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GOOD FAITH IN LABOR NEGOTIATIONS: TESTS AND REMEDIES

James A. Gross, Donald E. Cullen,† and Kurt L. Hanslowe‡*

One of the most delicate tasks of our labor policy is that of ensuring that employers and unions discharge their statutory duty to bargain collectively in good faith.¹ The task is delicate because of the difficulty of policing a subjective state of mind. The good faith test is but a subtle legislative effort to assure sufficient governmental intervention to produce genuine and effective collective bargaining, without unduly reaching into the substantive content of private collective bargaining relationships. In other words, the good faith test seeks to prevent sham or surface bargaining while leaving the parties a wide latitude in selecting their negotiation tactics. Likewise, the *outcome* of bargaining is intended to reflect the desires and strengths of the parties rather than a governmental judgment by the National Labor Relations Board or by the courts as to what are reasonable positions or fair results.

The mere statement of these policy aims suggests the hazards and controversy that have always surrounded the good faith test. Implementation of the test entails not only the juggling of these somewhat conflicting policy goals, but, because a negotiator's state of mind must usually be inferred from his objective conduct, it also requires an appraisal of conduct in situations where "normal" behavior often includes bluffing, name calling, impugning of motives, and threats to substitute coercion for persuasion. Moreover, a strong and determined employer can evade good faith bargaining for several years, even if he is ultimately found to have breached his statutory duty. When the day of reckoning does arrive, the remedies applied by the Board—primarily a cease and desist order and an affirmative order to bargain in good faith upon the request of the other party—are often too little and too late.

Proposals for reform reflect opposite stances. One view suggests that the good faith test has outlived its usefulness, and that employers and unions, protected in numerous ways by other provisions of the

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¹ Labor Management Relations Act (Taft-Hartley Act) § 8(a)(5), 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).

labor laws, should be left free to come to such terms as they may, without governmental supervision.² Another advises strengthening the bite of the good faith requirement by intensified use of section 10(j) injunctions, closer scrutiny of bargaining postures and stratagems, affirmative inclusion of substantive requirements in NLRB orders, and imposition of retroactive remedies.³

The pitfalls of the good faith test can be illustrated by re-examining three of the best known cases on this issue: two involving the Steelworkers' prolonged and abortive effort to establish a bargaining relationship with the Reed & Prince Manufacturing Company over the period 1937-1954,⁴ and a 1964 NLRB decision condemning General Electric's bargaining strategy known as Boulwarism.⁵ Each case invited imposition of the good faith requirement and its attendant remedies; their application, however, proved of little value to the aggrieved party. In general, the NLRB and the courts have tended to be too quick to condemn and too loath to punish. They have been overly zealous in imputing bad faith to employers' negotiating behavior, while applying the mildest of penalties to those most deserving condemnation. Thus, there is a need for both a narrowing of the area of conduct to be considered bad faith bargaining, and a strengthening of the penalties to be applied to that conduct.

A middle course should be steered between the extreme positions of scrapping or extending the duty of good faith bargaining. The law can and should encourage the parties to discuss their differences before resorting to open conflict. For example, it is both reasonable and feasible to require that negotiators give adequate notice of their intention to terminate a contract, be willing to meet at times convenient to both sides, be vested with some authority, provide relevant information, be willing to sign a written agreement, and, provided this duty is interpreted more carefully and consistently than in the past, make reasonable counterproposals.

This necessitates the abandonment of the totality-of-conduct doctrine. When the good faith test is pushed to the extreme position in

² INDEPENDENT STUDY GROUP, COMMITTEE FOR ECONOMIC DEVELOPMENT, *THE PUBLIC INTEREST IN NATIONAL LABOR POLICY* 81-82 (1961).

³ P. ROSS, *THE LABOR LAW IN ACTION: AN ANALYSIS OF THE ADMINISTRATIVE PROCESS UNDER THE TAFT-HARTLEY ACT* 30-32 (1966). See *Ex-Cell-O Corp.*, NLRB Trial Exam. Dec. 80-67 (Case No. 25-CA-2377, 1966); *Zinke's Foods, Inc.*, NLRB Trial Exam. Dec. 662-66 (Cases No. 30-CA-372, 30-RC-400, 1966).

⁴ *Reed & Prince Mfg. Co.*, 12 N.L.R.B. 944 (1939), *enforced*, 118 F.2d 874 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941); *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850 (1951), *enforced*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

⁵ *General Elec. Co.*, 150 N.L.R.B. 192 (1964).

which a party's total bargaining behavior can be condemned although no single act is illegal in itself, the test is too easily abused in appraising past conduct and is ineffectual as a guide to future conduct. The totality-of-conduct approach is particularly weak when it relies on employer communications and unorthodox negotiation tactics for evidence of motive. Finally, existing proposals for stronger remedies in this area are appropriate only if the Board is willing to exercise greater restraint in applying the good faith test.

I

THE REED & PRINCE MANUFACTURING COMPANY CASES

The United Steelworkers of America (at the outset known as the Steelworkers Organizing Committee—SWOC) made two principal and largely unsuccessful efforts to establish collective bargaining with Reed & Prince—a medium-sized, family-owned enterprise that manufactures nuts, bolts, screws and related products. Both attempts resulted in unsuccessful strikes and judicially enforced NLRB rulings that the company had failed to discharge its duty to bargain in good faith with the union. Each of the union's legal victories was followed by a substandard contract and the demise of the union as an active and representative entity.

A. *The First Case: The Initial Attempt to Unionize, Bargain, and Reach a First Contract*

SWOC's first attempt to organize Reed & Prince produced cards signed by about ninety percent of the employees authorizing SWOC as their bargaining representative.⁶ Chester Reed, the company president, indicated a willingness to recognize the union,⁷ and, despite his initial anxiety,⁸ a preliminary agreement was reached on March 19, 1937, three days after the first bargaining conference.⁹ The contract included a provision for the parties to meet not later than April 2, 1937 to work

⁶ Reed & Prince Mfg. Co., 12 N.L.R.B. 944, 948 (1939).

⁷ *C.I.O. Levels Three Demands at Reed & Prince*, Worcester Telegram, March 17, 1937.

⁸ At the first bargaining conference on March 16, 1937, the employer inquired about SWOC's plans for organizing his principal competitors, so that Reed & Prince would not be placed at a competitive disadvantage.

⁹ The contract contained company recognition of SWOC as the bargaining representative for its members (the union did not seek exclusive recognition), a 12½% increase in all base and piece rates, an 8-hour day and a 40-hour week. 12 N.L.R.B. at 949. The agreement was ratified by an almost unanimous vote of the union members and was signed by Chester Reed on March 19, 1937. *Reed & Prince and C.I.O. Sign*, Worcester Telegram, March 20, 1937.

out a more comprehensive agreement, but in five subsequent bargaining conferences the parties failed to agree on a final contract.¹⁰ The union struck on May 25, 1937.¹¹ The company submitted a signed contract as its final offer to the union on June 3, 1937.

On the issues still in dispute, the proposed contract provided for a grievance procedure without arbitration, citizenship as a consideration in promotions and layoffs (a position which caused the union deep concern), no pay for holidays, no access to the plant for a union delegate, and a provision designed to prevent SWOC from requesting a closed shop or a checkoff at any time in the future.¹² In an accompanying letter sent to all employees, Chester Reed told union officials:

We had 52 years of peaceful, harmonious, relations with our employees until you and the C.I.O. became "intermediaries" for our workers

. . . .

. . . The law . . . for the present . . . forces us to deal with you—and, as U. S. citizens (despite your dislike of them and desire to exalt the alien) we still, speaking for the company, do and will obey the law.

. . . .

Judging from the many unsolicited letters received by the management from our employees, you will undoubtedly find that the great majority of them are anxious to return to work, are opposed to this C.I.O. sabotage of their wage earning capacity, and will enthusiastically welcome your prompt signing.¹³

1. *Company Propaganda: Evidence of Bad Faith but not Illegal per se*

In determining that the company had deliberately intended to avoid agreement with the union, as opposed to simply bargaining "hard" on some issues, the NLRB relied heavily on the company's publicity campaign. Company representatives admitted that their attitude toward negotiations did change after the preliminary agreement, but claimed justification for the change in a union vote authorizing a strike and in alleged communist influence in the CIO.¹⁴ The union and

¹⁰ They tentatively agreed on a preamble, four sections dealing with recognition, wages, hours of work, and vacation—issues largely covered by the preliminary contract. There was no agreement on issues such as grievance procedure, holidays, access to the plant for a union delegate, minimum production standards, or the inclusion of citizenship as a consideration in promotions and layoffs. 12 N.L.R.B. at 952.

¹¹ *Id.*

¹² *Id.* at 952-53.

¹³ *Id.* at 953.

¹⁴ Given a verbal promise that there would be no strike for a year, Chester Reed was upset by a union vote authorizing its negotiating committee to call a strike should

the Board, however, attributed the company's shift in attitude to its two new bargaining representatives, who brought with them an approach to labor-management relations that was novel for the 1930's:

A labor crisis today demands new methods for quickly and skilfully organizing public opinion—methods which capital until recently has been too proud or too indifferent to accept. Force and bloodshed are entirely unnecessary; also the thick-headed guards, the provocative private detectives, and questionable characters of all types, who practice the so-called 'Art of Strike Breaking'. Instead of these strong armed men, a scientific staff swings into action to present the facts, to organize public opinion, to defend business against the attacks of labor racketeers. Spot news men, reporters, wire men, statistical men land at the strike headquarters. Government, Federal, State and Local laws . . . are at their finger tips, or at the end of a telephone. Every conference is planned; the military strategy of warring armies is no more carefully prepared than that of a big industrial dispute. . . . The strategy of the opponent is carefully watched, checked and in many cases pre-diagnosed.¹⁵

The Board found that, instead of trying to settle the strike by collective bargaining, most of the company's activities centered on a publicity campaign.¹⁶ Bulletins, cartoons, reprints of correspondence, and copies of radio addresses were mailed to all employees. Some of these communications referred to the union and its methods as "alien" and "Un-American." Others imputed pecuniary and corrupt motives to the union leaders. A third technique consisted of outright abuse and name calling which characterized the CIO as a "gang of sluggers, communists, radicals, and soap box artists, professional bums, expelled members of labor unions, outright 'scabs' and . . . red affiliates."¹⁷

By the third week of the strike, the propaganda strategy bore fruit. A group of employees organized a back-to-work movement and by July 12, over half of Reed & Prince's employees had signed a petition authorizing acceptance of the June 2, 1937 contract offer and termina-

negotiations fail. Alarm was also caused by newspaper articles charging SWOC with a disregard for contracts and for causing a complete industrial relations upheaval around the country. *Id.* at 950.

¹⁵ *Id.* at 954. Jay Clark, who had a reputation for being "firm" with unions, replaced Reed & Prince's former counsel, and recommended the services of Charles Gallagher, whose firm conducted public relations work and was subsequently engaged for that purpose by Reed & Prince. The quotation appeared in a magazine article written earlier by Gallagher.

¹⁶ *Id.* The Board considered it significant that Gallagher maintained a file of newspaper clippings which linked the CIO with communism, sit-down strikes, and industrial warfare, and discussed the material with Reed & Prince officials. *Id.* at 951.

¹⁷ *Id.* at 956.

tion of the strike.¹⁸ Reed & Prince reopened its plant doors on July 14, and approximately 380 strikers returned by the following day.¹⁹

The NLRB found unanimously that the employer violated the National Labor Relations Act by abandoning, after an initial posture of cordiality, all willingness to come to terms with the union.²⁰ Support for this conclusion was found in part in the employer's vituperative publicity campaign which, although not declared illegal in itself, was viewed as designed to undercut the authority of the union. The NLRB decided that the back-to-work movement was the desired result of the company's propaganda and that the signing of the petitions was "the result of the exhortations and admonitions" in the literature.²¹

The Board's reaction to the company's communications is difficult to accept. The quote concerning the bargaining representatives' labor relations philosophy, the fact that their office "was equipped with mimeographing machines and mailing facilities"²² and a file of derogatory news clippings,²³ and the fact that the company's communications disparaged the union and its leaders are treated as if their mere existence made the employer's guilt self-evident. Although it is reasonable to disapprove of the company's choice of policy and to deplore the employer's language, such practices are often an accepted part of the strategy of collective bargaining—each party praises his own bargaining position and motives and damns the other party, scorns its demands, impugns its motives, and castigates its leaders. Surely, this was mild stuff given the usual conduct of labor relations in the 1930's.

A further example of the Board's curious reading of the company literature is its response to the following June 14th "dispatch to employees" from Chester Reed:

They [the employees of Reed & Prince] . . . are realizing that the only way they can ever get back to work is to go down to the union meeting, demand the right to have the contract signed by the union officers, and take a written ballot, supervised by their own people, and not a group of aliens and foreigners, to go back to work.²⁴

¹⁸ *Id.* at 959-60. The group had obtained the assistance of an attorney, Charles Ward Johnson. At a meeting in his office, it was agreed that it would be "good sportsmanship" if the CIO, which had caused the strike, be given the chance to lead the men back. When SWOC declined, Johnson annexed the signed petitions to the company's proposed contract and notified the union that Reed & Prince had signed a contract with a majority of its employees, now represented by Johnson.

¹⁹ Record, vol. 3, part 2, at 1099, 1353-54, 1378-79, *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874 (1st Cir. 1941).

²⁰ 12 N.L.R.B. at 969-71, 978.

²¹ *Id.* at 961.

²² *Id.* at 954.

²³ See note 16 *supra*.

²⁴ 12 N.L.R.B. at 958.

The NLRB, focusing on the derogatory nature of the words "aliens and foreigners," decided that Reed meant to discredit and "stigmatize" the union. It is, however, at least as plausible to select for emphasis the fact that Reed did not replace the strikers with non-union men but rather sought *union* approval of the company contract by means of a secret ballot vote held at a union meeting.

2. *The NLRB Remedy and the Demise of the Union*

Since the Board ruled that the company's propaganda was not an unfair labor practice per se, it did not order Reed & Prince to stop communicating with its employees or to alter the content of its communications—and therein lies the most serious weakness of the Board's approach. Because legal actions are used as evidence of an illegal motive, there can be no order to stop committing any specific wrong. The NLRB has no remedy other than an exhortation to the company officials to start thinking right.

The NLRB also based its finding of a refusal to bargain upon the company's rejection of four union attempts to continue collective bargaining after the commencement of the strike: through a "conciliator" from the United States Department of Labor on June 5; a request on June 9 for a "private conference" with management from Clinton Golden, Regional Director of SWOC; a meeting before the Massachusetts State Board of Arbitration and Conciliation on June 28; and a mediation effort by the Mayor of Worcester on July 15.²⁵ Reed & Prince maintained that under the law it was free to ignore the suggestions of third parties.²⁶ The Board did not find the company guilty per se of a refusal-to-meet violation of section 8(a)(5), but it refused to consider these acts in isolation:

[C]onsidering the negotiations prior to the strike, and the whole course of the respondent's violently anti-union conduct subsequent to the strike, we find that these were part of a larger plan to avoid any concessions that would be acceptable to the Union and in the meantime to break the ranks of the Union so that collective bargaining would be unnecessary.²⁷

²⁵ *Id.* at 962-69. The Board noted that:

The first two efforts made by the Union to meet with the respondent after the beginning of the strike, were utilized by the respondent merely as material from which to mold propaganda which it directed to its employees in an effort to forestall bargaining with their duly designated representatives. At the meeting before the State Board, the respondent held firmly to all the provisions of the contract except for the one concession . . . which it must have realized was so insubstantial as to be no concession at all. The fourth overture through the mayor met with a flat refusal.

Id. at 970.

²⁶ *Id.*

²⁷ *Id.*

The totality approach left Reed & Prince without specific instructions from the Board concerning elimination of particular activity in order to meet its legal obligations. The NLRB did, however, order Reed & Prince to bargain collectively at the union's request.²⁸

This remedy also proved most inadequate. Although the NLRB decision was sustained in the Court of Appeals for the First Circuit,²⁹ the legal battle did not end until the Supreme Court, on July 2, 1941, denied the company's petition for review.³⁰ By this time, the local union was crippled and totally inactive. The international SWOC organization, "with the employees within the plant afraid to become active in the union," signed a "substandard" agreement with Reed & Prince on October 3, 1941.³¹ When the local asked the company to reopen the contract on February 3, 1945, Reed & Prince raised the question of the majority status of the union and the issue went to the War Labor Board. In September, 1945, the union filed for certification with the NLRB but was unable to obtain sufficient signatures to meet the Board's requirements. The War Labor Board case was dropped and the local was officially deemed collapsed.³²

B. *The Second Attempt at Bargaining: Inferring Bad Faith from the Substance of the Bargaining Positions*

In a 1950 NLRB election following an organization drive of several months, the production and maintenance employees of Reed & Prince voted 449 to 304 in favor of representation by the United Steelworkers of America.³³ The union made an initial attempt to bargain several days later, but the first negotiations did not take place until September 15, 1950.³⁴ Ensuing negotiations once more proved fruitless, and were followed by a strike and refusal-to-bargain charge. The Board, this time by a divided vote, again found the employer to have breached its statutory duty to bargain:

We conclude, therefore, that the Respondent exhibited bad faith in the bargaining negotiations, and we rely especially on the following facts: (1) The delay in scheduling the first meeting and

²⁸ *Id.* at 978-80.

²⁹ *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874 (1st Cir. 1941).

³⁰ 313 U.S. 595 (1941).

³¹ *Hearings on Reed & Prince Manufacturing Co. Labor Dispute Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 3-4, 175-79 (1951).

³² *Id.* at 4.

³³ *Id.*; *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850, 851 (1951). See also *Reed & Prince Union Vote Today*, Worcester Telegram, July 12, 1950.

³⁴ 96 N.L.R.B. at 851.

in furnishing the wage and pension data; (2) the insistence upon the presence of a stenotypist at the bargaining sessions; (3) the unreasonable withholding of acquiescence on admittedly trivial matters, such as notice-posting facilities and the recognition clause; (4) the hasty institution of the wage increase after the negotiations had broken down, without notifying the Union or in any way permitting the Union to share in the credit for the increase; and (5) the handling of the checkoff issue.³⁵

1. *The Totality-of-Conduct Approach: Legal Acts Can Lead to Bad Faith*

As in the first case, the NLRB found no clear refusal to meet, but rather a lengthy series of sterile bargaining sessions. Thus, the employer's motives had to be inferred from circumstantial evidence, and using this test the Board concluded that:

Although no one of the separate elements in this case is in itself conclusive evidence of bad-faith bargaining, when the entire bargaining pattern of the Respondent is viewed in its totality and the individual items are appraised together, the picture [of bad faith] is clear.³⁶

Reed & Prince claimed to have delayed the commencement of negotiations for six weeks because of the previously arranged vacations of the company bargaining team. The Board questioned whether the company "would have delayed, for such a relatively long period of time, negotiations for a business contract or a bank loan," and decided that, when appraised "in the context of the Respondent's whole course of conduct," this delay "was another aspect of the Respondent's calculated effort to avoid reaching an agreement with the Union while preserving the appearance of bargaining."³⁷ The company's explanation for the delay of two months in responding to a union request for certain wage and pension data was similarly tested. The explanation—the impreciseness of the initial union request and the subsequent illness of two employees in its industrial relations department—although plausible on its face, became further evidence of bad faith when viewed as part of Reed & Prince's entire course of conduct.³⁸ The majority also believed that the company's insistence on a stenotypist to take down a verbatim transcript of the negotiation sessions was evidence of bad faith, since it was not the usual approach of a good faith participant in collective bargaining. The practice was "not conducive to the friendly atmosphere

³⁵ *Id.* at 858 (footnote omitted).

³⁶ *Id.* at 857.

³⁷ *Id.* at 852-53.

³⁸ *Id.*

so necessary for the successful termination of the negotiations" and was "condemned by experienced persons in the industrial relations field."³⁹

The critical weakness of this totality approach is as clear here as it was in the first *Reed & Prince* case: because legal acts were used as evidence of an illegal motive, the Board could not order the company to discontinue any specific violation. The Board compounded the problem by taking note of the first *Reed & Prince* case:

The Respondent is not experiencing labor relations difficulties for the first time. More than 10 years ago, a predecessor of the Union sought recourse to the Board in a not too dissimilar situation, and it was not until the Board issued an Order and the Court of Appeals for the First Circuit enforced the Order that the Respondent negotiated a collective bargaining agreement. We have scrupulously avoided prejudging the Respondent because of its rather unsavory labor relations history, but the Board is not required by law to ignore this history. Accordingly, in evaluating the evidence in this case, we have given some weight to this factor.⁴⁰

Along with the problem of prejudgment, the NLRB's extension of its search for evidence of the employer's *current* state of mind to events adjudicated a decade earlier gives rise to some apprehension about the potentially limitless range of the totality approach. Similarly, the condemnation of the use of a stenotypist by "experienced persons" seems inadequate support for a conclusion of law.

2. *The Reasonableness of the Company's Proposals*

Although the two *Reed & Prince* cases were similar in several respects, the second has become better known because it so clearly involved an evaluation by the Board of the reasonableness of the employer's substantive bargaining positions. The Court of Appeals for the First Circuit held that the Board, in testing an employer's good faith, must satisfy itself that the over-all attitude and position of the company reflects an honest endeavor to make collective bargaining work. The court agreed that although the Board is not to "sit in judgment upon the substantive terms of collective bargaining agreements," it "is not to be blinded by empty talk and by the mere surface motions of collective bargaining . . ."⁴¹ Thus, the Board must consider the reasonableness of the employer's bargaining positions.

The principal union demands were: a wage increase of at least fifteen cents an hour; a grievance procedure ending in arbitration; some

³⁹ *Id.* at 854.

⁴⁰ *Id.* at 857 (footnotes omitted).

⁴¹ NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953).

form of union security (either a union shop or a maintenance-of-membership clause); a checkoff of union dues; six paid holidays; a pension plan; and a seniority provision. The union also sought the right to post noncontroversial notices on the company bulletin boards, an expansion of the company's proposed recognition clause, and a leaves of absence provision.⁴²

The bulletin board issue, although trivial in substance, illustrates the Board's reasonableness approach. The NLRB recognized that Reed & Prince was under no legal obligation to make its bulletin boards available to the union, but noted "that the granting of such posting permission is a common industrial practice. Accordingly, it seems reasonable to us that the Respondent, if it was dealing in good faith, would have offered to the Union some sort of posting facilities."⁴³ Reed & Prince had also amended the union's proposed recognition clause to include the first proviso of section 9(a) of the Taft-Hartley Act, which gives employees the right to present their grievances directly to management without the intervention of the union.⁴⁴ The company, however, was unwilling to incorporate the second proviso of that section, granting the union the right to be present at the adjustment of such grievances. A majority of the Board believed that, once Reed & Prince insisted on the first proviso of section 9(a), "if it were seeking a good faith disposition of issues, it would have readily acceded to the Union's natural request to include the second proviso."⁴⁵ Thus, a refusal could not be made in good faith.

The court of appeals, after a review of the reasonableness of all the bargaining proposals of the parties, carried the Board's approach to the substance of the proposals even further:

Thus 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 minor requests, and if the employer makes not a single serious proposal meeting the union at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith⁴⁶

⁴² *Id.* at 135. Reed & Prince offered the union a 10-cent increase provided no further negotiations be held on this point. The Steelworkers rejected the offer but stated that, since it regarded the various economic benefits as a single "package," it might agree to the 10-cent increase once the company stated its position on pensions, insurance, and paid holidays. Reed & Prince would not agree to the Steelworkers' other demands but did explain its objections on all points. *Id.* at 135-37.

⁴³ 96 N.L.R.B. at 854.

⁴⁴ 29 U.S.C. § 159(a) (1964).

⁴⁵ 96 N.L.R.B. at 855.

⁴⁶ 205 F.2d at 134.

The court continued:

In other words, while the Board cannot force an employer to make a "concession" on any specific issue or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all.⁴⁷

3. *A Proposed Good-Faith Test as Applied to Reed & Prince*

If section 8(a)(5) of the Taft-Hartley Act is to impose "any substantial obligation at all," then the NLRB can and even must make an assessment of the reasonableness of the parties' substantive bargaining positions. The scope of the reasonableness test, however, should be narrowed.

Certain collective bargaining offers are clearly difficult to reconcile with good faith bargaining. An example is one employer's proposal of "no union shop, no employee eligible for union membership until six months after hiring, arbitration cost borne by requesting party, a 15 per cent per hour reduction of wages for all employees, and a ten-year contract with a 2 per cent annual minimum automatic wage increase plus merit increases at the discretion of the employer."⁴⁸ Other offers are clearly consistent with or even better than the "ordinary current-day contract." The difficulty is in evaluating the reasonableness and good faith of offers that fall somewhere between these almost self-evident examples—such as the offer in the second *Reed & Prince* case.

The company's November 22 contract proposals were not as barren as Judge Magruder maintained in the First Circuit's decision.⁴⁹ *Reed & Prince* did agree to a grievance procedure, albeit one without arbitration, and the company stressed that it did not ask the union to agree to a no-strike clause—thereby acknowledging the quid-pro-quo relationship later celebrated by the Supreme Court.⁵⁰ Furthermore, al-

⁴⁷ *Id.* at 134-35 (emphasis in original). The court added an element not specifically relied on by the Board—the company's November 22 contract proposal. According to the court:

This [proposal] was a brief two-page document . . . [which] had no provisions as to wages, grievance procedure, or the other major items which the Union had proposed for inclusion in the contract. 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 . . .

Id. at 139.

⁴⁸ P. ROSS, *THE GOVERNMENT AS A SOURCE OF UNION POWER* 228 (1965).

⁴⁹ For text of the company's proposals, see *Hearings*, *supra* note 31, at 188-91.

⁵⁰ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960).

though the November 22 proposals contained no wage clause, Reed & Prince had not retracted its earlier offer of a ten-cent wage increase and, as the court pointed out, the company was responding to the union's November 10 contract proposal "which was complete except for a wage clause."⁵¹ The Reed & Prince offer was certainly not in the same category as the above example of a fifteen percent wage reduction and a ten-year contract.

The NLRB and the courts should find bad faith only on the basis of offenses that can be identified precisely, and to which precise remedies can be applied. This "identifiable offenses" approach, applied to the record of the Reed & Prince negotiations, demonstrates that contracting the NLRB's discretion need not limit the Board to finding per se violations and provides, instead, an effective good faith test in these more difficult cases.

For example, Reed & Prince maintained that since section 302 of the Taft-Hartley Act "makes it a criminal offense for management to pay a labor organization any money,"⁵² the checkoff was not a bargainable issue. The company was clearly mistaken and its refusal to negotiate this issue was a violation of the law. The company also objected to the union's proposal for leaves of absence on the ground that it was not its practice to grant such leaves of absence.⁵³ At the hearing before the trial examiner, however, the Board introduced in evidence a Reed & Prince employee handbook that read in part: "This [section relating to employee service credits] does not apply to cases where the Management has granted in writing permission for Leave of Absence."⁵⁴ The company had made a clear misstatement of fact. Finally, Reed & Prince's refusal to incorporate the second part of section 9(a) into the recognition clause was plainly unreasonable.

These identifiable and correctible errors—a clear refusal to bargain on a mandatory subject, a fraudulent assertion, and a clearly unreasonable position on a substantive issue—can be read together to reach a conclusion of bad faith. This approach covers more than purely per se violations, but falls far short of the Board's current totality doctrine. It would, in addition, provide the parties with specific instructions on how they should alter their behavior to comply with the law.

⁵¹ 205 F.2d at 137.

⁵² Brief for Respondent, appendix at 30, *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953).

⁵³ 205 F.2d at 137.

⁵⁴ *Id.* (brackets in original).

4. *The Remedy in the Second Case and the Second Demise of the Union*

The court of appeals, on June 9, 1953, entered a decree⁵⁵ enforcing the Board order that required Reed & Prince to cease and desist from refusing to bargain with the union, to notify its employees that the company would not solicit its employees to abandon their concerted activities, and, upon request, to bargain collectively with the United Steelworkers.⁵⁶

On June 19, the union requested an "immediate" collective bargaining meeting⁵⁷ but bargaining did not commence until July 14. Negotiations continued into April of 1954 when the Steelworkers signed an agreement with Reed & Prince. The company agreed to provide a desk on its premises so that the union could collect its monthly dues at an agreed time and place, and also agreed to the posting of union notices of a noncontroversial character on bulletin boards provided by the employer. The contract also contained a three-step grievance procedure without arbitration and without a no-strike clause, but with a provision that the union be given an opportunity to be present at any grievance adjustment. Finally, the agreement incorporated the existing wage scale and company policies on reporting pay, hours of work, seniority (without a citizenship requirement), vacations, and incentives.⁵⁸ The union membership's reaction to the contract is illustrated most aptly by the comments of a man who spoke from the floor when the union leadership presented the agreement to the members: "Is that all we get after 39 months? Nothing, just nothing?"⁵⁹

Approximately three hundred strikers had crossed the picket lines during the strike.⁶⁰ By November 1954, only sixteen men had paid any dues since the strike ended. The local union president's description of his experiences during the first weeks of his return to Reed & Prince capture the flavor of the time:

I am going to work . . . [four employees] stepped out of the office to greet me with why you dirty rat, you got a hell of a nerve to come back here, you won't stay here long . . . you no good son

⁵⁵ 205 F.2d 131.

⁵⁶ 96 N.L.R.B. at 860-61.

⁵⁷ Letter from Sidney Grant (attorney for the Steelworkers) to Reed & Prince, June 19, 1953, on file at USWA Regional Office in Worcester, Mass.

⁵⁸ Agreement between Reed & Prince Mfg. Co. and United Steelworkers, Apr. 26, 1954, on file in the Cornell Law Library.

⁵⁹ *Reed & Prince Strike Settlement Explained*, Worcester Evening Gazette, Apr. 24, 1954.

⁶⁰ Letter from R. E. Gorgeson, Sec'y., Reed & Prince Mfg. Co. to Michael Ryan, Field Rep., USWA, June 4, 1954, on file at USWA Regional Office in Worcester, Mass.

of a bitch When I arrived at the time clock, these same people formed a circle which I had to go through . . . and there was the same profanity They followed me upstairs to my department and grouped around me I asked how long this was to last of the two bosses . . . [they] walked away . . . they came again during the morning; at noon time there was a regular parade of people going through the department to jeer and point at me . . . and with smiles inquired if I enjoyed my visitors and assured me I would receive this kind of treatment for 39 months"⁶¹

He wrote again in November of 1954:

After six months of working at Reed & Prince, it has become a living nightmare, truly, I wonder how much longer I can take it. I look back on the four years I have carried the torch for these people and think of what it has done to me . . . I positively have no future.⁶²

Today, the union continues to pass information on to a few men working in the Reed & Prince plant. The 1954 contract has never been renegotiated.

Even if the NLRB and court of appeals decisions were justified, the remedies once again failed to effectuate the policies of the Act. Reed & Prince, despite the sweeping decisions against it, was once more free of the burden of collective bargaining.

II

THE GENERAL ELECTRIC CASE

The Reed & Prince cases illustrate two problems of the good faith test when a weak union fails to secure a first contract from a stubborn employer: (1) how can the latter's intentions be inferred from his acts, and (2) if bad faith is indeed found to have existed, how can a decision two or three years after the fact breathe life into the shattered union? These perplexing problems are by no means the only questions that arise concerning an employer's good faith. For example, in a study of all merit cases involving section 8(a)(5) that were filed over a recent five-year period, it was found that the parties in fourteen percent of these cases had bargained together for over ten years, and in another twelve percent for three to ten years.⁶³ In such established relationships,

⁶¹ Handwritten Notes of Franklin Knight, Pres., Local 1315, in files of the USWA Regional Office of Worcester, Mass.

⁶² *Id.*

⁶³ P. ROSS, *THE LABOR LAW IN ACTION: AN ANALYSIS OF THE ADMINISTRATIVE PROCESS UNDER THE TAFT-HARTLEY ACT* 64 (1966).

employer tactics (and perhaps intentions) may frequently be more sophisticated and complex than in first-contract situations—and therefore even more difficult for the Board and courts to appraise.

This is certainly true of the most celebrated of recent 8(a)(5) cases, in which the NLRB found General Electric guilty of bad faith bargaining for, among other things, following the negotiating approach known as "Boulwarism."⁶⁴ In sharp contrast to Reed & Prince, General Electric has been bargaining uninterruptedly with several unions since the 1930's. In the 1960 negotiations which gave rise to the NLRB finding of bad faith, a comprehensive, three-year contract was concluded with the principal union, the International Union of Electrical, Radio and Machine Workers (IUE), and with most of the other hundred-odd unions dealing with GE. In subsequent years, two other long-term agreements have been negotiated by the parties to the 1960 case, the last increasing wages and fringe benefits by about five percent a year. Finally, there have been only two major strikes at GE in the postwar period, one lasting two months in 1946 and the other for three weeks in 1960. As GE spokesmen are fond of pointing out, this record hardly suggests a company determined to avoid collective agreements with its work force. On what, then, did the Board base its findings of employer bad faith?

The majority opinion cited the following actions of the company in its 1960 negotiations with the IUE as evidence of its failure to bargain in good faith:

- (a) Its failure timely to furnish certain information requested by the Union during contract negotiations.
- (b) Its attempts, while engaged in national negotiations with the Union, to deal separately with locals on matters which were properly the subject of national negotiations, and its solicitations of locals separately to abandon or refrain from supporting the strike.
- (c) Its presentation of its personal accident insurance proposal to the Union on a take-it-or-leave-it basis.
- (d) Its overall approach to and conduct of bargaining.⁶⁵

The critical issues in this case revolved, of course, around the fourth charge. It is a nice question whether the Board would have up-

⁶⁴ General Elec. Co., 150 N.L.R.B. 192 (1964).

⁶⁵ *Id.* at 193 (footnote omitted). In a separate concurring opinion, Member Jenkins disagreed with the majority position on the last two of the above charges, but argued that the first two had been proved and, in the context of this case, were sufficient evidence in themselves to "justify a broad remedial order." *Id.* at 198. Member Leedom, dissenting in part, agreed with the first three specific charges, disagreed strongly with the broad fourth charge, and concluded that on balance the majority's finding of bad faith was not supported by a preponderance of the evidence. *Id.* at 200-03.

held this general charge in the absence of the specific violations described in (a) through (c) above. The majority insisted that their determination was "based upon our review of the Respondent's entire course of conduct" and not simply "its approach to or techniques in bargaining."⁶⁶ As will be seen, however, other language in the majority opinion (and particularly in the trial examiner's intermediate report, affirmed without change by the majority) strongly suggests that the Board would have upheld the broad charge even if it had stood alone. Thus, GE's "overall approach to and conduct of bargaining" is the key issue and, at the risk of oversimplification, the relatively minor violations described in the first three charges will be ignored.

A. *Boulwarism: A First and Final Offer Accompanied by a Propaganda Campaign*

General Electric has systematized and articulated its approach to and conduct of bargaining to a degree reached by few other companies.⁶⁷ Developed in the late 1940's under the direction of Lemuel R. Boulware, a corporation vice president with extensive marketing experience, GE's labor policies can best be understood by the phrase "job marketing." The company attempts to "market" its jobs and policies to workers in the same general fashion in which it successfully markets its products to consumers. It determines what the "customer-worker" wants through attitude surveys, supervisors' reports, studies of bargaining developments in other companies, as well as the union's formal demands. It then fashions a "product" (contract offer) to meet these desires so far as possible, while also meeting the company's obligations to other groups, such as stockholders and consumers. Finally, it "merchandises" the result.

The "merchandising" step is the controversial aspect of Boulwarism. The company believes that its first offer to a union should be as "full and fair" as possible—not the niggardly opener of the typical bargaining ritual, but all that the company intends to provide in the final contract. By this technique, GE hopes to establish the same trust and reputation for fair dealing with its employees that it believes it has among consumers of its products. If the union can prove the company offer erroneous in some factual respect, or if the bargaining environment, such as the general price level or settlements in other key industries, should drastically change during the course of negotiations, then

⁶⁶ *Id.* at 196.

⁶⁷ For a detailed and largely impartial description of Boulwarism, see Trial Examiner Arthur Leff's intermediate report, *id.* at 207-10. For a vigorous and informative defense of GE's labor policies, see H. NORTHRUP, *BOULWARISM* (1964).

the company professes its willingness to alter its offer. Occasionally, the company has offered a series of options, or otherwise indicated its willingness to change the mix of its bargaining package. But GE flatly refuses to change the *size* of its first-offer package in order to play the haggling game, stave off a strike, or make the union negotiators look good to their constituents. If the union does not like this first and final offer, of course, it has every right to strike—and GE, in turn, has the right to try to run its plants during any strike.

This merchandising strategy also calls for the company to advertise its bargaining wares as aggressively as its consumer products. The company feels that union officials can hardly be expected to describe the company's proposal to the workers impartially, much less enthusiastically; therefore, the company must present its case directly to the workers as well as to their representatives. Many employers communicate their views to employees during negotiations, of course, but few do so on the scale of GE. During the 1960 negotiations and strike, for example, the company directed 246 separate written communications to the workers in its Schenectady plant and 277 items to workers in its Pittsfield, Massachusetts plant.⁶⁸

To its many admirers, this bargaining strategy is a long overdue assertion of management's right to do more than react negatively to labor's every initiative; it demonstrates management's willingness to "do right voluntarily" by its workers and to communicate its case to them as effectively and extensively as the union presents its own. To the critics of Boulwarism, GE has simply put a pretty label on an obvious power play, for until recently the unions at GE have been so weak and divided that many observers thought the company could call nearly any tune it wished at the bargaining table. Whatever the reason, many of the postwar settlements at GE were very close to the company's initial offer. In 1960, however, the major union at GE, the IUE, pressed its challenge of Boulwarism to the limit—first on the picket line, in a strike which collapsed completely in three weeks and had little perceptible effect on GE's first and final offer, and then before the NLRB, in a case so lengthy and complex that the Board decision was not handed down until 1964.

B. *The Board Decision: The Totality Approach Revisited*

In essence, the Board found that neither of GE's principal tactics—the first and final offer or the communications program—was a vio-

⁶⁸ Typical communications included letters to workers' homes, leaflets, and newspaper advertisements. 150 N.L.R.B. at 219 & n.19.

lation of section 8(a)(5), but when taken together in total context, they constituted evidence of management's refusal to bargain in good faith.

In criticising the first tactic, offering a "fair and firm" proposal at the outset, the Board insisted that it was *not* requiring all employers to start low and bargain upward as proof of their good faith, but it reserved the right to appraise a significant departure from "normal" negotiating tactics as circumstantial evidence of an employer's state of mind.

This "bargaining" approach [used by GE] undoubtedly eliminates the "ask-and-bid" or "auction" form of bargaining, but in the process devitalizes negotiations and collective bargaining and robs them of their commonly accepted meaning. "Collective bargaining" as thus practiced is tantamount to mere formality and serves to transform the role of the statutory representative from a joint participant in the bargaining process to that of an adviser. In practical effect, Respondent's "bargaining" position is akin to that of a party who enters into negotiations "with a predetermined resolve not to budge from an initial position," an attitude inconsistent with good-faith bargaining.⁶⁹

As for GE's defense that it obviously wanted to and did reach an agreement with the IUE, the Board stressed that "a party who enters into bargaining negotiations with a 'take-it-or-leave-it' attitude violates its duty to bargain although it goes through the forms of bargaining, does not insist on any illegal or nonmandatory bargaining proposals, and wants to sign an agreement."⁷⁰

Concerning GE's practice of extensive communication with employees during negotiations, the Board presumably agreed with the trial examiner's analysis that although it is not inherently unlawful for an employer to communicate to his employees his bargaining positions, the progress of the bargaining, or criticism of the union, these communications do reveal the employer's frame of mind.⁷¹

For a summary of the numerous and varied messages that GE directed toward its employees in 1960, the intermediate report is again the best source:

[T]he Respondent through its extensive employee communication system (a) anticipated the Union's major bargaining demands long before the start of negotiations and began to condition employee

⁶⁹ *Id.* at 195-96 (footnotes omitted).

⁷⁰ *Id.* at 194 (footnote omitted). The Board also pointed out that if a party's desire for an agreement were the only touchstone of its good faith, then section 8(b)(3), which imposes a parallel bargaining obligation on the unions, would make little sense, for unions always want an agreement. *Id.* at 197 and 267 (intermediate report).

⁷¹ *Id.* at 274 (intermediate report).

attitudes to a favorable reception of its views and rejection of the Union's conflicting positions; (b) after the presentation of the Union's demands but before the actual start of negotiations, vigorously criticized the Union's demands as endangering job security and questioned the motives of the IUE leadership; (c) during the negotiations, continued along the lines above indicated, and, in addition, presented, at some plants practically on a daily basis, reports on the progress of negotiations, highly slanted in its favor; and (d) following the presentation of its offer deluged employees with communications designed to induce them to pressure the Union into acceptance of its offer, to discredit the motives and integrity of the IUE leadership, and to achieve other objectives⁷²

The communications program undoubtedly reflects that the Respondent sought primarily to deal with the Union through the employees rather than with the employees through the Union, thus distorting the accepted approach.⁷³

A majority of the Board endorsed, in effect, the trial examiner's appraisal of the motives underlying GE's communication program,⁷⁴ and then summarized their principal finding:

In short, both major facets of Respondent's 1960 "bargaining" technique, its campaign among the employees and its conduct at the bargaining table, complementing each other, were calculated to disparage the Union and to impose without substantial alteration Respondent's "fair and firm" proposal, rather than to satisfy the true standards of good-faith collective bargaining required by the statute.⁷⁵

C. *Pitfalls of the Totality Doctrine*

The *GE* case obviously poses a very subtle test of the employer's duty to bargain in good faith. The Board's opinion—and particularly the intermediate report—present a powerful indictment of Boulwarism, and yet the end result is one of uncertainty.⁷⁶

Some uncertainty, for example, must surely be engendered by the censorious reaction of the Board majority and the trial examiner to the company's communications. What is so reprehensible about the fact that a company's propaganda during negotiations was "highly slanted in its favor," or "vigorously criticized the Union's demands as endan-

⁷² *Id.* at 273 (intermediate report).

⁷³ *Id.* at 274 (intermediate report).

⁷⁴ *Id.* at 195-96.

⁷⁵ *Id.* at 196.

⁷⁶ As Member Leedom plaintively dissented: "I do not mean to suggest that the issue of good or bad faith has any clear-cut answer here. My position is not dictated so much by strong conviction as by uncertainty." *Id.* at 203.

gering job security," or was aimed at inducing the workers to vote for the company offer against the advice of their representatives—or even tried to "discredit the motives and integrity" of the union leadership? It is common knowledge that such brickbats are heaved by one or both of the parties in many negotiations and are usually discounted as standard ploys in the bargaining ritual. The Board offers an appealing reformulation of section 8(a)(5) in its statement that "the employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees,"⁷⁷ but in practice this is not a very helpful guide for judging the motives underlying a company's otherwise legal propaganda campaign. Indeed, if an employer communicates at all with his employees during negotiations, what other motive is he likely to have except influencing "the union through the employees?" And even if one accepts the questionable characterization of GE's communications program as "distorting the accepted approach" to bargaining, is good faith to be equated only with prevailing practice?

Another source of uneasiness is the Board's attempt to infer a take-it-or-leave-it attitude from GE's tactic of a "first, full offer," without condemning the tactic as a per se violation or passing on the adequacy of the offer itself. The Board's motives are completely admirable; it should not tell the parties how to negotiate or what a "fair contract" is. Yet, the alternative tests used by the Board are scarcely preferable.

The GE approach at the bargaining table was condemned not for its novelty or per se illegality, but because it "devitalizes negotiations and collective bargaining and robs them of their commonly accepted meaning." Why this stress on the "commonly accepted meaning" of bargaining as a test of good faith? In essence, that is the standard which employers have been urging on the Board for thirty years in opposition to union pressure to extend the range of mandatory bargaining subjects beyond those "commonly accepted" at the moment. The Board rightfully rejected that conservative standard in appraising labor's innovations at the bargaining table,⁷⁸ and it should be rejected in appraising management's innovations. Otherwise the widely hailed development of the continuous-bargaining technique in other industries might also be condemned since it is designed to avoid the "commonly accepted" practice of deadline negotiation.

Although it is plausible to argue, as the Board does, that a party's proven desire to reach an agreement is not definitive evidence of its

⁷⁷ *Id.* at 195.

⁷⁸ See, e.g., *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

good faith, this principle is difficult to defend without reference to the content of the agreement in question. As noted earlier, it is most persuasive when applied to a company that desires agreement only on terms so blatantly "unfair" that they constitute a demand for conducting employee relations on a non-union basis.⁷⁹

This principle is far less persuasive when applied to a company such as GE, that desires agreement "on its own terms," but the terms are roughly similar to those being negotiated in comparable bargaining relationships. The 1960 strike, for example, was in response to GE's "first and final" offer of a comprehensive, three-year contract that provided for a dues checkoff (but not a union shop), two wage increases (of three and four percent), improvements in existing pension and insurance programs, and a new "Income Extension Aid" program for retraining, layoff and severance pay, tuition aid, and similar features. The Board made no attempt to appraise this proposal⁸⁰ but simply reiterated the principle that a party's desire to reach an agreement is not necessarily proof of its good faith. This puts the Board in an anomalous posture: if a company's final offer is niggardly, its content may be used as evidence of "surface bargaining" and bad faith, but if the offer is relatively good, its content is irrelevant to the issue.

Of course a good offer is not conclusive proof of good faith; any offer can be attended by other violations such as a refusal to furnish required information to the union—an actual occurrence in the GE case. However, in any appraisal of an employer's "overall approach to and conduct of bargaining," the employer's offer is just as relevant when its content is reasonably good as when it is unreasonably bad. In neither case should the Board assume that it cannot scrutinize the substance of the parties' proposals for evidence of good faith, and it certainly should not adopt this approach in one set of circumstances and abandon it in another.⁸¹

⁷⁹ The NLRB and the First Circuit leveled precisely this charge against the company in the second *Reed & Prince* case, and even then had to strain to find bad faith underlying a management offer that was tough but not outrageous.

⁸⁰ The proposal was accepted by 43 other unions, including eight AFL-CIO locals then negotiating with GE. Jacobs, *The Showdown at G.E.*, THE REPORTER, Oct. 27, 1960, at 35.

⁸¹ It is interesting to speculate how the Board would rule on an 8(b)(3) charge that the union "goes through the forms of bargaining, does not insist on any illegal or non-mandatory proposals, and wants to sign an agreement," but only one matching the terms of an existing area or industry pattern. Is this take-it-or-leave-it bargaining, or merely the "accepted approach" to bargaining in many follower relationships? Apparently, the Board has never passed on such a case of "union Boulwarism," although its practice is surely more extensive than the management version.

Finally, the *GE* case again reveals the fatal weaknesses in the remedy to which the Board's reasoning inevitably leads in such cases. Stripped of the details concerning the minor per se violations, the remedy in *GE* consisted solely of a directive to the company to cease and desist from violating 8(a)(5).⁸² But what does that mean? Presumably the company need not play the start-low-and-retreat-upwards game at the bargaining table, since the Board studiously refused to rule illegal the "first, full offer" tactic. Nor does the company have to give up the employee communication campaign or reduce its volume to some specified percentage, or alter its content in some identifiable way—for the communications program was viewed by the Board only as a clue to *GE*'s frame of mind.

Thus, like *Reed & Prince*, the *GE* decision imparts only an exhortation to the *GE* management to change its frame of mind without necessarily changing any of its actions. How equitable or effective is a decree that offers neither the company nor the union any guide whatever by which to judge the legality of management's future actions? And how can such a decision even remotely offer the union any amends for management's actions in the past, if those actions were in fact illegal?

The basic deficiency in the *GE* remedy is not an inevitable failure of an attempt to police motives. In the ordinary 8(a)(3) case, for example, the Board must also infer from surrounding circumstances an employer's motives in performing an act that may be perfectly legal, such as discharging a worker. When the Board finds an improper motive present in such a case, however, it offers an affirmative remedy to the injured party, such as reinstatement, and usually issues some understandable guides for future avoidance of the offense. Even in the difficult first-contract cases, such as *Reed & Prince*, the Board can at least go through the motions of ordering the offending management back to the bargaining table. But this action has no relevance or effect if applied to General Electric.

In short, the Board decision in the *GE* case clearly illustrates the hazards of pressing the totality doctrine to its extreme. For at that point, the Board is in the anomalous position of finding a party guilty of everything in general and nothing in particular. Surely something is amiss when the Board feels able to condemn a party's "overall approach to and conduct of bargaining" and yet is unable to make even token amends to the party presumably injured by that approach in the past,

⁸² 150 N.L.R.B. at 197-98, 284-87.

and is unable to tell the offending party how it should alter its behavior in the future.

III

A PROPOSAL FOR GOOD FAITH TESTS AND REMEDIES

The Board's totality-of-conduct approach leaves unanswered, in the *Reed & Prince* situation, how to produce meaningful collective bargaining in first-contract negotiations, and in the *General Electric* situation, how prospectively to conform to law the parties' collective bargaining relationship. The results lead to another, more basic issue. The Board's effort has been to make collective bargaining function as a process by which the union can achieve a significant voice in the management of an enterprise's employment conditions. Accordingly, "Boulwarism" is bad because its effective practice by an employer produces a union which is neurotic due to its inability to "deliver" to the employees more than what the employer is already prepared to pay. The *Reed & Prince* situation is likewise subject to condemnation because of the employer's success in preventing the union from ever getting off the ground as an effectively functioning institution.

Thus, if the assurance of status and success for the union is indeed an aim of our labor policy, the Board's present approach is ineffective. But it is not at all clear that it is or should be the aim of the law to strengthen an ineffective union or to cure a "neurotic" one under the guise of applying a duty to bargain in good faith. "Boulwarism," in other words, may be poor labor relations, but is it for that reason illegal?

One independent study group concluded that legislation cannot realistically bring good faith to the bargaining table.⁸³ This position minimally implies deletion of the "good faith" requirement from the Act, or it may imply elimination of the duty to bargain *entirely*, leaving the questions of *whether* bargaining takes place, *how* it is conducted, and *what* results are produced, completely to the interplay of the relative strength of the parties.

While this solution, especially in its more extreme form, has the appealing virtue of simplicity, neither elimination of the good faith test nor the more radical proposal is required or desirable. The good faith test, however, needs to be applied in a fashion both narrower and sharper than the free wheeling and ineffective totality-of-conduct technique.

⁸³ INDEPENDENT STUDY GROUP, COMMITTEE FOR ECONOMIC DEVELOPMENT, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 82 (1961).

A. *Identifiable Offenses Approach*

The NLRB, therefore, in enforcing the duty to bargain, should be required to *identify* clearly the conduct it deems illegal. If it can find no such illegal conduct, no violation of the Act should be found. If illegal conduct *is* found to have been committed, the determination, depending upon the facts, may or may not be accompanied by a finding of bad faith. Thus, for example, an employer's honest mistake as to the nonbargainability of a subject later deemed to be within the area of mandatory bargaining, would constitute a *per se* violation of the Act not involving bad faith. In contrast, some of the employer's conduct in the second *Reed & Prince* case, such as the factual misrepresentation of the company's leave of absence policy, could be the sort of illegal bargaining posture which might support a finding of bad faith.

This approach admittedly restricts the scope and significance of the good faith concept that was, after all, retained by the 1947 Act instead of the House version's purely objective standards.⁸⁴ Its adoption, however, is a price worth paying to eliminate the uncertainties engendered by the totality-of-conduct approach. Indeed, the restricted application of the good faith concept more closely approaches the 1947 Congressional intent, which was, despite the retention of a subjective test, to *inhibit* the degree of NLRB supervision of the bargaining process. Thus, the House Conference Report stated that the duty to bargain was not meant

to compel either party to agree to a proposal or require the making of any concession. Hence, the Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties.⁸⁵

B. *Reasonableness of the Bargaining Proposals Themselves*

Moreover, an added dimension should be given to the good faith concept which, although perhaps somewhat expanding upon the House Conference Report statement, is nevertheless more compatible with it

⁸⁴ H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947). These standards included the duty to receive and discuss proposals and counterproposals, to reduce agreements reached to writing, and to precede strikes or lock-outs by a strike vote of the employees. They explicitly *excluded* a duty to reach agreement, accept proposals or counterproposals, or to submit counterproposals.

⁸⁵ H.R. REP. No. 510, 80th Cong., 1st Sess. 34 (1947), *reprinted in* N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 505, 538 (1948).

than the fuzzy totality-of-conduct test. The substance of a bargaining proposal should be evaluated and good or bad faith inferred from it to the extent that it is clearly reasonable or unreasonable. Thus, an employer's excessively niggardly bargaining offer, adamantly adhered to, should be available to support a finding of bad faith bargaining. On the other hand, a reasonably fair offer, advanced and defended with similar adamancy, should not be viewed as inconsistent with good faith bargaining. In line with this analysis, an employer's making *no* counter-proposal could support a conclusion that he is bargaining in bad faith or not bargaining at all. Using the good faith concept in this manner will undoubtedly produce close questions. For instance, should the Board act when a previously non-unionized employer endeavors, through tough bargaining, to maintain the advantages of his earlier non-union wage differential. In such a case, so long as the employer is meeting and treating with the union, is not asserting clearly unreasonable bargaining positions, and is not committing other unfair labor practices, the Board's posture ought to be one of cautious circumspection rather than zealous fervor in finding bad faith.

It seems appropriate for the Board to conclude that a proposed substantial wage reduction is evidence of bad faith, or that a comprehensive bargaining offer, approximating current settlements elsewhere, is consistent with good faith bargaining. On the other hand, it seems much more problematical for the NLRB to enjoy a hunting license to ferret out, as it did in the second *Reed & Prince* case, a sequence of picayune incidents (such as the bulletin board controversy and the use of a stenotypist) for the purpose of finding bad faith.

C. Remedies to Suit the Violation

With the good faith concept thus refined, the Board may find fewer breaches of the duty to bargain, but, being required to pin-point unlawful conduct, it would be in an improved position to remedy violations of the law. Furthermore, utilization of this approach should, in situations justifying them, be combined with remedies sharper than a mere prospective cease and desist order. The cease and desist order may be sufficient for inadvertent *per se* violations or for cases in which the evidence of bad faith is relatively insignificant. When evidence of violation is clear and extensive, or when bad faith bargaining is aggravated by other unfair labor practices, however, resort should be had to preliminary injunctive relief, or to retroactive compensatory relief of the sort currently being urged upon the Board in refusal-to-bargain cases.

The NLRB is presently considering the question of making retro-

active compensatory relief available in refusal-to-bargain situations.⁸⁶ The proposed remedy, as stated by the trial examiner in the *Ex-Cell-O* case, would require the employer to "[c]ompensate . . . its employees for the monetary value of the minimum additional benefits . . . which it is reasonable to conclude that the Union would have been able to obtain through collective bargaining . . . for the period commencing with the date of the Respondent's formal refusal to bargain . . ."⁸⁷

To be sure, the Board's authority to afford such relief is being sharply contested. There is also debate over whether the relief should be made available in all cases, including those in which an employer refuses to bargain merely because he desires to secure judicial review of a Board ruling in a representation proceeding, or limited to aggravated refusal-to-bargain situations. The latter is consistent with the proposal here.

Difficult problems of calculating the amount of compensatory relief are also likely to arise. However, since the Board can recognize a clearly unreasonable bargaining stance, and an eminently reasonable one, calculation of what the union could reasonably have achieved, had there been good faith bargaining should also be possible.

Furthermore, combining the *Ex-Cell-O* remedy with the proposed narrowed good-faith test, and limiting it to egregious instances of lack of good faith, would render the remedy a more clearly appropriate exercise of statutory discretion and authority on the part of the Board, and might thus enhance its chances of judicial acceptance. Indeed, if the remedy is *not* accepted by the courts, even in aggravated cases, the difficulties unearthed in this article suggest the necessity of a statutory amendment enhancing the Board's remedial powers, and possibly extending them to include punitive damages for flagrant refusal-to-bargain situations.

The combined requirement of greater precision in finding violations of the duty to bargain, of clearer direction to the parties as to how they failed to discharge this duty, and of speedier and more comprehensive remedies in serious cases would result in fairer and more effective enforcement of good faith in labor negotiations.

⁸⁶ See, e.g., *Ex-Cell-O Corp.*, NLRB Trial Exam. Dec. 80-67 (Case No. 25-CA-2377, 1967); *Zinke's Foods, Inc.*, NLRB Trial Exam. Dec. 662-66 (Cases No. 30-CA-372, 30-RC-400, 1966); *Herman Wilson Lumber Co.*, NLRB Trial Exam. Dec. 757-66 (Case No. 26-CA-2536, 1966); *Rasco Olympia Inc.*, NLRB Trial Exam. Dec. 167-66 (Case No. 19-CA-3187, 1966).

⁸⁷ *Ex-Cell-O Corp.*, NLRB Trial Exam. Dec. 80-67, 18 (Case No. 25-CA-2377, 1967).