determining an objective definition of "good faith", courts often take the opposite approach of defining "bad faith" and then determining if that "bad faith" is present.[11]

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6. It has been noted, "If one were to select the single area of our national labor law which has posed the greatest difficulty, for the National Labor Relations Board, that area would be encompassed within the phrase 'the duty to bargain in good faith.'" Cooper, *Boulwarism and the Duty to Bargain in Good Faith*, 20 RUTGERS L. REV. 653 (1966). For other recent articles see" Davis, *Unilateral Action Under the National Labor Relations Act*, (pt. 1, 2), 52 CHI. BAR REC. 129, 179 (1970-71); Forkosch, *Boulwarism: Will Labor-Management Relations Take It or Leave It?* 19 CATH. U.L. REV. 311 (1970); Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248 (1964); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Humphrey, *The Duty to Bargain*, 16 OHIO ST. L.J. 403 (1955); Comment, *Collective Bargaining—Is It Working?* 4 LOYOLA U.L.A.L. REV. 361 (1971); Note, *Collective Bargaining: Insistence, But Only to a Point*, 22 DRAKE L. REV. 365 (1973); Note, *Labor Law: Freedom of Contract and the Duty of Collective Bargaining*, 17 LOYOLA L. REV. 209 (1971); Note, *Labor Law—Duty to Bargain in Good Faith—Boulwarism within the Totality of Circumstances*, 48 N.C. L. REV. 999 (1970).

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

8. Wilson & Co. v. NLRB, 115 F.2d 759 (8th Cir. 1940).

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

10. *Id.* at 155 (Frankfurter, J., concurring).

11. *E.g.*, in a situation involving a combination of delaying tactics plus unilateral wage increases during negotiations, the court of appeals held that for an employer not to find

Certain *specific* practices by an employer can result in a determination that a §8(a)(5) violation has been committed.[12] However, lack of good faith may be present in the absence of a *per se* violation of §8(a)(5). In such a case, good faith—or lack of it—depends upon a factual determination based on the overall conduct of the party charged.[13] Thus, a violation may result from either a "per se" violation or from the totality of several incidents which separately would not constitute a refusal to bargain nor establish a "bad faith" intent.[14]

The "obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession."[15] Still, there *is* a duty that is not satisfied by mere discussion of grievances with employee representatives. Bargaining contemplates the making of agreements which serve as a working basis for carrying on the employer-employee relationship.[16] Simply stated, then, the goal of collective bargaining is the making of contracts.[17]

What, however, are the specific duties of the parties in trying to reach this objective? One, oft-cited, criterion is stated as follows:

> [T]here is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and, if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for the adjustment of grievances.[18]

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anything at all to agree to during negotiations is some evidence of a desire not to reach an agreement with the union and, therefore, bad faith. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). The court went on to say "the employer is obliged to make *some* reasonable effort in *some* direction to compose [*sic*] his differences with the union, if §8(a)(5) is to be read as imposing any substantial obligation at all." 205 F.2d at 135.

12. *E.g.*, it was held that unilateral changes in working conditions made by an employer during bargaining can be found to constitute *per se* violations of the duty to bargain, since such changes result in a "refusal to negotiate *in fact*." NLRB v. Katz, 369 U.S. 736, 743 (1962).

13. NLRB v. General Elec. Co., 418 F.2d 736, 756 (2d Cir. 1969). *See* note 56 *infra*.

14. *See* note 46 *infra*.

15. NLRA §8(d); 29 U.S.C. §158(d). The Supreme Court has held that the NLRB does not have the power to order an employer to agree to a specific contract provision, despite the Board's finding that the employer's refusal to agree to that provision was based on a desire to frustrate agreement. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

16. Fetzer Television, Inc. v. NLRB, 299 F.2d 845 (6th Cir. 1962).

17. To add to the confusion, it has been noted that even collective bargaining cannot be precisely defined. While it appears to be a simple concept there is no standard pattern of collective bargaining and, thus, no precise behavioral definiton. H.D. MARSHALL & N.J. MARSHALL, COLLECTIVE BARGAINING, Ch. 1 (1971). For a behavioral analysis of collective bargaining, *see* R.E. WALTON & R.B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965).

18. Glove Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939). Other Fifth Circuit

This criterion, however, leads to further questions and problems. If the duty is somewhat nebulous in nature, subjective in determination and difficult to legally enforce, does its existence serve any useful, practical purpose? With all its frailties, is the standard of a duty to bargain in good faith worth holding onto?

There are those who would strongly argue that the "good faith" concept is unviable, problematic and more trouble than it is worth.[19] Others are of the view that such a concept does serve a meaningful purpose.[20] In considering the usefulness of the good faith concept in the area of collective bargaining, this comment concentrates on one facet of the bargaining process—the employer's behavior during contract negotiations.[21] This behavior is broken down according to a classification sometimes used by the Board and the courts, *i.e.*, good faith bargaining, bad faith bargaining, and bargaining that exhibits a lack of good faith.[22] This classification leads to overlaps and confusion. However, the confusion that results is a function of the approach itself and is intended to show how "gray" this area of the law, in fact, is.[23]

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decisions have quoted the same standard. *See, e.g.*, NLRB v. Herman Sausage Co., 275 F.2d 229, 230-32 (5th Cir. 1960).

19. See THE BUREAU OF NATIONAL AFFAIRS, THE LABOR BOARD AND THE COLLECTIVE BARGAINING PROCESS, Ch. IV (1971); E.F. BEAL, E.D. WILKERSHAM AND P. KIENAST, THE PRACTICE OF COLLECTIVE BARGAINING, Pt. V (1972); INSTITUTE OF COLLECTIVE BARGAINING AND GROUP RELATIONS, COLLECTIVE BARGAINING TODAY, 22-30 (1971).

20. *See* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248 (1964).

21. This partial analysis has been selected as the vehicle for reviewing the concept of good faith bargaining because of the complexity of the concept—in general and as it relates to various contingencies in the early stages of the bargaining process. However, it should be emphasized that for a complete treatment of the good faith concept, one should also consider employee representative bargaining, recognition of unions, subjects for mandatory negotiations and like topics. See 2 CCH LAB. L. REP. (LAB. REL.) ¶3085, at 7806 (1972).

22. This differentiation is not followed with total consistency. One reason is that "bad faith" and "lack of good faith" are sometimes used interchangeably in the same decision. Further, determining bodies sometimes point to both specific practices which are violative in themselves plus the consistent pattern of behavior in discussing the violations involved. Other decisions begin with discussions of "good faith" and then switch to one of the other approaches for the remainder of the decisions. However, the tendency seems to be to classify along the lines suggested. Thus, this comment follows this sometimes artificial differentiation and refers to positive statements or "good faith bargaining" determinations of specific violations or "bad faith bargaining" and cumulative effect violations or "lack of good faith bargaining."

23. Another source of confusion is the effect of environment on the total situation. Those factors include the size of the plant, the amount of investment per worker, the nature of the company's products market and cost structure, and the relationship of the plant to the community. H.D. MARSHALL & N.J. MARSHALL, COLLECTIVE BARGAINING 12 (1971).

I. GOOD FAITH BARGAINING

As noted, the subjective nature of the duty to bargain in good faith leads to problems of interpretation and determination. The Board and the courts adhere to a case-by-case approach and rarely determine what "good faith bargaining" is with any degree of specificity.[24] However, there are some generalized statements of what behavior is encompassed in the good faith standard.

Good faith bargaining contemplates the making of agreements which will serve as working bases for the carrying on of the employer-employee relationship.[25] This duty does not require an employer to agree to any particular proposal[26] nor does it exclude the use of economic pressures to enforce demands.[27] What the Act does require is that an employer accept the spirit of collective bargaining by according recognition to the union and conducting negotiations with a sincere purpose of finding a basis of agreement concerning issues presented.[28] Such "good faith" standards review the philosophy behind such a duty and the reasons for its existence. Opinions that define good faith negotiations define the broad parameters of acceptable behavior. Although somewhat abstract in nature, such discussions are sufficiently concrete to provide the employer with notice of what is expected of him.

Though such formulations are necessary, they do not define objective behavior patterns which employers can follow with any degree of precision. While, in some cases, the Board states reasons for finding that an employer has negotiated in good faith,[29] a review of those cases shows a clear absence of any cumulative guidelines. The crux of the problem is that statements of proper behavior, because they point to the ultimate objective of the statutory duty,

24. The research for this comment led to few accounts of specific behavior that indicated a good faith intent. The few examples that were found seemed to be a review of the specific employer's reasonable tactics rather than suggested steps to be followed. *See* note 29 *infra*. As will be discussed in the following section, the Board and the courts more consistently rely on a negative approach.

25. Fetzer Television, Inc., v. NLRB, 299 F.2d 845 (6th Cir. 1962); NLRB v. Highland Pork Mfg. Co., 110 F.2d 632 (4th Cir. 1940).

26. Northwestern Photo Engraving Co., 140 N.L.R.B. 24 (1962).

27. NLRB v. Insurance Agents' Internat'l Union, 361 U.S. 477 (1960).

28. NLRB v. Lightner Pub. Corp., 113 F.2d 621 (7th Cir. 1940).

29. *E.g.*, in NLRB v. General Tire & Rubber Co., 326 F.2d 832 (5th Cir. 1964), the Court noted that it failed to enter collective bargaining with an open mind and sincere purpose where the evidence showed that an employer met with the union in eighteen bargaining sessions, either accepted the union's contract proposals or advanced factually supported counter offers, accepted 38 adjustments of its counter offers and arrived at an essential agreement with the union on all issues except the union's proposal for check-off of union dues.

can only be written in abstract terms. Instructing one to negotiate in the "spirit of the Act" or in the "spirit of collective bargaining," in effect mandates an attitude. While a good faith attitude between negotiating parties is beneficial, if not a prerequisite, to the reaching of agreement, neither the Board nor the courts can enforce a feeling. Thus, both the Board and the courts have employed an outcome-oriented approach in determining what employers may not do and prohibiting such actions.

II. Bad Faith Bargaining

Because of the impractibility of describing desirable negotiating practices with any degree of precision, the determining bodies instead seek to weed out what cannot be tolerated. The issue then becomes whether from an examination of the totality of circumstances, it can be inferred that the employer went through the motion of apparent negotiation as an elaborate pretense with no sincere desire to reach an agreement.[30] Although bad faith bargaining is said to be determined by an examination of the total pattern of negotiating behavior, certain types of conduct have been viewed as per se indications of refusal to bargain in fact. Thus, bad faith practices include both specific types of behavior and violations found through the accumulation of individual factors. Although there is some overlap, the Board and the courts tend to distinguish between the two situations by designating the former as "indications of bad faith" and the latter as "indications of lack of good faith."

One of the more obvious "indications of bad faith" is unilateral action during negotiations. When such action by the employer involves a condition under negotiation, a *per se* §8(a)(5) violation exists. Unilateral actions constituting a violation include granting wage increases,[31] offering and granting benefits and changes in working conditions while at the same time threatening loss of jobs through sub-contracting of work,[32] and withdrawal of holiday, vacation, jury and premium pay after the expiration of an old contract and during talks for a new contract.[33] Such conduct, in effect, tells the employees that without collective bargaining, they can secure advantages at least as great as those the union can secure.[34]

30. NLRB v. General Elec. Co., 418 F.2d 736 (2d Cir. 1969).

31. NLRB v. Katz, 369 U.S. 736 (1962).

32. Houston Sheet Metal Contractors Ass'n (Kitchen Equip. Div.), 147 N.L.R.B. 774 (1964).

33. Molders & Allied Workers, Local 155 v. NLRB, 64 CCH Lab. Cas. ¶11,396 (D.D.C. 1971).

34. For examples of unilateral actions held *not* indicative of "bad faith" see:

Because §8(d) gives statutory recognition to certain basic procedural elements of collective bargaining, failure to comply with such minimal steps is also a *per se* refusal to bargain. Since the definition of collective bargaining includes "the execution of a written contract including any agreement reached",[35] refusal to sign a written memorandum of such agreement has been uniformly regarded as a *per se* violation.[36] An employer's insistence on bargaining by mail[37] has been found to be a violation of the mandate "to meet at reasonable times."[38] Violations of the obligation to "confer in good faith"[39] have been found in a refusal to bargain about a mandatory subject[40] or insistence to the point of impasse on a permissive subject of bargaining.[41] These *per se* violations have been held to be "indications of bad faith" independent of other factors.

Other relatively clear-cut indications of bad faith include the holding of a predetermined position throughout the negotiations,[42] the shifting of positions on bargained matters,[43] the refuting of previously agreed upon terms,[44] and the raising of new and additional issues after agreement has been reached.[45] All of the above activities tend to demonstrate a purpose to frustrate negotiations and prevent agreement.

Such *per se* or independent indications of bad faith are relatively specific, detailed and obvious. However, pointing to specific prohibited behavior does serve a useful function. By making employers aware of what will not be tolerated, blatant situations of bad faith are often avoided. Even the most anti-union employer will not usually take action that will automatically result in a Board determination against him, for in the politics of power this would result

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Southwestern Pipe, Inc., v. NLRB, 65 CCH LAB. CAS. ¶11,758 (5th Cir. 1971); Waiakamila Corp., 192 N.L.R.B. 878 (1971); and NLRB v. Newberry Equipment Co., 58 CCH LAB. CAS. ¶12,946 (8th Cir.1968). From the above examples it can be seen that to indicate bad faith the unilateral actions must relate to the negotiations or must be found to be directed toward hampering the negotiations or coupled with an anti-agreement intent.

35. NLRA §8(d); 29 U.S.C. §158(d).

36. NLRB v. Big Run Coal & Clay Co., 385 F.2d 788, 56 CCH LAB. CAS. ¶ 12,271 (6th Cir. 1967).

37. Duro Fittings Co., 121 N.L.R.B. 377 (1958).

38. NLRA §8(d); 29 U.S.C. §158(d).

39. *Id.*

40. NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

41. NLRB v. American Compress Warehouse, 350 F.2d 365 (5th Cir. 1965).

42. Wheeler Elec. Membership Corp., 153 N.L.R.B. 1291 (1965); California Girl, Inc., 129 N.L.R.B. 209 (1960).

43. Marley Co., 150 N.L.R.B. 919 (1965); Wate, Inc., 132 N.L.R.B. 1338 (1961), *enforced*, 310 F.2d 700 (1962).

44. Carolina Paper Bd. Corp., 183 N.L.R.B. 544 (1970).

45. Clinton Packing Co., 191 N.L.R.B. 879 (1971).

in a psychological victory for the other side. Further, employers who are actually trying to negotiate in good faith can determine what specific practices have been outlawed. Yet these are not sufficient in themselves to police the "good faith concept." First, one must again remember that *all* relevant factors are usually considered in order to piece together a subjective state of mind. Second, these specific prohibitions do not cover situations in which no particular activity in itself is a §8(a)(5) violation, but rather the individual actions add up to an overall refusal to bargain.

III. Lack of Good Faith

As seen in the preceding two sections, good faith guidelines are either non-existent or abstract while bad faith actions are more identifiable and concrete. Between these two extremes are the more difficult and more numerous situations—those cases in which the court looks for an overall presence or absence of good faith in contract negotiations. In these cases, although one specific factor is not found which in itself indicates "bad faith" the sum total of the circumstances or the pattern of negotiations which has emerged is sufficient to indicate a "lack of good faith."[46] These are the situations which give the Board and the courts their most consistent problems. All the relevant factors must be weighed and balanced to determine whether the manifestations of positive, negative and neutral tactics combine to produce good faith negotiations.

The use of delay tactics may indicate a lack of good faith. Dilatory tactics held to be unlawful include shifting of positions whenever an agreement seems to have been reached; arranging a number of conferences at which either the employer or his attorney is not present so that the one in attendance could excuse failure to reach a conclusion on the absence of the other; and, refusing to enter into a written contract after having exhausted objections to the substantive terms of the contract.[47] The Ninth Circuit Court of Appeals in *NLRB v. Kit Manufacturing Co.*,[48] listed other typical stall and delay maneuvers used by the employer in that case which resulted in an overall refusal to bargain in good faith: refusing to negotiate while an unfair labor practice case was pending; conditioning bargaining on the union's withdrawal of charges against the

46. NLRB v. Wonder State Mfg. Co., 344 F.2d 210 (8th Cir. 1965); NLRB v. Cascade Employers Ass'n, Inc., 296 F.2d 42 (9th Cir. 1961).

47. Solo Cup Co. v. NLRB, 332 F.2d 447 (4th Cir. 1964); McCann Steel Co., 190 N.L.R.B. 12 (1971).

48. 335 F.2d 166 (9th Cir. 1964), *cert. denied*, 380 U.S. 910 (1965).

employer; and, sending a proposed incentive plan to employees rather than to the union.

However, an employer's reasonable change in position or delay in negotiations does not indicate lack of good faith. These should not be confused with the use of dilatory tactics, for in the latter it must be determined that such actions were directed toward the sabotaging of effective bargaining. Thus, a shift in position was not indicative of bad faith when the union involved had not accepted the original proposals, and, therefore, no agreement had been reached;[49] and, an employer's delay because of a heavy bargaining schedule in which the company negotiators were involved in closing twenty to thirty union contracts was not evidence of bad faith bargaining.[50]

In sum, delaying actions during negotiations are a form of "bad faith" only if the delay can be seen as an indication of coming to the bargaining table with a closed mind.[51] It is the *consistent pattern* of delay and hindrance of negotiations that will be found to be unlawful.[52] This delaying strategy, when taken together with other actions inconsistent with the goal of successful contract agreement, often substantiates the determination that negotiations lack good faith intent.[53]

Further, an employer who maintains a take-it-or-leave-it attitude in negotiations may be exhibiting an unlawful lack of good faith.[54] One of the most notorious examples of this position is seen in *NLRB v. General Electric Co.*[55] In that case the court held that an employer may not combine a take-it-or-leave-it bargaining method with such a widely publicized stance of unbending firmness that it is unable to alter a position once taken. Such conduct consti-

49. Fehr Baking Co., 104 N.L.R.B. 240 (1953).

50. Chevron Oil Co., Standard Oil Co. of Texas Div. v. NLRB, 65 CCH LAB. CAS. 11, 730 (5th Cir. 1971).

51. NLRB v. Southwestern Porcelain Steel Corp., 317 F.2d 527 (10th Cir. 1963).

52. NLRB v. W.R. Hall Distributor, 341 F.2d 359 (10th Cir. 1965).

53. Pioneer Astro Metallics, Inc., 156 N.L.R.B. 468 (1965).

54. The rational for this position is well stated in the following:

> [W]hile the employer is assured these valuable rights, [that the Board cannot require the yielding of positions] he may not use them as a cloak. In approaching it from this vantage, one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere "surface bargaining," or "shadow boxing to a draw," or "giving the union a runaround while purporting to be meeting with the union for the purpose of collective bargaining." NLRB v. Herman Sausage Co., 275 F.2d 229, 232 (5th Cir.), *rehearing denied*, 277 F.2d 793 (1960) (citations omitted).

55. 418 F.2d 736 (2d Cir. 1969).

tutes absence of subjective good faith, for it implies that the employer can deliberately bargain and communicate as though the union were non-existent, in clear derogation of the union's status as exclusive representative of its members.[56]

However, the term "hard bargaining" has been used to describe a similar, though *lawful* situation in which a party to the negotiations maintains a position or takes action that appears to put the other party at a disadvantage.[57] Thus, it seems that factors which, in slightly different circumstances, might indicate lack of good faith do not indicate such when a court determines that they merely evidence "hard bargaining." This demonstrates that in considering the sum total of factors, like actions can be decided with opposite results. While this approach is not mathematically precise, it does result in fairly consistent judgments and provides the employer with notice that he is expected to actually bargain with employee representatives.

IV. Discussion

In sum, one abstract standard, one relatively precise standard, and one sketchy standard that must be used in the majority of cases emerge. Each approach has its strong and weak points. All coalesce into a general test for determining the statutory duty of good faith. This general standard cannot be specifically defined. Even its breakdown into three sub-approaches as suggested here is artificial,

56. The pattern of conduct inconsistent with good faith bargaining in the *General Electric* case included: (1) specific violations of the Act involving a unilateral take-it-or-leave-it insurance offer; (2) insistence on doing no more than the law absolutely required; (3) the disregard of the legitimacy and relevancy of the union's position of the employees' statutory representatives; (4) the display of a patronizing attitude toward the union even before the general reopening of negotiations; (5) vague responses to the union's specific proposals; (6) a "prepared lecture series" instead of counter-proposals when the union offered its plan; (7) persistent refusal after publicizing its proposal to estimate the total size of the wage-benefit package program that it would consider reasonable; (8) the only defense to an unreasonable position—the purpose not yielding to the union; (9) the display of an unbending posture even when it became apparent that the union would have to concede to employer's terms, and (10) a refusal to withhold publicizing its offer until the union had opportunity to propose suggested modifications.

57. In a 2-1 decision, a majority of a Board panel found that although some items indicated its willingness to reach a bargaining contract, and both union and management adopted an attitude of hard bargaining and intransigence on such major items as wages and benefits. The dissent felt that the employer's behavior indicated that he entered discussion with a colored mind toward mutual agreement, and, therefore, committed a §8(a)(5) violation. Unoco Apparel, Inc. & Internat'l Ladies Garment Workers Union, AFL-CIO, 1974 CCH NLRB ¶26,150, *enforced on other issues*, 76 CCH Lab. Cas. ¶10,717 (5th Cir. 1975). See also M.R. & R. Trucking Co., v. NLRB, 64 CCH Lab. Cas. ¶11,308 (5th Cir. 1970); Hondo Drilling Co. N.S.L. & Local 826, Internat'l Union of Operating Eng'rs, AFL CIO, 1974 CCH NLRB ¶26,907, *enforced*, 525 F.2d 864 (5th Cir. 1976).

overlapping and somewhat confusing. Faced with such a state of affairs, one returns to the principal questions: are the Board and the courts effectively enforcing NLRA mandates by attempting to define "good" and "bad" negotiating attitudes? Is this statutory duty to bargain in good faith necessary or practical?

The duty to bargain in good faith is still an evolving and fluctuating concept, "dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed across the table."[58] The legitimate purpose of this duty is to foster productive negotiations. While the duty is legitimate, it is not *a fortiori* necessary.

In considering whether such a standard is necessary, one must look to the alternatives. There are those who argue that subjects, procedures and strategies of negotiations are best left to the parties involved.[59] However, without a standard—nebulous though it might be—parties would be freer to "shadow box to a draw."[60] In the present situation negotiating parties are, at least, on notice that they are expected to make a sincere effort toward reaching a fair agreement. The party who intends to walk the fine line between actual and pretended negotiating efforts is aware that he may be called to account for his actions. As long as there are weak unions there will be employers tempted to engage in collective bargaining without substance. It seems that as long as employers are so inclined then *some* standard directed toward sincere contract negotiating is necessary if the duty to bargain is to have any meaning at all.[61]

Following necessity is practicality. Determining a subjective state of mind is problematic. Although objective manifestations are considered in a case-by-case approach, an across-the-board objective standard to meet all future situations cannot be formulated. Indeed, Duvin suggests that the use of objective criteria to regulate collective bargaining is a dangerous interjection of rigidity into an area where flexibility is required.[62] Rather, the absence of definite language in the statute or legislative history requires that important decisions on this issue be made in the light of sound labor policy.[63]

58. Times Publication Co., 72 N.L.R.B. 676, 682-83 (1947).

59. *E.g.*, LABOR STUDY GROUP, THE PUBLIC INTEREST IS NATIONAL POLICY 82 (Committee for Economic Development, 1961).

60. Stonewall Cotton Mills Inc., v. NLRB, 129 F.2d 629, 631 (5th Cir.), *cert. denied*, 317 U.S. 667 (1942).

61. See Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

62. Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 285 (1964).

63. *Id.*

To list thirty definite practices that indicate or lead to a presumption of "bad faith" leaves the "creative mind" to find that thirty-first practice. So, of its nature, the standard herein involved must be flexible; it must be tested against the particular fact situation of the individual case. While the Board's and courts' method of determining good faith or lack of it may not be practical on an absolute scale, it is the most feasible available. Perhaps the best summary of this view, that the standard of a duty to bargain in good faith serves a necessary and practical purpose, was stated eighteen years ago by Archibald Cox:

> The law can influence man's attitudes, up to a point, by declaring a higher standard of conduct than the legal machinery can enforce. A good many companies could have done no more if listening politely had satisfied their legal obligation. Many empty discussions were gradually and unconsciously transformed into a bona fide exchange of ideas leading to mutual persuasion; for this is a field in which there is much wisdom in the saying of Elie Halévey that "many a man has become a good man as a result of a life of hypocrisy."[64]

Barbara Pugliese Gorman

64. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1439 (1958).