RECENT CASES

THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT PREROGATIVES

On January 1, 1936, the petitioner Inland Steel Corporation initiated an optional pension plan for the payment of retirement annuities to its employees. By unilateral amendment effective in December 1943, the plan was extended so as to cover all of the employees of Inland Steel, provided they had attained the age of thirty and had been employed by petitioner for a period of five years. One of the significant provisions of the plan from its inception had been the requirement that employees in order to benefit from the plan had to retire at the age of sixty-five. In August 1941 because of the wartime man power shortage, the petitioner was forced to suspend this compulsory retirement provision. It was, however, reinvoked in April 1946, at which time the company announced that no retirements would be deferred beyond June 30, 1946. As far as the employees concerned were affected, the announcement seems to have been little more than a matter of form, since all of the employees who had reached the age of sixty-five, some 224 in number, had already voluntarily retired by April 1, 1946. Soon after the petitioner's announcement the union representative filed a grievance protesting the unilateral action taken by the company in regard to both the 1943 amendment and the reassertion of the clause in 1946, and demanded that these matters be made the subject of collective bargaining negotiations. The petitioner, however, refused to discuss its retirement plan with the union, whereupon the union representative filed a complaint with the NLRB charging the petitioner with unfair labor practices under Section 8(5) of the National Labor Relations Act. On petition to review and set aside the Board's finding that by such a refusal to bargain the petitioner had violated Section 8(5), the Circuit Court of Appeals for the Seventh Circuit, subject to conditions not here material,[1] ordered the decision of the Board enforced. *Inland Steel Company v. NLRB.*[2]

The grounds on which the petitioner based its refusal to bargain center around the question of the scope of the subject matter regarding which the em-

[1] As a condition precedent to the enforcement of the Board's order that Inland Steel bargain collectively, the union was required to comply with Section 9(h) of the Labor-Management Relations Act. The Court denied the union's contention that this provision of the Act was unconstitutional and thus stayed the order to bargain collectively until the officers of the bargaining representative had signed the "non-communist affidavit." For a discussion of this aspect of the Act see Mulroy, The Taft-Hartley Act in Action, 15 Univ. Chi. L. Rev. 595, 621, 624 (1948).

[2] 70 F. 2d 247 (C.A. 7th, 1948), enforcing 77 NLRB No. 1 (1948).

ployer is under a duty to bargain. As stated in both the original and amended acts, Section 8(5) requires an employer "to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a)." The pertinent portion of the latter section provides that the duly selected representative of the employees in an appropriate unit shall be their exclusive representative "for the purpose of collective bargaining *in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .*"[3] The area of business which this section of the act requires the employer to include within the framework of his collective negotiations presents a difficult and controversial problem. There would appear to be no valid reason for an employer objecting to the union merely being heard and discussing any matter which the union might wish to raise. If in fact the duty to bargain consisted of nothing more than the obligation to meet and discuss, little or no difficulty would be encountered. However, in spite of the very modest definition which this duty receives within the context of the Act,[4] as it has been evolved through the decisions of the courts and labor boards, the duty to bargain approaches the duty to make concessions.

That the statutory duty to bargain has become a status-changing device is due largely to the judicial requirement that the bargaining, in order to satisfy the provisions of the act, must be carried on in "good faith."[5] The requirement of good faith is not complied with by a mere readiness to engage in discussion or negotiation.[6] Rather it ". . . contemplates exchange of information, ideas and theories in open discussion and an honest attempt to arrive at an agreement."[7] Although the duty to bargain may not be defined as the duty of the employer to agree with the bargaining representative about "matters of substance," once any agreement or understanding is reached the statute requires "its expression in a signed contract."[8] While some authorities have stated that congressional objectives at the time the Act was passed were relatively limited,[9] the courts have interpreted the legislative history as supporting the positive nature of the duty to bargain. The Supreme Court has held that the congressional purpose of the statute was "to compel employers to bargain collectively with their em-

[3] 49 Stat. 449 (1935), 29 U.S.C.A. § 151 (Supp., 1947); 61 Stat. 136 (1947), 29 U.S.C.A § 151 (Supp., 1947) (italics added).

[4] While the union is by the amended act also under a positive duty to bargain, the nature of the employer's duty is not affected in substance by the 1947 act. See 61 Stat. 140 (1947), 29 U.S.C.A. § 158(d)(1)–(4) (Supp., 1947). Both the Board and the Court specifically found that there had been no change in the scope of the subject matter of compulsory collective bargaining under the amended act. Inland Steel Co. v. NLRB, 170 F. 2d 247, 249 n. 2 (C.A. 7th, 1948).

[5] For a general discussion of the requirement see 3d Annual Report of NLRB 96 (1938).

[6] Timken Roller Bearing Co. v. NLRB, 161 F. 2d 949 (C.C.A. 6th, 1947).

[7] Aluminum Ore Co. v. NLRB, 131 F. 2d 485 (C.C.A. 7th, 1942).

[8] H. J. Heinz Co. v. NLRB, 311 U.S. 514, 526 (1940).

[9] Freidin, The Public Interest in Labor Dispute Settlement, 12 Law & Contemp. Prob. 367, 368 (1947).

ployees to the end that employment contracts, binding on both parties, should be made."[10] If subsequent to the designation of the statutory bargaining agent, the employer decides that he desires to alter any "condition of employment" of his employees, he is in a very real sense no longer free to exercise his unilateral discretion as manager; and he "can no longer make such a change on the basis of individual bargaining."[11] Although he has not yet been notified of the union's desire to bargain collectively, the "employer has no choice but to offer to bargain with the union. . . ."[12] The employer must meet the proposals of the bargaining agent with objections or counter proposals that are manifestly reasonable. The absence of persuasive arguments supporting the reasonableness of the employer's position leaves him with dubious alternatives. The first, which is really no alternative at all, is to be adjudged by the Board guilty of an unfair labor practice in refusing to bargain. The second involves compromise and concession. With the broadening of the demands which must be considered in the bargaining procedure this second alternative becomes less desirable from the traditional viewpoint of management. While the inroads which organized labor has made on the "prerogatives of management" reflect the extent to which the union has been able to control the supply of labor from which the employer recruits his employees, the courts' decisions have nevertheless provided the labor movement with an effective device for obtaining the concessions and compromises desired.

With the obligation to bargain collectively established as the duty to make patently reasonable compromises, the subject matter assumes considerable importance. Under the Act an employer is guilty of unfair labor practices if he refuses to bargain in regard to anything which may be included in the general category "conditions of employment." This provision provides only a very general yardstick for considering those "functions of management" which the employers claim are not the rightful concern of the employees or their representatives. This sphere of management-function may be restricted not only in the usual contract negotiations but also in bargaining about grievances. For although the term "grievance" is not defined, the Act requires employers to bargain about the disposition of grievances as well as provisions of the proposed working agreement.[13] When the accepted grievance procedure allows the negotiation of *all* disagreements over interpretation and application of the collective agreement, it has been held to require bargaining in regard to any and all questions which might arise between the employer and the union.[14]

[10] NLRB v. Sands Mfg. Co., 306 U.S. 332, 342 (1939).

[11] In re General Motors Corp., 59 NLRB 1143, enforced General Motors Corp. v NLRB, 150 F. 2d 201 (C.C.A. 3d, 1945).

[12] Ibid.

[13] U.S. Automatic Corp., 57 NLRB 124 (1944).

[14] See Hughes Tool Co. v. NLRB, 147 F. 2d 69 (C.C.A. 5th, 1945), enforcing 56 NLRB 981 (1945).

In the leading case of *NLRB v. Jones & Laughlin Steel Corporation*,[15] the Supreme Court, in denying the company's contention that it was being deprived of the right to conduct its own business, laid down what now appears to be a somewhat misleading indication of the scope of the subject matter of the duty to bargain. The court held that Section 9(a) imposed on the employer "only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling labor disputes."[16] The recent holdings by the Supreme Court are, however, not easily contained within such a limited definition. The decisions in the *Medo Photo*[17] case, *Order of Railroad Telegraphers v. Railway Express Agency*,[18] and the *J. I Case*[19] litigation uphold the general proposition that an employer cannot enter into any contract with his employees except through the bargaining representative.

The ruling in the *Medo* opinion announced that action by an employer which brought about any changes in wages, hours, or other conditions of employment without prior bargaining with the union representative could not realistically be distinguished from the unfair labor practice of refusing to bargain. This seems especially forceful since no collective agreement had ever been reached by the Medo Photo Supply Corporation and the union, and since the employer's unilateral action had come about as the result of negotiations initiated by a majority of the employees.

Inland Steel unsuccessfully argued that some of the dicta of the Supreme Court in the *J. I. Case* decision indicated that there were subjects concerning which an employer was under no obligation to bargain.[20] However, any uncertainty which may be said to stem from the *J. I. Case* dicta is clarified by the certain language of the Court in the *Railroad Telegraphers* opinion which was handed down the same day. "[E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions."[21] The petitioner also urged that the term "wages" as used in Section 9(a) should be construed as the wages earned by employees for the actual performance of work. This the Board rejected as being at odds with the stated purpose of the act and in conflict with the fact that Congress in generally

[15] 301 U.S. 1 (1937).

[16] Ibid., at 44.

[17] Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).

[18] 321 U.S. 342 (1944).

[19] J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

[20] Petitioner urged that ". . . individual contracts may embody matters that are not necessarily included within the statutory scope of collective bargaining, such as stock purchase, group insurance, hospitalization, or medical attention. We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice." J. I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944).

[21] Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 347 (1944).

defining the ambit of obligatory collective bargaining used not only the specific terms "rates of pay" and "hours of employment" but also the generic and widespread phrases "wages and other conditions of employment."[22] Such a broad construction has been rather generally supported by the courts.[23] One of the more significant cases is *NLRB v. J. H. Allison Co.*[24] In enforcing the Board's order, the Circuit Court of Appeals for the Sixth Circuit denied the argument of the employer that since the granting of "merit increases" to individual employees was determined on the basis of an individual's performance, it was not a matter which concerned the union, but was rather one of the functions of management. In the words of the court, "[t]he labeling of a wage increase as a gratuity does not obviate the fact that a gratuitous increase on the basis of merit does, in actuality, effect changes in rates of pay and wages, which by the Act are made the subject of collective bargaining."[25]

A recent decision of the National Labor Relations Board[26] takes note of the "accepted subjects in the expanding field of collective bargaining" as including "social security programs . . . group insurance, hospitalization, medical care, old-age pensions and other allied subjects." The Board concluded that such subjects "are not only appropriate, recognized, and accepted subjects for collective bargaining, but that the language of the Act and its legislative history evidence a congressional purpose to require collective bargaining on these subjects by an employer, when so requested by an authorized representative of his employees."[27] Apparently, any limiting definition of the subject matter of obligatory bargaining may not validly be taken from the context of the Act dealing with other unfair labor practices. The Supreme Court indicated such a broad meaning in the *Express Publishing Co.*[28] case. Refusal to bargain, defined as an unfair labor practice by Section 8(5), may be wholly unrelated to "discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization," all of which are defined as unfair labor practices by Section 8(3). Even a rather cursory examination of the reported court decisions and Board orders reveals that an employer is under a positive duty to bargain collectively about nearly every conceivable question that the statutory representative may raise.[29] In fact,

[22] In re Inland Steel Co., 77 NLRB No. 1 (1948). [23] See note 29 infra.

[24] 70 NLRB 377 (1946), enforced 165 F. 2d 766 (C.C.A. 6th, 1948), cert. den. 69 S. Ct. 31 (1948).

[25] 165 F. 2d 766, 768 (C.C.A. 6th, 1948).

[26] In the Matter of General Motors Corp., Case No. 7-Ca-37 (NLRB, May 13, 1948).

[27] Ibid.

[28] NLRB v. Express Publishing Co., 312 U.S. 426, 434 (1941).

[29] Subjects concerning which the employer has been found under a duty to bargain: 1) Subcontracting by employer. Western Electric Co., Inc., 16 L.R.R.M. 1656 (1945); Kulhne Chemical Co., 16 L.R.R.M. 1836 (1945). Contra: Graef & Schmidt Co., 16 L.R.R.M. 1651 (1945). 2) Number of employees to be hired. Timken Roller Bearing Co., 70 NLRB 500 (1946). 3) Union security. National Licorice Co., 7 NLRB 537 (1938), enforced as mod. 104 F. 2d 655

"absent any provision in the contract leaving certain areas open to individual bargaining, the only thing left to individual agreement is the act of hiring."[30] Given the jurisdictional prerequisites and the ability of bargaining agents to couch their position in language that is not per se unreasonable, the safe answer appears to be that the employer is never justified in refusing to bargain solely on the ground that to do otherwise would be to permit encroachment on the "prerogatives of management."[31]

In addition to the decisions of the courts which indicate a broadening of the subject matter of compulsory bargaining, there has been an enlargement in the scope of collective negotiations which are entered into without Board compulsion.[32] The collective agreements, which in a sense result from the substitution of collective bargaining for unilateral employer control of the various conditions of employment, mirror such a trend. Perhaps an outstanding example of this can be found in the collective agreements of the International Ladies Garment

(1939), enforced as mod. 309 U.S. 350 (1940). 4) Reinstatement of discharged employees and discharge of a nondiscriminating nature. National Licorice Co. v. NLRB, supra; Washington Woolen Mills, 23 NLRB 1 (1938). 5) Union demand for a change in the management of the firm. In re Consumers' Research Inc., 2 NLRB 57 (1936). 6) Re-employment of old employees at new location. Brown-McLaren Mfg. Co., 34 NLRB 984 (1941). 7) Whether employees be given time off without loss of pay for discussion of grievances. Glen L. Martin Co., 16 L.R.R.M. 1611 (1945). 8) Union's demand for information which the company classed as confidential. Aluminum Ore Co. v. NLRB, 131 F. 2d 485 (C.C.A. 3d, 1942). 9) Right of employer to print and issue a pamphlet entitled "Employees' Manual." Timken Roller Bearing Co., 70 NLRB 500 (1946). 10) Union's request for clause providing that union's consent had to be obtained in advance of any change of operations. Bergen Point Iron Works, 17 L.R.R.M. 1538 (1945). 11) Disposition of grievances presented by nonunion employees. U.S. Automatic Corp., 57 NLRB 124 (1944). 12) In setting up new unit, employer is not required to bargain in regard to job classification, but must bargain about "misclassification." Shell Oil Co., Inc., 16 L.R.R.M. 1864 (1945). 13) Seniority provisions. Highland Park Mfg. Co., 12 NLRB 1238 (1938). 14) Schedule of working hours. North American Aviation Inc., 16 L.R.R.M. 1746 (1945). 15) Sick leave plan. Glen L. Martin Co., 16 L.R.R.M. 1585 (1945). 16) Bonuses. Singer Mfg. Co., 24 NLRB 444 (1940), enforced as mod. 119 F. 2d 131 (1941). 17) Demand that company loan an employee the money necessary to pay a union fine. Clifton Wright Hat Co., 2 NLRB 1st, at 51 (1934). 18) Demand that employer discharge a supervisor. Aladdin Industries Inc., 22 NLRB 1195 (1940). 19) Sunday and holiday provisions. Singer Mfg. Co., supra. 20) Arbitration provisions. Boss Mfg. Co., 3 NLRB 400 (1936), enforced as mod. 107 F. 2d 574 (1939). 21) Regarding application, interpretation, administration, and/or modification of collective agreement. NLRB v. Sands Mfg. Co., supra. It is also interesting to note that one court felt obliged to set down the dictum that an employer is not obliged to bargain collectively about "legislative policies and other generalities." Globe Cotton Mills v. NLRB, 103 F. 2d 91 (C.C.A. 5th, 1939).

[30] J. I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944). U.S. Automatic Corp., 57 NLRB 124 (1944).

[31] No reported cases used the test of reasonableness to establish the good faith of the union demands, but such a test would appear to correspond with the pattern developed by the NLRB and the courts. At the present time the court would probably not hold legitimate a demand by the union to bargain about a complete alteration of the corporate structure of the business if the company refused to do so. Such a demand, however, may in the future appear as patently reasonable.

[32] Metcalf, Collective Bargaining for Today and Tomorrow 115–36 (1937); Pierson, Collective Bargaining Systems (1942); Smith, Leonard J., Collective Bargaining 10–15 (1946).

Workers Union which have been very explicit in this regard. They specify the conditions under which an employer may reorganize his business, or enter into another partnership, or send materials to other firms for fabrication, or introduce a week-work as opposed to a piece-work basis of wage payments.[33] Another example is the coal mining industry, where the representatives of the mine employees take part in the control of "all aspects of the productive process which affect the miners' opportunity to earn a living," and their bargaining agreements indicate the unions' "joint effort in dealing with conditions affecting a district of the entire industry."[34] In some industrial fields employers have been able to force the inclusion of management clauses in their collective contracts which prescribe certain zones wherein employer-management is to be free from any union interference. In spite of the provisions of such clauses, however, the sphere of management-function may become the subject of collective bargaining whenever the collective agreement is renegotiated. The inclusion of management clauses may also be said merely to reflect the relative strength or weakness of the bargaining parties at the time the agreement is signed, rather than anything like a long range working definition to which the parties will adhere.

The attitude of the courts toward the nature and subject matter of compulsory collective bargaining is a reflection of both the present strength of organized labor and the general language of the Act. The inability of the courts to determine the proper scope of collective bargaining stems from the opposing views with which employers and organized employees regard the bargaining process. The reasoning behind the employer's reluctance to bargain is the fear that in the absence of legal definition, he "may be forced to negotiate about matters that are necessarily the function and responsibility of management, thus impairing their power of decision and their effectiveness as business managers."[35] On the other hand, the assumption which the advocates of organized labor make is to the contrary. "The extent to which unions in general seek to strike out for terms not normally within the area of collective bargaining is not so much influenced by ideologies as by a conviction that these problems have a direct bearing on employment and wages."[36]

Admittedly, in those areas where organized labor is strongly entrenched, collective bargaining tends to become a method of management of the firm. If the relative strength of the labor movement continues to develop and the scope of

[33] Merchants' Garment Agreement Arts. 6, 10, 25, 29 (1937).

[34] Suffern, The Coal Miners Struggle for Industrial Status 359, 376 (1926); Goodrich, The Miners' Freedom, c. 3 (1925). Compare the United Mine Workers' 1939 collective agreement which provided that the "management, direction of the working force and the right to hire and discharge are vested exclusively in the Operator. . . ." Appalachian Agreement, Tit. Management of Mines (1939), with the agreements signed by the National Maritime Union and the steamship companies in 1940 which contained no provision of this sort.

[35] Industrial Relations Counselors, Monograph No. 9, National Collective Bargaining Policy 5 (1945).

[36] Barbash, Labor Unions in Action 96 (1948).

collective bargaining is further expanded, the traditional definition of "management"—as either a legally defined group of people or a function, from which unions are excluded—may come to have little real meaning. Insofar as labor's usurpation of the prerogatives of management presents a legislative problem, the solution has been said to lie in a legislative redefinition of the scope of collective bargaining.[37] However, any statute which attempts specifically to define those matters which are to be recognized as the proper subjects of collective bargaining, as well as those which should be left to the discretion of management, leaves the real problem untouched. Inasmuch as both employer and employee define their legitimate interests in different ways and from different points of view, such a statute would be a compromise, with the significant concessions being valid only on a short-run basis. Perhaps a more obvious drawback to such an approach is the lack of any nation-wide pattern which could be used as the basis for the suggested statutory definitions. The extreme differences in the labor-management function which are encountered in each industry indicate that any effective definition is unlikely.

A more realistic argument would favor a requirement that as the function of labor becomes the management function, labor be made to assume the responsibilities and statutory limitations imposed on management. In other words, to the degree that organized labor succeeds to that discretion formerly exercised by the management group, it would be required to give up those rights and privileges which are accorded exclusively to labor. Such a solution would not attempt to confine either group within any statutory definition not already attained, but would instead be an important addition to the now recognized "rules of the game."

DETERMINATION OF UNION RESPONSIBILITY BY AGENCY PRINCIPLES

Two recent National Labor Relations Board decisions have interpreted the controversial "agency" definition of the Taft-Hartley Act.[1] In the *Sunset Line & Twine Co.*[2] case, a strike arose out of the failure of the company and the local union to negotiate a new contract. When some of the employees began to return to work they were called abusive names and were followed home from work by striking employees. One non-striker was threatened with a beating, and another engaged in a fight with the business agent of the local union. A crowd composed of pickets, strikers, and members of the local employed at

[37] Industrial Relations Counselors, Monograph No. 9, National Collective Bargaining Policy 41 (1945).

[1] Labor-Management Relations Act § 2(13), 61 Stat. 139 (1947), 29 U.S.C.A. § 152(13) (Supp., 1947).

[2] Sunset Line & Twine Co., 79 N.L.R.B. No. 207, Lab. Rel. Rep. (Spec. Supp., Oct. 25, 1948).