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COORDINATED BARGAINING TACTICS OF UNIONS*

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In October 1968 the National Labor Relations Board issued its long-awaited decision in *General Electric Co.*,[1] the coordinated bargaining case. *GE* is a major step in the evolution of national labor policy towards coordinated bargaining tactics, but it leaves important issues unresolved.

I

THE *General Electric* CASE

Briefly, the facts in *GE* were these: In 1965 eight international unions representing GE employees in separate bargaining units joined together to form the Committee on Collective Bargaining (CCB). The stated purpose of the CCB was to formulate a set of common goals and to achieve those goals through "coordinated" bargaining with GE. It was understood by the participating unions that when the common goals were determined, no union would deviate from those goals without first consulting the other unions.

Beginning in November 1965, the CCB sought a meeting with GE to discuss the common demands of the cooperating unions, but GE refused to participate in multi-union discussions. The unions then retreated. One of them, the International Union of Electrical, Radio and Machine Workers (IUE), announced that it was abandoning its request for joint bargaining and sought a meeting solely between GE and the IUE negotiating committee. GE agreed to this suggestion, and the two parties arranged a meeting.

In preparation for that meeting, however, IUE added to its negotiating committee as nonvoting members one representative from each

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1 173 N.L.R.B. No. 46, 69 L.R.R.M. 1305 (Oct. 23, 1968), *enforced in relevant part*, General Elec. Co. v. NLRB, 71 L.R.R.M. 2418 (2d Cir. June 9, 1969).

of the other seven unions that had comprised, with IUE, the CCB. IUE's stated purpose in adding these representatives was to gain the benefit of their experience in negotiating with GE. IUE also claimed that this device would provide inter-union communication adequate to prevent GE's signing a contract with one union on terms favorable to the company and then using that contract as a lever to obtain favorable contract terms from other unions. The company was thought to have practiced such "whipsawing" in the past.

GE refused to meet with IUE as long as representatives of other unions were present. IUE then filed unfair labor practice charges protesting the company's failure to meet. The Board, with Member Jenkins dissenting, sustained the union's contention that GE, by its refusal to bargain with IUE, had violated section 8(a)(5) of the Labor Management Relations Act.[2]

The critical issue, as the Board saw it, was quite narrow. Although GE claimed that the outside union representatives, though formally representing IUE, in fact intended to bargain for their own unions, the Board found this claim unsupported by the evidence before it. Indeed, the Board stated that by its refusal to negotiate at all with the IUE committee, GE had prevented any demonstration of intent by the outside union representatives. Thus it was unnecessary for the Board to decide whether attempted bargaining by members of the IUE negotiating committee on behalf of unions other than IUE, *i.e.*, multi-unit or joint bargaining, would have privileged the company's refusal to negotiate. Similarly, the Board found a lack of evidence to support the company's contention that the several unions were "locked in" to an understanding that none would sign a contract until all had satisfactory offers. Thus it was also unnecessary for the Board to decide whether proof of such an agreement would have justified a refusal to bargain. Finally, since no charges against IUE were before it,[3] the Board had no occasion to consider whether, apart from the effect of IUE's conduct on GE's bargaining obligation, that conduct was itself unlawful. On the Board's view of the facts, therefore, the sole issue of law before it was whether the mere presence on the IUE negotiating committee of persons normally representing unions other than IUE justified the company's refusal to bargain. The Board had little trouble

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2 29 U.S.C. § 158(a)(5) (1964).

3 Charges had been filed, but were dismissed by the Board's General Counsel. *See* McLeod v. General Elec. Co., 257 F. Supp. 690, 701 (S.D.N.Y.), *rev'd on other grounds*, 366 F.2d 847 (2d Cir. 1966).

resolving that issue against GE, and the courts, in cases preceding *GE*, have accepted this principle.[4]

The starting point for analysis of the Board's decision in *GE* is section 7 of the Labor Act.[5] Section 7 provides that "[e]mployees shall have the right to . . . bargain collectively through representatives of their own choosing," and this right has repeatedly been held to include the derivative right of the bargaining agent to select the individuals who will act in its behalf.[6] In a few cases the Board has held that an individual was subject to a conflict of interest so severe as to disqualify him from serving as a representative,[7] but the principle of those cases does not seem controlling here.

Perhaps the best way to demonstrate that possible conflicts of interest among the representatives should not have privileged GE's refusal to bargain is to analyze the contrary arguments in the dissenting opinion of Board Member Jenkins. Member Jenkins argued that a representative of, for example, IAM, temporarily serving on the IUE negotiating committee, would find it impossible to separate the interests of IAM from those of IUE. Accordingly, the representative would argue against accepting a company proposal that would be to the advantage of IUE if its acceptance would put pressure on IAM to accept a similar or less satisfactory proposal not in the best interests of IAM. The consequences would be harmful not only to IUE-represented employees, who might lose benefits otherwise available to them, but to

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4 *See* Standard Oil Co. v. NLRB, 322 F.2d 40, 44 (6th Cir. 1963); McLeod v. General Elec. Co., 257 F. Supp. 690, 701-02 (S.D.N.Y.), *rev'd on other grounds*, 366 F.2d 847 (2d Cir. 1966). *See also* American Radiator & Standard Sanitary Corp. v. NLRB, 381 F.2d 632 (6th Cir. 1967); Wagner, *Multi-Union Bargaining: A Legal Analysis*, 19 LAB. L.J. 731, 738-39 (1968).

The Board also rejected (3-2) GE's defense that no violation of the Act could be found in its refusal to meet with IUE prior to the date on which the existing contract, by its terms, was subject to reopening. The Board found that, although GE was under no obligation to reopen the contract ahead of time, it had agreed to do so, and held that when parties agree on early reopening they are subject to the same standards of good faith bargaining as if the contract expressly provided for such opening. 173 N.L.R.B. No. 46, at 9, 69 L.R.R.M. at 1309. Discussion of this issue is outside the scope of this article.

5 29 U.S.C. § 157 (1964).

6 *See* cases cited in note 4 *supra*. *See also* NLRB v. Roscoe Skipper, Inc., 213 F.2d 793, 794 (5th Cir. 1954); NLRB v. Deena Artware, Inc., 198 F.2d 645, 650-51 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953); *cf.* Prudential Ins. Co. v. NLRB, 278 F.2d 181, 183 (3d Cir. 1960). *Compare* these cases *with* NLRB v. International Ladies' Garment Wkrs. Union, 274 F.2d 376 (3d Cir. 1960); NLRB v. Kentucky Util. Co., 182 F.2d 810 (6th Cir. 1950).

7 *See* Kennecott Copper Corp., 98 N.L.R.B. 75 (1952); Douglas Aircraft Co., 53 N.L.R.B. 486, 489 (1943); *cf.* Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954). *But cf.* NLRB v. David Buttrick Co., 399 F.2d 505 (1st Cir. 1968).

the employer, which would find it "virtually impossible . . . to achieve its aims and possibly amicably settle one phase of its negotiations and obtain a certain measure of industrial peace . . . ."[8]

Member Jenkins's arguments are not persuasive. In the first place, the non-IUE representatives did not have the power to prevent IUE from accepting a company offer satisfactory to IUE. Not only were all non-IUE representatives without a vote on the negotiating committee, but the negotiating committee itself was limited to recommending to the IUE Conference Board whether the latter, composed solely of IUE representatives, should accept or reject an offer by GE. The ultimate decision was made by the Conference Board.[9] Thus the danger of any injury to the interests of IUE employees through the presence on the negotiating committee of representatives from other unions, whose interests might differ from those of IUE, does not appear substantial.

Of course, the presence at the bargaining table of representatives of other unions might discourage IUE from engaging in negotiations leading to a settlement on terms advantageous to it but not to the other unions. Nonetheless, it was the judgment of all the unions, including IUE, that the pursuit of individual, short-term advantage by one union on behalf of employees represented by it would, in the long run, be harmful to the long-term common interests of all GE unions and employees. It would hardly be appropriate for the Board to substitute its judgment for that of the employees' chosen representative as to whether the long-term economic interests of those employees might most satisfactorily be advanced by separate or coordinated bargaining. Primary responsibility for advancing employee economic interests vis-à-vis the employer unquestionably rests with the union, not with the Labor Board.[10]

The presence of representatives of other unions, by discouraging an individual settlement on terms favorable to IUE but not to the other unions, might also encourage economic confrontation, and such confrontation might be substantially broader than it would be if each union bargained individually. Indeed, it would seem clear that it was primarily to present GE with the spectre of several strikes at the same time that the several unions dealing with GE decided to utilize a system of coordinated bargaining.[11] The resulting threat to industrial

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8 173 N.L.R.B. No. 46, at 19, 69 L.R.R.M. at 1312 (Member Jenkins, dissenting).

9 McLeod v. General Elec. Co., 257 F. Supp. 690, 693 (S.D.N.Y.), *rev'd on other grounds*, 366 F.2d 847 (2d Cir. 1966).

10 *Cf.* NLRB v. David Buttrick Co., 399 F.2d 505 (1st Cir. 1968).

11 This is not to say that the unions had necessarily agreed that none would sign until

peace, however, would not have justified the Board in proscribing the presence of the non-IUE representatives. Industrial peace is not normally to be purchased by depriving a party of a valuable bargaining tactic. The Supreme Court has held that, although the Labor Act compels parties to bargain in good faith, it does not preclude them from resorting to tactics destructive of industrial peace in order to strengthen their respective bargaining positions.[12] In *Insurance Agents' International Union*,[13] the Board found that a union's slow-down tactics, designed to put pressure on the employer during otherwise good faith bargaining, constituted a violation of the union's statutory bargaining obligation. The Court thought otherwise:

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors . . . exist side by side. . . .
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> . . . [W]e think the Board's approach involves an intrusion into the substantive aspects of the bargaining process . . . . [I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations.[14]

The freedom of the parties to utilize whatever bargaining tactics they wish has not always been afforded the solicitude shown by the Court in *Insurance Agents'*.[15] Indeed, Professor Wellington has referred to that case as "perhaps the high water mark for freedom of contract in modern labor-management relations."[16] If that be so, how-

all did, since the independent action of each union in holding out for the goals that all had agreed upon could also present the employer with a number of strikes at the same time.

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

13 119 N.L.R.B. 768 (1957).

14 361 U.S. at 489-90.

15 *See, e.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), *discussed in* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1430-42 (1958).

16 H. WELLINGTON, LABOR AND THE LEGAL PROCESS 63 (1968).

ever, the tide has not ebbed appreciably since *Insurance Agents'*. In *American Ship Building Co.*[17] the Board found a lockout aimed at strengthening the employer's bargaining position to be unlawful because the employer had no reasonable grounds to believe a strike was imminent. Despite the interruption of industrial peace caused by the lockout, the Supreme Court reversed, relying heavily on the *Insurance Agents'* principle that the Board is not an arbiter of what economic weapons a party may use in seeking acceptance of its contract demands.[18] This principle is not without its limitations; if the use of a particular economic weapon by an employer is inherently destructive of employee interests in self-organization and collective bargaining, the use of that weapon will violate sections 8(a)(1) and (3) of the Act.[19] But the mere fact that a particular tactic or weapon is inimical to industrial peace does not provide a basis for proscribing its use. This is the essential teaching of *Insurance Agents'*, and it has not been eroded by subsequent decisions.[20]

Nor is there any characteristic unique to coordinated bargaining tactics that removes them from the protection of *Insurance Agents'*. Multi-union collaboration against a large employer may lead to a strike that will shut that employer down, cause unemployment for many non-striking employees, and seriously inconvenience the public. On the other hand, uncoordinated bargaining with a common employer has led to the same or worse results; even the strike of a single strategically placed union can be disastrous. In neither of these situations, however, has it been suggested that the union bargaining tactics are unlawful.

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17 142 N.L.R.B. 1362 (1963).

18 American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317-18 (1965). *See also* NLRB v. Brown, 380 U.S. 278 (1965).

19 NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967); American Ship Bldg. v. NLRB, 380 U.S. 300, 311-12 (1965); NLRB v. Brown, 380 U.S. 278, 287 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-32 (1963). *See generally* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968); Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 CORNELL L.Q. 193 (1966); Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEXAS L. REV. 470 (1966).

20 NLRB v. Katz, 369 U.S. 736 (1962), is not inconsistent with this conclusion. The vice of an employer's unilateral alteration in terms and conditions of employment during bargaining, found to be unlawful in that case, is not only that it is disruptive of the bargaining process, and so destructive of industrial peace, but also that it is not a tactic used to, or likely to, improve the terms of the agreement from the employer's standpoint. Rather, its likely result will be a permanent unilateral determination by the employer of conditions of employment, a result contrary to the Labor Act's purpose of encouraging joint determinations. *See* Schatzki, *supra* note 19, at 495-501.

This is not to deny the desirability of discouraging persons with the power to call company-wide strikes from utilizing that power unnecessarily; it is simply to say that the impact of an economic weapon does not determine its legality under the existing national labor relations laws.[21] A different statutory scheme may be thought desirable by some, but consideration of that issue is beyond the scope of this paper as it is beyond the province of the Board and the reviewing courts.[22] The question here, as before those tribunals, is whether coordinated union bargaining tactics violate the Labor Act, and the point is that the risk of company-wide strikes flowing from the use of these tactics is not a basis for finding their use unlawful. Nor, on the same reasoning, does their use justify an employer's refusal to bargain with the cooperating unions; to hold otherwise would be to permit the Board to deter indirectly, by depriving the unions of the benefits of the Act, what it could not prohibit directly. Hence the Board properly declined to excuse GE from its bargaining obligation on the ground that the presence of representatives of other unions on the IUE negotiating committee would be disruptive of industrial peace.

The final point in Member Jenkins's dissent was that to allow representatives of employees in other units to attend and participate in negotiations for a unit which they do not represent

> may have the effect of broadening or narrowing, at the pleasure of the unions concerned, the numbers, types and locations of the employees covered or affected by the bargaining. This in turn would conflict with the responsibility of the Board to determine the scope of the appropriate unit under Section 9 of the Act . . . .[23]

Pressing for multi-unit bargaining is of doubtful legality, but the presence of representatives from other unions does not inevitably lead to multi-unit bargaining without the employer's consent. Indeed, representatives of other unions might be scrupulously careful to avoid

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21 One exception, not here relevant, is that a strike (or lockout) affecting an entire industry or a substantial part thereof, and which imperils the national health or safety, may be enjoined for 80 days. Labor Management Relations Act of 1947 (Taft-Hartley Act) §§ 206-10, 29 U.S.C. §§ 176-80 (1964) [hereinafter cited as LMRA].

Another exception may relate to the use by one party of a bargaining weapon that would totally destroy the rough balance of power that exists between unions and employers by inevitably bringing the other party to its knees. *Cf.* Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities,* 47 TEXAS L. REV. 378, 382 (1969). Multi-union collaboration in bargaining, however, whatever gains it may accomplish for the participating unions in some cases, surely is insufficient to compel total submission on the part of all employers.

22 *See* McLeod v. General Elec. Co., 257 F. Supp. 690, 705 (S.D.N.Y.), *rev'd on other grounds,* 366 F.2d 847 (2d Cir. 1966).

23 General Elec. Co., 173 N.L.R.B. No. 46, at 20, 69 L.R.R.M. 1305, 1312 (1968).

such pressures. Under these circumstances, the majority in *GE* seems to have been clearly correct in holding that the mere possibility that the non-IUE representatives might seek multi-unit bargaining did not warrant forbidding attendance of such representatives at the IUE negotiations.

II

Agreements Restricting the Union's Freedom to Contract

A more difficult set of questions are those the Board found it unnecessary to decide in *GE*. The first of these is whether the unions involved might lawfully have entered into an agreement as to the circumstances under which each would contract with GE.

Two types of agreement are possible that are substantially more restrictive of an individual union's freedom to contract than the agreement involved in *GE*. That agreement was that none of the cooperating unions would sign for less than the agreed-upon terms without *consulting* the others. Alternatively, a number of unions bargaining with a single employer might agree that none will sign a contract for less than the agreed-upon terms without the *consent* of the others. Under this "minimum-terms-or-consent" agreement, each union is free to sign when the employer offers to grant it the common demands. A somewhat more restrictive agreement is that no union will sign until all are offered the agreed-upon terms—a "common-terms-to-all" agreement. In the past the Board has drawn a distinction between these agreements. In *Standard Oil Co.*,[24] it held a union's refusal to sign a contract predicated on a minimum-terms-or-consent agreement to be lawful, but a refusal predicated on a common-terms-to-all agreement was held to violate section 8(b)(3) of the Act.[25]

A. *Minimum-Terms-or-Consent Agreements*

With respect to the minimum-terms-or-consent agreement, the Board appears correct in finding no violation of the Act; such an agree-

[24] 137 N.L.R.B. 690 (1962), *enforced*, 322 F.2d 40 (6th Cir. 1963). *See also* American Radiator & Standard Sanitary Corp., 155 N.L.R.B. 736 (1965), *enforcement denied on other grounds*, 381 F.2d 632 (6th Cir. 1967).

[25] 29 U.S.C. § 158(b)(3) (1964). In deciding that the union respondents in *Standard Oil* had violated the Act by refusing to sign agreements in two units until negotiations were satisfactorily concluded by another local in another unit, the Board noted that the unions had failed to raise their demand for agreement at the third unit during negotiations, "but rather, without any consultation with the Company, made such agreement a *sine qua non* of their signing the fully negotiated contracts." 137 N.L.R.B. at 691. *See also* Standard Oil Co. v. NLRB, 322 F.2d 40, 45 (6th Cir. 1963). The *Standard Oil* holding is thus quite narrow and is perhaps limited to the facts of the case.

ment serves a legitimate and substantial union interest. Settlement by one of several unions negotiating with the same employer on terms less satisfactory than those demanded by the others places each of the others at a substantial disadvantage in seeking the employer's agreement to the greater demands. The employer's right to coordinate his bargaining with several separate bargaining units, establishing a company-wide pattern from which none of the negotiators in the individual units is free to vary, further supports the conclusion that a minimum-terms-or-consent agreement does not violate a union's bargaining obligation. This was precisely the manner in which GE handled its bargaining with the several unions representing its employees. The employer's obvious purpose is to improve his over-all bargaining position by preventing a high settlement in one unit from being used as a lever to obtain such settlements elsewhere. If this is a legitimate means for an employer to strengthen his bargaining position, it seems equally legitimate when used by a union.

A minimum-terms-or-consent agreement does not force the employer to engage in what as a practical matter is joint or multi-unit bargaining. Although the demands are determined on a multi-unit basis, the employer remains free to discuss those demands on a unit-by-unit basis.

The more serious objection to a minimum-terms-or-consent agreement is that it lessens the significance of the bargaining table as a place where argument, persuasion, and the free interchange of views can take place; crucial decisions are made not at the bargaining table but in the inter-union conferences. Regardless of its impact on the value of bargaining, however, the minimum-terms-or-consent agreement seems to fall within the protection of the *Insurance Agents'* case.[26] An agreement between a group of unions dealing with the same employer that none will sign for less than the agreed-upon terms increases the pressure on the employer to satisfy the common demands of each; the employer knows that if he does not acquiesce, he may be faced with a number of simultaneous strikes. It is precisely the teaching of *Insurance Agents'* that an economic weapon of this nature, much less an implied threat thereof, is not to be held unlawful simply because it renders the peaceful persuasion of the bargaining table less meaningful.

Finally, it might be argued on the basis of the Board's earlier *General Electric* decision[27] that a union that is party to a minimum-terms-or-consent agreement takes a bargaining position "akin to that

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

27 150 N.L.R.B. 192 (1964).

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."[28] A union arguably cannot be bargaining in good faith when it comes to the bargaining table having previously entered into an agreement not to sign a contract except on terms agreed to by it and another union. To the extent the Board's *General Electric* decision supports that argument,[29] however, the decision appears erroneous. It is plain on the face of the Act that neither a union nor an employer need compromise its initial bargaining position to satisfy its obligation to bargain in good faith.[30] As long as the union or employer is not seeking to avoid agreement altogether, insistence on terms favorable to it, albeit the terms originally proposed by it, does not violate its bargaining obligation.[31] Consequently, there is no justification for holding that either must come to the bargaining table *prepared* to compromise its initial position. And, applying that logic to the immediate problem, there is no reason why a union cannot come to the bargaining table having agreed with another union not to compromise, but to insist on the agreed-upon terms. Rather, as Member Jenkins stated in his concurring opinion in the earlier *General Electric* decision:

> I would not find a lack of good-faith bargaining where either the employer or the union entered the negotiations with a fixed position from which it proposed not to retreat, engaged in hard bargaining to maintain or protect such position, and made no concessions from that position as a result of bargaining.[32]

Although minimum-terms-or-consent agreements should be held lawful, they probably should not be subject to judicial enforcement. If the agreement were enforceable, even a union which had been convinced by the employer that it should compromise its initial position could be barred from doing so. The imposition of this absolute bar-

28 *Id.* at 196, *quoting from* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154 (1956) (Frankfurter, J.).

29 *But see* 150 N.L.R.B. at 197: "Our decision rests . . . upon a consideration of the totality of Respondent's conduct." *See also* Jaffe, *Major Developments of the Year under the NLRA*, 18TH NYU ANN. CONF. ON LABOR 61, 65-67 (1966).

30 LMRA § 8(d), 29 U.S.C. § 158(d) (1964). *See also* H.R. REP. No. 510, 80th Cong., 1st Sess. 34-35 (1947).

31 *See* Cox, *supra* note 15, at 1412-18 & cases cited therein.

32 150 N.L.R.B. at 199. On this analysis, the congressional disapproval of a "take it or leave it" approach to bargaining (93 CONG. REC. 4135, 4363, 5014 (1947)) is effectuated by requiring a party to explain the reasons for its bargaining position and listen to arguments from the other party as to why it should alter that position, not by compelling concessions or a willingness to make concessions, either of which would be inconsistent with § 8(d). *See* Cox, *supra* note 15, at 1411-12.

rier to entering into a collective agreement may be contrary to the national labor policy favoring such agreements.[33] Concluding that a minimum-terms-or-consent agreement is not judicially enforceable does not render meaningless the conclusion that such agreements are not unlawful. As a practical matter, judicial enforcement is rarely if ever contemplated as a sanction for non-performance of such an agreement;[34] the parties trust that the long-term benefits of abiding by the agreement will overcome the short-term advantages offered by the employer for not doing so. A conclusion that unions may lawfully enter into minimum-terms-or-consent agreements but that such agreements are not judicially enforceable appears to be a reasonable balance between the competing policies of encouraging parties to enter into collective agreements and leaving them free to take such steps as they wish to strengthen their respective bargaining positions.

B. *Common-Terms-to-All Agreements*

The second type of agreement is the common-terms-to-all agreement. Here the cooperating unions agree that none will sign until all receive the agreed-upon terms. Against the legality of a refusal to contract based on such an agreement, it is argned that the union's insistence on certain action by the employer elsewhere introduces into the negotiations an issue unrelated to the terms and conditions of employment in the unit for which it is supposed to be bargaining. Agreement on those terms and conditions is thereby frustrated, contrary to the purpose of the Act.[35]

The contrary argument is that it is wholly unrealistic to regard terms and conditions in one unit as irrelevant to the interests of employees in other units.[36] The employees in each unit have a direct and immediate interest in the terms and conditions of employment in every other unit since a low scale of wages and benefits in one unit will tend to depress these items in all units. If the unions representing separate units cannot decline to sign contracts until the other unions

33 Although only an injunction ordering compliance with the inter-union agreement would constitute an absolute barrier to entering into a collective agreement, the prospect of a substantial damage award for doing so might, as a practical matter, be an equal deterrent. Thus, if the former is not allowed, neither should the latter be permitted.

34 Research has disclosed no reported cases in which a union sought judicial enforcement of an inter-union agreement prohibiting signing of a contract with an employer except on certain terms.

35 *Cf.* NLRB v. Borg-Warner Corp., 356 U.S. 342, 349-50 (1958).

36 *See* United States Pipe & Foundry Co. v. NLRB, 298 F.2d 873, 877-78 (5th Cir.), *cert. denied*, 370 U.S. 919 (1962); Standard Oil Co., 137 N.L.R.B. 690, 693-96 (1962) (Chairman McCulloch, dissenting).

have received satisfactory offers, the employer will be free to sign a contract with one or more unions at the agreed-upon terms and then, freed from the threat of supportive strikes by the no-strike clauses in the contracts already signed, insist on lower terms in the other units.[37] Finally, by alternating the units in which favorable contracts are signed, the employer could prevent any glaring disparities from developing while at the same time keeping the general wage and benefit level below what it might otherwise be. On the other hand, if each union may decline to sign a contract, even on the agreed-upon terms, until all other unions bargaining with the same employer have also been offered those terms, each union will be free to exert economic pressure in support of the other unions to the long-range advantage of all.[38]

The conclusion that it is not unlawful for a union to refuse to sign a contract otherwise acceptable to it, in order to remain free to exert economic pressure on behalf of other unions in other bargaining units, is buttressed by holdings under the Labor Act. It has long been held that employees have a section 7 right to strike in support of the demands of other employees of the same employer, even though the latter are in a separate bargaining unit,[39] and that such a strike does not violate section 8(b)(4), the secondary boycott section of the Act.[40] The Board and the courts have recognized that such action assures the employees in the first unit of the support of the other employees if the first unit has a dispute with the employer. Section 8(b)(4) is of particular significance since the competing interests involved there are

37 This tactic could be used to particular advantage by an employer who operates more than one plant engaged in the same process. Such an employer could, after signing a contract at one or more plants, substantially minimize the impact of a strike at any other plant by transferring work from the struck plant to non-struck plants.

38 *See* Hildebrand, *Coordinated Bargaining: An Economist's Point of View,* 19 LAB. L.J. 524, 525-27 (1968).

39 *See* Southern Greyhound Lines, 169 N.L.R.B. No. 148, 1968-1 CCH NLRB ¶ 22,177 (Feb. 28, 1968); A.O. Smith Corp., 132 N.L.R.B. 339, 340 n.5 (1961), *modified,* 343 F.2d 103 (7th Cir. 1965); Texas Foundries, Inc., 101 N.L.R.B. 1642, 1683 (1952), *enforcement denied on other grounds,* 211 F.2d 791 (5th Cir. 1954); *cf.* Houston Contractors' Ass'n v. NLRB, 386 U.S. 664 (1967). Although a divided Board held in Brown & Root, Inc., 99 N.L.R.B. 1031, 1036-38 (1952), *modified,* 203 F.2d 139 (8th Cir. 1953), that employees in one unit striking in protest against unfair labor practices involving employees in another unit were not to be treated as unfair labor practice strikers, but only as economic strikers (*see* NLRB v. Thayer Co., 213 F.2d 748, 752 (1st Cir.), *cert. denied,* 348 U.S. 883 (1954)), there was no dispute as to the protected nature of the strike, despite the non-unit status of the striking employees. *See also* A.O. Smith Corp., *supra* at 340 n.5.

40 29 U.S.C. § 158(b)(4) (1964). *See* Houston Contractors' Ass'n v. NLRB, 386 U.S. 664, 667-69 (1967); *cf.* NLRB v. Teamsters Local 986, 225 F.2d 205, 210 (5th Cir.), *cert. denied,* 350 U.S. 914 (1955). *But see* Penello v. American Fed'n of Television & Radio Artists, 291 F. Supp. 409 (D. Md. 1968); Kennedy v. San Francisco-Oakland Newspaper Guild, F. Supp. , 69 L.R.R.M. 2301 (N.D. Cal. Feb. 7, 1968).

essentially the same as those involved in the problem before us; in each case labor has an interest in bringing economic pressure to bear to obtain its legitimate goals, and the employer has a countervailing interest in narrowing the permissible field of industrial conflict.[41] Inasmuch as the use of economic pressure in support of employees in another bargaining unit is not a violation of section 8(b)(4), the union seems justified in not signing a contract containing a no-strike clause in order to remain free to utilize what the law recognizes as permissible economic pressure. Not signing seems justified even if the contract contains only a limited no-strike clause, one that does not bar the union from striking in support of the demands of other employees of the same employer. Presumably the union would not refuse to contract under these circumstances unless its refusal to do so placed some economic pressure on the employer to accede to the demands of those other employees. If the union's interest in the outcome of a dispute involving employees in another bargaining unit is sufficient to justify the use of a strike in support of those employees, it would also appear sufficient to justify the utilization of whatever economic pressure might flow from the refusal to contract. Hence, no-strike clause or not, a union should be free to refuse to sign a contract otherwise acceptable to it in order to put pressure on the employer to acquiesce in the demands of other employees in a separate bargaining unit.[42]

The power of employers, under some circumstances, to agree on a common bargaining position and utilize their combined economic power to resist a union's demands provides additional support for the legality of a refusal to contract based on a common-terms-to-all agreement. In *The Evening News Association*,[43] for example, each of two Detroit newspapers bargained with separate units of the same Team-

41 *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951).

42 In those unusual cases in which, because of the absence of common control of daily operations or labor relations, the prohibitions of § 8(b)(4) apply to a strike by employees in one bargaining unit in support of employees in another bargaining unit of the same employer (*see* Penello v. American Fed'n of Television & Radio Artists, 291 F. Supp. 409 (D. Md. 1968); Kennedy v. San Francisco-Oakland Newspaper Guild, F. Supp. , 69 L.R.R.M. 2301 (N.D. Cal. Feb. 7, 1968)), application of the principles discussed above would appear to dictate a contrary result; *i.e.*, the impermissibility of a refusal to contract in one unit in order to support contract demands of employees in another unit. In addition, since a strike against one employer, or group of employers in a multi-employer bargaining unit, in support of employees of another employer, or multi-employer bargaining unit, would violate § 8(b)(4), a refusal to contract with the former in support of the latter would violate § 8(b)(3). *See* Danielson v. International Longshoremen's Ass'n, F. Supp. , 70 L.R.R.M. 2487 (S.D.N.Y. Feb. 11, 1969).

43 166 N.L.R.B. No. 6, 1967 CCH NLRB ¶ 21,592 (June 29, 1967), *petition for review denied sub nom.* Newspaper Drivers & Handlers Local 372, 404 F.2d 1159 (6th Cir. 1968).

sters local. The Board held that the newspapers did not violate the Act when they identified certain common issues as vital to each and agreed that if the Teamsters struck either employer over its refusal to accede to union demands on those issues, the other would lock out its Teamster employees. The newspapers subsequently effectuated the agreement, and the Board held that the Act had not been violated.[44] The two newspapers, the only daily papers in Detroit, were in direct competition with each other and were faced with identical demands from the same union. Under these circumstances, if the employers had not been free to combine, the union would have been able to strike one and utilize the competitive pressure resulting from the other's continued operation to obtain its demands. Armed with a successful contract from one employer, the union would then have been able to use that contract, coupled with the threat of a strike, to obtain a similar contract from the other newspaper. In other words, absent the employers' power to combine, the union would have been free to utilize whipsaw tactics against the two employers. If a group of unions dealing with a single employer are not able to combine, that employer will be similarly free to use whipsaw tactics against them; indeed, the unions bargaining with GE claimed that it was using precisely those tactics against them. Hence, the conclusion seems warranted that a group of unions dealing with a single employer, as well as a group of employers dealing with a single union, should be free to determine their common goals and utilize their combined economic power in support of those goals.[45]

It might, however, be argued that the Supreme Court's decision in *H. J. Heinz Co. v. NLRB*[46] forbids a union from refusing to sign a contract otherwise acceptable to it until other unions have received a satisfactory contract. In that case, the Court held, *inter alia,* that an em-

44 *See also* Weyerhauser Co., 166 N.L.R.B. No. 7, 1967 CCH NLRB ¶ 21,587 (June 29, 1967), *petition for review denied sub nom.* Western States Regional Council v. NLRB, 398 F.2d 770 (D.C. Cir. 1968). *Compare* these cases *with* David Friedland Painting Co., 158 N.L.R.B. 571 (1966), *enforced,* 377 F.2d 983 (3d Cir. 1967).

45 Although this discussion has concerned a union's refusal to contract in order to put pressure on the common employer to agree to the common demands of another unit, the freedom to refuse to contract should not be limited to the situation in which the demands in each unit are the same. The protections of § 7 are not limited to those cases in which the demands of the striking employees are the same as those of the employees they support, nor do the prohibitions of § 8(b)(4) apply solely because the employees whom the union would induce to strike are not in immediate common cause with those whom they are supporting. *See* cases cited notes 39 & 40 *supra.* There is no reason why the permissible scope of union economic action should be narrower under § 8(b)(3) than it is under §§ 7 and 8(b)(4).

46 311 U.S. 514 (1941).

ployer that had reached agreement on all matters in dispute between it and the union representing its employees violated its duty to bargain in good faith when it refused to sign a contract embodying the terms of that agreement.[47] Arguably, a union that has reached agreement on all matters in dispute between it and the employer similarly violates its duty to bargain in good faith when it refuses to sign a contract unless the employer agrees to certain demands made by another union in another bargaining unit. The two situations are clearly distinguishable, however. In the former, the refusal to sign takes place in the context of total agreement between the parties. The employer's refusal to sign a contract under these circumstances is inconsistent with the principles of collective bargaining in that it denies "joint participation in the culminating act of promulgating the wages, hours and other terms and conditions of employment."[48] Additionally, when complete agreement has been reached, the employer's refusal to contract provides powerful evidence of bad faith; *i.e.,* a desire to deny full recognition to, and so discredit, the employee representative, or to avoid the agreement at some future date.[49] In the case with which we are concerned, however, the union's refusal to contract is based on an unsatisfied demand—that the employer offer the same contract terms to employees in another unit—and is aimed at compelling adherence to that demand. A union's refusal to contract until all its demands are met is neither inconsistent with the principles of collective bargaining nor evidence of bad faith on the union's part. Hence, a union's refusal to sign a contract based on an inter-union common-terms-to-all agreement is not rendered unlawful by *H. J. Heinz.*

C. *The Effect of Pennington*

One further issue to be considered before leaving the question of the legality of inter-union agreements of either the minimum-terms-or-consent or the common-terms-to-all variety is the effect on such agreements of the Supreme Court's decision in *United Mine Workers v. Pennington.*[50] The Court's actual holding in *Pennington* was quite narrow: A union forfeits its exemption from the antitrust law when it agrees with one set of employers to impose a certain wage scale on other employers, and apparently then only if the purpose of the agree-

47 *Id.* at 523-26. This holding was subsequently incorporated into § 8(d) of the Act, which requires "the execution of a written contract incorporating any agreement reached if requested by either party." 29 U.S.C. § 158(d) (1964).

48 Cox, *supra* note 15, at 1423.

49 *See id.* at 1422-23.

50 381 U.S. 657 (1965).

ment is to force the other employers out of business.[51] This holding poses no antitrust problems for unions that agree to seek common goals from a single employer, since the Court held only that union-employer agreements are cognizable under the antitrust laws, not that inter-union agreements may violate those laws. Indeed, the classic statement of the reach of the antitrust laws to the activities of labor unions would appear to negate the latter possibility. In *United States v. Hutcheson*[52] the Court said:

> So long as a union acts in its self-interest *and does not combine with non-labor groups,* the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[53]

The inter-union agreement, not involving a combination of labor and non-labor groups, appears to fall within the protection of section 20 of the Clayton Act and hence to be immune from antitrust prosecution.[54]

Language in *Pennington* does, however, cast doubt on the permissibility under the Labor Act of inter-union agreements to seek common goals from a single employer. The Court said:

> [T]here is nothing in the [national] labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.[55]

If, as the Court suggests, it is contrary to national labor policy for a union, by agreement with one employer, to limit its freedom to nego-

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51 *See* Lewis v. Pennington, 400 F.2d 806, 813-14 (6th Cir.), *cert. denied,* 393 U.S. 983 (1968); Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws,* 32 U. CHI. L. REV. 659, 714-21 (1965).

52 312 U.S. 219 (1941).

53 *Id.* at 232 (emphasis added; footnote omitted). The Court quoted this language from *Hutcheson* in *Pennington,* itself emphasizing the italicized language. 381 U.S. at 662.

54 An inter-union agreement to seek common goals from a single employer can also be distinguished from an employer-union agreement to impose certain labor standards on another employer in that the former does not restrict competition in the product market, the evil at which the antitrust laws are aimed. *See* Meltzer, *supra* note 51, at 719 n.205.

55 381 U.S. at 666.

tiate with another employer in a different bargaining unit, it is arguable that it is likewise contrary to that policy for a union, by agreement with another union, to limit its negotiating freedom in a different bargaining unit vis-à-vis a common employer. In both cases the agreement is incompatible with unit-by-unit bargaining, and the union is deprived of full freedom to respond to a bargaining situation as circumstances might warrant.

Pennington need not be interpreted so broadly, however. To the extent that the vice of the employer-union agreement in *Pennington* was that it placed the union in a strait jacket in its dealings with other employers, the inter-union agreement is distinguishable. An agreement between an employer and a union that the latter will seek from other employers the same terms and conditions of employment it obtained from the first employer may be easily enforced; a clause may be included in the union's collective bargaining contract with the first employer stating that on the union's failure to comply with the agreement, the contract will be terminated or modified to substitute for the existing terms the more favorable terms given another employer. This clause places the union under such pressure not to grant more favorable terms to other employers that to describe the union as strait-jacketed in its dealings with those employers is accurate. There is no comparable technique for self-enforcement of an inter-union agreement to seek common terms from a single employer. Judicial enforcement is not normally sought[56] and it has been suggested that if sought it should be denied.[57] Even if such agreements are judicially enforceable, however, the delay and uncertainty involved in obtaining enforcement places them in a substantially different category from employer-union agreements.

Regardless of whether inter-union agreements are distinguishable from union-employer agreements, however, the Court's opinion in *Pennington* should be reconsidered; neither agreement is contrary to the national labor policy.[58] *Pennington* purports to draw from the national labor policy a rule that will best serve the interests of union members, while at the same time ignoring the utility of the agreements that it condemns in furthering those interests. For example, a union-employer agreement whereby the union agrees to seek the same wages and benefits accorded by the contracting employer from all other employers in the industry may induce each of the employers to agree to

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56 *See* note 34 *supra* & accompanying text.

57 *See* note 33 *supra* & accompanying text.

58 *See generally* Meltzer, *supra* note 51, at 714-21.

higher wages than he would otherwise, because it removes the fear that a competitor will get a better bargain. Similarly, an inter-union agreement to seek common goals from a common employer may prevent the employer from whipsawing the separate unions and so improve the bargain struck by each with the employer. Each of these agreements may have deleterious results for some union members, but it is one of the functions of a union to reconcile the competing interests of its members in order to present a united front to the employers with which it deals. As long as the union acts in good faith it is sound policy not to upset the balance it strikes.[59]

D. *Inter-Union Agreements as a Defense to an Employer's Refusal to Bargain*

Assuming that an inter-union agreement of either of the types here discussed would be contrary to national labor policy and that a refusal to contract predicated on such an agreement would violate section 8(b)(3), would proof of the existence of either agreement serve as a defense to an employer's refusal to bargain with a union that was a party thereto? The Board appears to have held, without analysis, that it would not.[60]

This holding seems correct. The primary argument against the Board's decision is that if the inter-union agreement is unlawful, one method of deterring its use is to privilege the employer to refuse to bargain with all unions party to that agreement. Privileging a refusal to bargain, however, might delay all bargaining with unions suspected of having entered into such agreements, and it is unnecessary to take this risk. First, the unlawful agreement is harmless if it is not honored,[61] and there is no certainty that it will be honored until the union refuses to sign an otherwise satisfactory contract. Second, adequate sanctions are available if the union does refuse to sign because of the agreement. The employer can refuse to bargain further,[62] and the Board,

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59 *See* Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

60 *See* Standard Oil Co., 137 N.L.R.B. 690 (1962), in which the Board held that the unions involved violated § 8(b)(3) by refusing to sign a contract until the employer had met the demands of another union in another bargaining unit and also held, without discussing the relation between the two issues, that the employer's refusal to meet with the representatives of the cooperating unions violated § 8(a)(5).

61 *See* McLeod v. General Elec. Co., 257 F. Supp. 690, 707 (S.D.N.Y.), *rev'd on other grounds*, 366 F.2d 847 (2d Cir. 1966).

62 The employer's defenses to a § 8(a)(5) charge at this point would be two-fold: First, that the union's unlawful agreement was directly obstructing negotiations by preventing the union from signing the agreed-upon contract (*see* Times Publishing Co., 72 N.L.R.B.

upon the filing of section 8(b)(3) charges, can obtain an order directing the union to sign a contract containing the agreed-upon terms.[63]

III

UNION INSISTENCE ON JOINT BARGAINING

A. *Legality*

The other question left unanswered by the Board in *GE* is what would be the consequences of an insistence by two or more unions, certified to represent employees of the same employer in separate bargaining units, that the employer meet and discuss with them jointly their common contract demands. Initially, the Labor Act does not bar an employer and a coalition of the labor organizations representing his employees in separate units from negotiating jointly if they wish to do so;[64] some companies and unions have by mutual agreement used this bargaining format for a number of years.[65] Nor is there anything on the face of the Act forbidding union insistence on joint bargaining when the employer does not agree. Section 8(b)(3) compels a union to bargain collectively with an employer, provided it is the representative of his employees, subject to the provisions of section 9(a). Section 9(a), in turn, states that representatives chosen by the majority of the employees in a unit appropriate for collective bargaining "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect of rates of pay, wages, hours of employment, or other conditions of employment."[66] Thus, although section 9(a) provides the chosen union with representative status only as to those employees in the bargaining unit, it does not explicitly bar the chosen union from insisting that the employer nego-

676, 683 (1947)); second, that the union's refusal to sign had created a bargaining impasse. *See, e.g.*, Taft Broadcasting Co., 163 N.L.R.B. No. 55, 1967 CCH NLRB ¶ 21,170 (March 20, 1967), *petition for review denied sub nom.* American Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

63 *See* Danielson v. International Longshoremen's Ass'n, F. Supp. , 70 L.R.R.M. 2487 (S.D.N.Y. Feb. 11, 1969); *cf.* Brotherhood of Painters Local 1385, 143 N.L.R.B. 678, 682 (1963), *enforcement denied on other grounds*, 334 F.2d 729 (7th Cir. 1964); Automobile Wkrs. Union, 134 N.L.R.B. 1337, 1339 (1961); Local 65, Sheet Metal Wkrs., 120 N.L.R.B. 1678, 1679-80 (1958).

64 McLeod v. General Elec. Co., 257 F. Supp. 690, 705 (S.D.N.Y.), *rev'd on other grounds*, 366 F.2d 847 (2d Cir. 1966); Engle, *Coordinated Bargaining: A Snare—and a Delusion*, 19 LAB. L.J. 518 (1968).

65 Engle, *supra* note 64, at 518; Hildebrand, *supra* note 38, at 524-25.

66 29 U.S.C. § 159(a) (1964).

tiate common demands jointly with that union and another union representing employees in another unit.

One might argue that a demand as to the format of negotiations is unrelated to "conditions of employment" in the bargaining unit, and thus outside the scope of subjects on which a party may insist.[67] The statutory phrase "conditions of employment," however, has not been limited to the tangible circumstances under which employment takes place, but has been construed to include all matters that will substantially affect those circumstances.[68] Employers and unions rightly believe that whether bargaining takes place on a joint or multi-unit basis may affect the circumstances under which the employees involved will ultimately be working. Hence, union insistence on joint bargaining does not appear impermissible on the ground that it is unrelated to terms and conditions of employment.

An issue more substantial than whether union insistence on joint bargaining is contrary to the letter of the Labor Act is whether such insistence is contrary to any policy of the Act.[69] The argument that it contravenes policies of the Act is this: When the Board has found a particular unit to be appropriate for collective bargaining and certified a particular union as the representative of employees in that unit, for the certified union to insist on bargaining jointly with another union certified in another unit is to compel the employer to bargain in a unit not appropriate for collective bargaining.

The Board has held that "a union which insists upon bargaining only for an inappropriate unit does not fulfill its obligation to bargain as defined in the Act."[70] Analysis of the cases in which the Board has so held, however, reveals that almost without exception they involved the efforts of a union certified to represent one group of employees to

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67 *See* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

68 *See* United States Pipe & Foundry Co. v. NLRB, 298 F.2d 873, 877-78 (5th Cir.), *cert. denied*, 370 U.S. 914 (1962). *See also* Fibreboard v. NLRB, 379 U.S. 203 (1964); UAW v. NLRB, 381 F.2d 265 (D.C. Cir.), *cert. denied*, 389 U.S. 857 (1967); Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966); Westinghouse Elec. Corp., 153 N.L.R.B. 443 (1965). A limitation on the scope of the bargaining obligation may be imposed in favor of "managerial decisions which lie at the core of entrepreneurial control." Fibreboard v. NLRB, *supra* at 223 (Stewart, J., concurring). *But see* Ozark Trailers, Inc., *supra*. But such a limitation would be wholly irrelevant to the problem here under consideration; whether bargaining shall take place on a single-unit or multi-unit basis hardly lies at "the core of entrepreneurial control."

69 *See* International Bhd. of Elec. Wkrs., 119 N.L.R.B. 1792, 1796 (1958), *enforced*, 266 F.2d 349 (5th Cir. 1959); National Maritime Union, 78 N.L.R.B. 971, 981-82 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949); *cf.* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

70 International Bhd. of Elec. Wkrs., 119 N.L.R.B. 1792, 1796 (1958) (footnote omitted).

press demands on a common employer that would affect other employees not represented by that union and who had not acquiesced in the demands.[71] In such cases the affected employees' interest in free choice of their bargaining representative may well justify the Board's rule. Interest in free choice does not, however, provide a basis for precluding insistence by the chosen representatives of both groups that their employer discuss common demands jointly.[72]

The combination of units that presses for joint bargaining might not be "appropriate for collective bargaining" as that term is used in section 9 of the Act because, for example, the units do not share a community of interests such that they should be represented by a single union.[73] But the question here is not whether the employees in the separate units should be represented by a single union; rather, it is whether two unions certified to represent those employees in separate units may determine what their common interests are, formulate mutually satisfactory demands, and insist that the employer discuss those demands jointly. Simply because a combined unit is inappropriate for representation purposes, it does not follow that a demand for joint bargaining is similarly inappropriate.[74]

B. *Limitation*

The suggestion that joint bargaining is not impermissible solely because combined units would be inappropriate for representation purposes does not, however, mean that joint bargaining is always permissible. Joint bargaining should be limited to those subjects as to which the unions involved have common demands. For example, a demand that all employees be free to retire at 55 and that an employer-wide pension fund be set up would be a permissible subject for joint bargaining, as would a demand that all employees receive an immediate ten percent wage increase. Suppose, however, that union *A* wanted a

71 *See id.;* Local 164, Painters, 126 N.L.R.B. 997, 1002-03 (1960), *enforced,* 293 F.2d 133 (D.C. Cir.), *cert. denied,* 368 U.S. 824 (1961); Local 19, Longshoremen, 125 N.L.R.B. 61, 65-69 (1959), *enforced in relevant part,* 286 F.2d 661 (7th Cir.), *cert. denied,* 368 U.S. 820 (1961). *See also* NLRB v. Retail Clerks' Int'l Ass'n, 203 F.2d 165 (9th Cir. 1953). *But cf.* International Longshoremen's Ass'n, 118 N.L.R.B. 1487 (1957), *remanded on other grounds,* 277 F.2d 681 (D.C. Cir. 1960).

72 *See* Anker, *Pattern Bargaining, Antitrust Laws and the National Labor Relations Act,* 19th NYU ANN. CONF. ON LABOR 81, 92-95 (1967).

73 *See, e.g.,* American Cyanamid Co., 146 N.L.R.B. 1415 (1964) and cases cited therein.

74 *See* Anker, *supra* note 72, at 101-02. A demand for joint bargaining following separate unit certification thus in no sense "denies the Board . . . ultimate control of the bargaining unit." Douds v. ILA, 241 F.2d 278, 283 (2d Cir. 1957). Rather, such a demand raises the wholly separate question of whether joint negotiations are appropriate even though a combined unit might not be.

twenty percent wage increase spread over three years, eight percent the first year and six percent the following two years; union *B* wanted a fifteen percent wage increase spread over two years, ten percent the first year, five percent the following year; and union *C* wanted a three-year contract with a six percent raise the first year and provision for annual reopening as to wages. Joint bargaining as to wages under these circumstances would simply be productive of confusion, and the unions should not be free to insist on it.

As a practical matter, this limitation will not weigh heavily on unions wishing to engage in joint bargaining. In most cases, union demands for joint bargaining are an effort to obtain uniform terms on those matters as to which the unions involved have common interests.[75] Nonetheless, in the interest of preventing needless disruption of collective bargaining, the Board would appear warranted in limiting joint bargaining to those situations in which the unions' demands are the same.[76]

C. *Union Insistence on Joint Bargaining as a Defense to an Employer's Refusal to Bargain*

If the unions' insistence on joint bargaining is limited to common demands, the employer must discuss with each of the unions involved its demand that he bargain jointly. That demand is related to terms and conditions of employment in the bargaining unit; hence section 8(a)(5) of the Act places the employer under a duty to discuss it. On the other hand, the employer's duty to discuss an issue does not oblige him to acquiesce in the union's demand;[77] to the contrary, he is entirely free, in turn, to insist on bargaining separately with each of the separate unions.[78]

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[75] *See* Lasser, *Coordinated Bargaining: A Union Point of View*, 19 LAB. L.J. 512, 514 (1968); Hildebrand, *supra* note 38, at 525-30.

[76] Nor should the result be different if the positions of the parties are reversed; that is, if two or more employers are dealing with a single union in separate bargaining units, those employers should be free to insist on joint bargaining without violating § 8(a)(5) as long as their contract demands are the same. *But see* The Eveuing News Ass'n, 154 N.L.R.B. 1494 (1965), *enforced sub nom.* Detroit Newspaper Publishers Ass'n v. NLRB, 372 F.2d 569 (6th Cir. 1967).

[77] LMRA § 8(d), 29 U.S.C. § 158(d) (1964).

[78] *But see* Anker, *supra* note 72, at 102, suggesting that an employer's refusal to acquiesce in a demand for joint negotiations when such a demand is reasonable would violate the employer's § 8(d) duty *"to meet at reasonable times* and confer in good faith with respect to wages, hours, and other terms aud conditions of employment . . . ." 29 U.S.C. § 158(d) (1964) (emphasis added). This appears an unlikely use of the italicized language, the purpose of which surely was to do no more than prevent an employer from unduly delaying collective bargaining. *See, e.g.*, Cummer-Graham Co., 122 N.L.R.B. 1044, 1068-70 (1959), *enforcement denied on other grounds*, 279 F.2d 757 (5th Cir. 1960).

As a practical matter, this conclusion is not likely to lead to a foundering of the entire collective bargaining process on the preliminary issue of joint or separate negotiations. Assuming that *GE* was correctly decided, the common employer, in his negotiations with each of the unions certified to represent his employees, must permit the attendance of representatives of all unions, albeit as temporary representatives of one. It is difficult to see why the employer would object to discussing with each of those representatives the common demands of the several unions. The only reason he might object would be the fear that to consent to joint bargaining would leave the unions free to insist on a contract in all units as the price of a contract in any unit. This fear is unfounded, however; two unions certified to represent employees of the same employer may insist on satisfactory contracts in all units as a precondition to a contract in any unit regardless of whether joint bargaining takes place or could be insisted upon.[79] And, as long as the employer's consent to joint bargaining does not legalize otherwise impermissible union insistence on satisfactory contracts in all units as the price of a contract in any unit, there would appear no reason for the employer to object to joint bargaining and no serious threat to industrial peace in his possessing the power to object.

The employer should be free under section 8(a)(5) to resist demands for joint bargaining even if this freedom does lead to industrial conflict. The essence of the dispute over joint bargaining is that unions are seeking to increase their economic muscle vis-à-vis the common employer and the employer is determined to resist. The efforts of employers and unions to improve their respective bargaining positions are not to be condemned by the Board on the ground that these efforts may be productive of industrial strife. To the contrary, as this article has sought to emphasize, the struggle to obtain, and the use of, economic muscle as a means to more satisfactory agreements is an accepted part of the national labor policy.

[79] *See* note 42 *supra* & accompanying text.