St. John's Law Review

Volume 29
Issue 2 *Volume 29, May 1955, Number 2*

Article 3

May 2013

Union Inroads Upon Management Through Collective Bargaining

St. John's Law Review

NOTES

UNION INROADS UPON MANAGEMENT THROUGH COLLECTIVE BARGAINING

Introduction

In *Matter of Richfield Oil Corp.*,[1] the National Labor Relations Board recently held that an employee stock purchase plan is a proper subject of compulsory collective bargaining. This decision has pointed up a factor that is effectively changing labor relations and our society. It is the culmination of a long series of cases evincing a trend on the part of the Board to give labor a stronger voice in management. It demonstrates how the Labor Management Relations Act [2] is employed to give unions a greater degree of control in managerial decisions and it provides the labor movement with an effective device for securing many concessions.

Following the failure of the National Industrial Recovery Act,[3] which gave employees the right to organize and bargain collectively through their chosen representatives, Congress passed the Wagner Act, which is now the Labor Management Relations Act.[4] The basis for such legislation is congressional authority in the area of interstate commerce.[5] In so legislating, Congress sought to eliminate certain causes of industrial strife and unrest which constituted a substantial impediment to the free flow of commerce. "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury. . . ." [6] It is important to note that the purpose and policy of the Act is ". . . *to prescribe the legitimate rights of both employees and employers* . . ." and ". . . to provide orderly and peaceful procedures for *preventing the interference by either with the legitimate rights of the other*. . . ." [7]

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[1] 5 CCH LAB. LAW REP. (4th ed.) ¶ 52,345 (NLRB 1954).

[2] 61 STAT. 136 (1947), 29 U.S.C. §§ 141-188 (1952) (Taft-Hartley Act).

[3] The unconstitutionality of this Act was determined by the Supreme Court in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[4] 49 STAT. 449 (1935), as amended, 61 STAT. 136 (1947), 29 U.S.C. §§ 141-188 (1952).

[5] U.S. CONST. Art. I, § 8. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[6] 61 STAT. 137 (1947), 29 U.S.C. § 151 (1952) (findings and policy).

[7] 61 STAT. 136 (1947), 29 U.S.C. § 141 (1952) (declaration of purpose and policy) (emphasis added).

The Duty to Bargain Collectively

The terms of the Act provide that it is an unfair labor practice for an employer to refuse to bargain collectively with his employees.[8] Conversely, it is an unfair labor practice for employees, through their properly certified labor organization or its agents, to refuse to bargain collectively with an employer.[9]

To carry out the terms and purpose of the Act, Congress created the National Labor Relations Board.[10] When deciding what subjects are within the ambit of collective bargaining, the Board looks solely to those standards set forth in Section 9(a). This section requires collective bargaining as to all matters included in the terms ". . . rates of pay, wages, hours of employment, or other conditions of employment. . . ." [11] The Act further provides that: ". . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ." [12]

Where there is a bargainable subject, the employer is compelled to confer in "good faith" as to that issue. If he does not do so, he may be adjudged guilty of an unfair labor practice. While this requirement does not, strictly speaking, compel the employer and employees to reach an agreement,[13] the employer does not discharge his duty to bargain collectively in good faith by merely meeting with the representatives of his employees and listening patiently while pretending a "semblance of an endeavor to reach a mutual understanding." [14] The Act requires something of a more affirmative nature. As was stated in *Singer Mfg. Co. v. NLRB*,[15] "[i]t [the Act] has placed upon the employer the duty . . . to enter into discussion with its employees with open and fair minds, with sincere purpose to find basis for agreement." [16] Such collective bargaining imposes a duty

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[8] 61 STAT. 140 (1947), 29 U.S.C. § 158(a)(5) (1952).
[9] 61 STAT. 141 (1947), 29 U.S.C. § 158(b)(3) (1952).
[10] 49 STAT. 451 (1935), as amended, 61 STAT. 139 (1947), 29 U.S.C. § 153(a) (1952).
[11] 61 STAT. 143 (1947), 29 U.S.C. § 159(a) (1952).
[12] 61 STAT. 142 (1947), 29 U.S.C. § 158(d) (1952).
[13] *Ibid.*
[14] Singer Mfg. Co. v. NLRB, 119 F.2d 131, 133 (7th Cir.), *cert. denied,* 313 U.S. 595 (1941).
[15] 119 F.2d 131 (7th Cir.), *cert. denied,* 313 U.S. 595 (1941).
[16] *Id.* at 134. See St. Joseph Stock Yards Co., 2 N.L.R.B. 39, 52-55 (1936).

to make reasonable efforts to adjust or regulate differences.[17] In the *Singer* case the court held that while the Act could not compel an employer to agree with the employees, the court may, in determining whether an employer had bargained in good faith, find his dealings to be a sham or pretense.[18] The result is that the employer must meet the proposals of the union with manifestly reasonable counter-proposals or objections or be adjudged guilty of an unfair labor practice. In this respect, the duty to bargain almost becomes the duty to make compromises and concessions.[19]

The obligation does not stop merely at an honest attempt to arrive at an agreement—more is required. Thus, at times, there is a refusal to bargain collectively when the employer declines to contribute certain information and data deemed useful to a resolution of the issue.[20] This is true although such information is confidential [21] and its divulgence might possibly, in those enterprises where competition is more than nominal, damage the employer's competitive position.[22] This is not expressly demanded by the Act, but rather, is implied from the duty to bargain in good faith.[23]

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[17] See NLRB v. American Nat. Ins. Co., 343 U.S. 395, 402 (1952); *cf.* Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 548 (1937).

[18] "The statute requires of the employer that he bargain collectively and whether he does so depends upon the character of his acts of commission or omission. Collective bargaining is an act; pretended collective bargaining is an omission to perform the act, and no unusual difficulty arises because, in determining whether bargaining within the meaning of the Act has indeed occurred, the trier of the facts must determine whether the acts proved were rendered in good faith or were merely in pretended good faith and performed with the actual intent to achieve the very opposite of collective bargaining. Existence or nonexistence of good faith, just as existence and nonexistence of intent, involve only inquiry as to fact. Whether a crime has been committed not infrequently depends upon existence or nonexistence of a felonious intent. Whether one is a bona fide purchaser for value of negotiable paper before maturity without notice puts in issue questions of fact. The neutrality required of an employer in his transactions with his employees is another intangible product of fact, the existence or nonexistence of which usually depends upon the character of acts committed or omitted. The civil law furnishes repeated instances of application of the principle." Singer Mfg. Co. v. NLRB, *supra* note 14 at 133-134.

[19] See 16 U. OF CHI. L. REV. 568, 569 (1949).

[20] For a comprehensive treatment of this subject see Sherman, *Employer's Obligation to Produce Data For Collective Bargaining,* 35 MINN. L. REV. 24 (1950); Note, 3 STAN. L. REV. 88 (1950).

[21] See Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942).

[22] This objection was raised repeatedly by witnesses at the 1953 Congressional Hearings on Proposed Amendments to the Taft-Hartley Act. See, *e.g., Hearings before Committee on Education and Labor of the House of Representatives,* 83d Cong., 1st Sess. 606-607, 1395, 1418-1419, 2209-2210, 2394-2395, 3702 (1953).

[23] See Aluminum Ore Co. v. NLRB, *supra* note 21; Note, 3 STAN. L. REV. 88 (1950).

The Problem Presented

The Act states that the legitimate rights of both the employer and the employee must be recognized. Labor has the right to make the employer submit to collective bargaining over wages, hours of employment, or other conditions of employment. Management has thereby lost its exclusive power over these subjects. To the degree that the Board has decided a matter to be a bargainable subject within the terms of the Act, management has suffered a limitation on its unilateral decision-making powers, and the bargainable area thereby becomes the joint responsibility of labor and management. The particular problem is to what extent the Board may go—when deciding what matters are included within the statutory scope of bargaining under the Act—without infringing upon the exclusive prerogatives of management. This problem is magnified by the fact that there is not even a proper definition of the scope of management.[24]

A variety of subjects are brought within the terms of the Act. Paid holidays, vacations and bonuses are an integral part of the earnings and working conditions of the employees and, as such, are proper subjects of collective bargaining.[25] Again, although no formal bonus plan was in existence, an employer has been compelled to bargain over a Christmas bonus. Because the bonus had been regularly paid for a substantial number of years, the court held that it assumed the status of "wages." [26] The installation of an incentive pay plan is also properly subject to collective bargaining.[27] Likewise, employers are compelled to bargain with the representatives of their employees as to individual merit wage increases based on the individual's performance.[28] Labeling of such an increase as gratuitous does not obviate the fact that it does effectuate changes in rates of pay and wages.[29] A profit-sharing retirement plan is also within the area of bargaining contemplated by the Act.[30]

In *Inland Steel Co.*,[31] it was held that an optional pension and retirement plan, to which the employer contributed, constituted wages;

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[24] See Feldman, *The Right to Manage*, 1 LABOR L.J. 287 (1950).

[25] See Singer Mfg. Co. v. NLRB, 119 F.2d 131 (7th Cir.), *cert. denied*, 313 U.S. 595 (1941) (The employer claimed it had pursued a practice in respect to these subjects since 1936 and expected to continue the same at its own discretion. It asserted that these subjects involved voluntary gratuities, the allowance or disallowance of which was to be determined solely by the employer.).

[26] Century Cement Mfg. Co., 100 N.L.R.B. 1323 (1952); see NLRB v. Niles-Bement-Pond Co., 199 F.2d 713 (2d Cir. 1952).

[27] John W. Bolton & Sons, Inc., 91 N.L.R.B. 989 (1950).

[28] NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948).

[29] *Ibid.*

[30] NLRB v. Black-Clawson Co., 210 F.2d 523 (6th Cir. 1954).

[31] 77 N.L.R.B. 1, *enforcement granted*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

hence it was bargainable. There the statutory definition of "wages" was broadly [32] construed to include not only remuneration received by an employee for actual performance of work, but such other ". . . emoluments of value . . . which may accrue to employees out of their employment relationship." [33] Applying this rule, a long established policy of granting ten shares of stock to employees has been termed an appropriate subject of bargaining.[34] Similarly, the price of company-furnished meals [35] and, at times, the amount of rent paid on company houses [36] also come within the purview of the Act. The *Inland Steel* definition has been extended, in *W. W. Cross & Co. v. NLRB*,[37] to cover group health and accident insurance plans. The court, in that case, defined "wages" by saying that ". . . it must have been meant to comprehend emoluments resulting from employment *in addition to* or supplementary to actual 'rates of pay.' " [38]

The Board's decision in *Richfield Oil Corp.*[39] followed this line of reasoning. The employer had unilaterally installed a voluntary stock purchase plan whereby employees who wished to participate could deposit a minimum of $5 or up to 5% of their salary therein. This fund is matched in part by the employer and the total is invested in stock of the employer, which stock is held in trust subject to the voting direction of the employee. The Board held the plan to be encompassed by the statutory terms "wages and other conditions of employment" and cited the *Inland Steel* rule as controlling.[40] Although the stock purchase plan involved was ostensibly includable in the term "wages" as broadly interpreted by the *Inland Steel* rule, there are other factors involved in the nature of the plan which may

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[32] See Weyerhaeuser Timber Co., 87 N.L.R.B. 672 (1949), wherein the Board took advantage of the fact that the definition of the term "wages" was broadly construed in *Inland Steel Co.*

[33] Inland Steel Co., *supra* note 31 at 4. See W. W. Cross & Co., 77 N.L.R.B. 1162 (1948), *enforcement granted*, 174 F.2d 875 (1st Cir. 1949).

[34] *See* United Shoe Machinery Corp., 96 N.L.R.B. 1309, 1314 (1951).

[35] Such meals come within the terms "conditions of employment" and "wages" where the employees had no public or employer-furnished means of transportation to public eating facilities. Weyerhaeuser Timber Co., *supra* note 32.

[36] See NLRB v. Bemis Bro. Bag Co., 206 F.2d 33, 37 (5th Cir. 1953); NLRB v. Hart Cotton Mills, Inc., 190 F.2d 964, 972 (4th Cir. 1951).

[37] 174 F.2d 875 (1st Cir. 1949).

[38] W. W. Cross & Co. v. NLRB, *supra* note 37 at 878 (emphasis added). The court attempted to further define the area by saying: "This does not necessarily mean that the word 'wages' as used in the Act covers all satisfactions, pleasures or gratifications arising from employment such as playing on a company baseball team, or attending a company picnic, or belonging to a company social club, *although* perhaps under some peculiar circumstances of employment in an isolated plant it might." *Ibid.* (emphasis added).

[39] 5 CCH LAB. LAW REP. (4th ed.) ¶ 52,345 (NLRB 1954).

[40] The majority stated: "It is now well established that the term 'wages' comprehends all emoluments of value which may accrue to employees because of their employment relationship. In our opinion, a stock purchase plan of the character before us is embraced by this statutory term." *Id.* at p. 51,771.

make its inclusion an unwarranted extension of that rule. A distinctive consideration is the fact that the employer may thereby have to bargain collectively over the very ownership of the company.[41] Board Member Beeson, in dissenting, maintained that the effect of the Board's decision constituted an interference with the "legitimate rights" Congress intended to protect in Section 1 of the Act. He reasoned that ". . . since an employer does not have to bargain with respect to supervisors, the determination of the very *ownership* of the company, involved in a stock purchase plan, could not be included in the required bargaining area without violating the intent of Congress. . . ." [42] The majority obviously recognized such a consideration to be a factor which would remove the subject from the area of required collective bargaining, leaving it solely within the province of management, when it noted that "[i]t by no means follows that the effect of our decision here is to require the Respondent to bargain with respect to its dividend, debt, and financial policies, simply because, as the dissenting opinion would have it, such matters are 'relevant' to the establishment of a stock purchase plan." [43] The Board thereby guarantees that bargaining collectively over such plans will not involve matters of ownership. In giving such an assurance, the Board relies on a rather tenuous analogy to unrelated subjects when it says "[i]ndeed, these factors are no less relevant where a union seeks to bargain about higher wages, pension plans, or profit sharing plans, all of which have been held by this Board and by the Courts to be subjects of mandatory collective bargaining. Yet no one can seriously contend that those decisions have forced employers to bargain as to their dividend, debt, or financial policies." [44] Thus, the result is that the Board recognizes that ownership is not within the terms of the Act and further, it concludes that the result of this decision will not compel bargaining over any of the ownership matters. This conclusion is, however, based on the premise that such bargaining has not occurred in other areas, *i.e.,* higher wages, pension plans,

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[41] ". . . [T]he *Inland Steel* case cannot be controlling because the present case presents a question which was not there involved and upon which neither this Board nor any court has ever passed. We refer to the question whether an employer is required to bargain over the ownership and control of his business. To hold that a corporate employer is required to bargain over the terms upon which employees may acquire and hold stock in the corporation would be to give an unequivocal affirmative answer to that question. To so hold would mean that a corporate employer such as Richfield must bargain regarding the number of shares to be acquired, their price, the method and time of payment of the price, the voting and other rights to be attached to the shares, the manner of exercise of those rights, and all of the other incidents of stock acquisition and ownership." Supplemental Brief for Respondent, pp. 6-7, Richfield Oil Corp., *supra* note 39.

[42] Richfield Oil Corp., *supra* note 39 at p. 51,774 (emphasis added).

[43] *Ibid.*

[44] *Ibid.*

and profit sharing plans—areas to which ownership is manifestly unrelated.

Considering again, for purposes of distinction, the nature of the plan, it would seem that there is a real difference [45] between the statutory term of "wages" as construed in previous decisions and the construction of that term in the *Richfield* decision. In that case the circumstances are essentially characterized by a privileged invitation to invest in the corporation's shares [46] rather than as an "emolument of value" earned by reason of the employment relationship.[47] Furthermore, the result of the decision is inequitable because, through stock ownership, labor now will be on both sides of the bargaining table. Where such worker-ownership is substantial, the Board has excluded employees from the bargaining table.[48]

Labor in Management

The foregoing cases demonstrate that the Board has taken a very broad view of what is comprehended by the terms "wages, rates of pay or other conditions of employment." Without statutory delineation of this area, the terms of the Act can be expanded to include anything that might indirectly and ultimately affect the employee.[49] It would seem that there is no limit to what may be included in the statutory terms. Management may lose all of its exclusive rights.[50] This is irreconcilable with the fact that the courts and the Act recognize that there are certain rights of management which cannot be infringed upon.[51]

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[45] The majority in the *Richfield Oil Corp.* decision, in holding that the benefits accruing to employees under the plan represent part of their compensation or remuneration received for their labor, said, ". . . we reject as totally unrealistic both Member Beeson's suggestion that the Plan is merely designed to encourage employees to become co-entrepreneurs and the Respondent's position . . . that its contributions are in no way related to compensation but represent merely an incentive to employees to invest in company stock, the sole consideration therefor being the contributions made by the participating employees." 5 CCH LAB. LAW REP. (4th ed.) ¶ 52,345, pp. 51,771-51,772 (NLRB 1954).

[46] It is privileged in the sense that it is open to employees of Richfield only and, because of Richfield's contribution, is tantamount to an offering of shares by the employer at reduced rates.

[47] See note 33 *supra.*

[48] Union Furniture Co., 67 N.L.R.B. 1307 (1946); see 41 VA. L. REV. 259 (1955).

[49] See Woods, *Mandatory Collective Bargaining,* 6 HASTINGS L.J. 1, 5 (1954) (testimony of Charles E. Wilson before the Senate Committee on Labor and Public Welfare in 1947).

[50] See Inland Steel Co., 77 N.L.R.B. 1, 27, *enforcement granted,* 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949), wherein the Board indicates that unions are now consulted on many matters which were formerly within the exclusive rights of management.

[51] See, *e.g.,* Inland Steel Co., *supra* note 50. "It is conceivable that the demands of employees may sometimes fall completely dehors the limits of em-

At the same time, labor is participating in management to a greater and greater degree. While it is beneficial for an employer to have aid from his employees in some matters of management,[52] it is not desirable that there be worker participation in all phases of direction, administration and execution. For labor to share in all phases of management may be ideal theoretically, but it is impractical. Such a goal overlooks the economic nature of the employer-employee relationship. It presumes that labor is qualified to handle such a job.[53] Further, such participation presumes that the union will assume responsibility to the owners of industry.[54] "Such a division of loyalties is possible, perhaps, only in a Utopian system of industrial democracy and calls for a degree of labor-management statesmanship which thus far has not been evident." [55] Unions cannot properly share or participate in management; for until they have full control of the enterprise, they are impelled in their desires by that which is their primary concern—the interest of their members.

Management, to protect its rights, has taken a positive approach which is becoming more and more commonplace. There is included a valid "management rights" clause in over 60% of the collective bargaining agreements negotiated today.[56] By this device, it is possible—notwithstanding the obligations of the Act as determined by the Board—to clearly define the scope of managerial action which is to remain solely in the employer's discretion.[57]

Conclusion

The effect of the *Richfield* and related decisions is to discourage voluntary amelioration of the employee's status by the employer in modes of compensation other than traditionally earned wages. For once the employer institutes a plan, it becomes bargainable and the union will probably try to increase the benefits.[58] Because of this,

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ployee interest. The Act does not seek to encroach on those prerogatives of the employer which give him a free hand to prosecute his business as he sees fit. . . . Our system of free enterprise must necessarily protect the employer in enjoying what is commonly termed his 'management prerogatives.'" *Id.* at 26-27.

[52] See Feldman, *The Right to Manage*, 1 LABOR L.J. 287, 291 (1950).

[53] *Id.* at 289.

[54] *Ibid.* See Burstein, *The Status of the Collective Bargaining Agreement*, 2 LABOR L.J. 902, 907 (1951).

[55] Burstein, *supra* note 54.

[56] See BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN COLLECTIVE BARGAINING CONTRACTS 39 (Rev. ed. 1950). As to the legality of such a clause, see NLRB v. American Nat. Ins. Co., 343 U.S. 395 (1952).

[57] See NLRB v. American Nat. Ins. Co., *supra* note 56.

[58] See GUNTERT, ANALYSIS OF THE RECORD OF THE 1953 CONGRESSIONAL HEARINGS ON PROPOSED AMENDMENTS TO THE TAFT-HARTLEY ACT. In discussing the *Inland Steel* case and the *Richfield Oil* situation, the author states: "The result of this situation is that employers who have traditionally kept pace

management will hesitate to offer employee benefits in the future, and labor will suffer in the end.

The need for remedial legislation is evident. It has been suggested by management that the Act be amended to exclude specifically from the area of required collective bargaining certain subjects which have traditionally been considered, because of their nature, within the exclusive domain of management, *e.g.*, health, welfare benefit, and stock purchase plans.[59] The Act would thereby provide the Board with a more definite framework or basis for deciding what is within or without the scope of compulsory bargaining. Alternatively, the Board should, on its own initiative, set up rules defining those areas where management is free to act unilaterally without apprehension of interference or intrusion by labor through the Board's decisions.

USE OF A FOREIGN TRUST TO AVOID THE NEW YORK RULE AGAINST PERPETUITIES

Introduction

The purpose of the Rule against Perpetuities has been to preserve the alienability of property.[1] The Rule terminated an historic conflict between the English landlords and the common-law courts. The landlords' desire to keep estates in the family line for as long as possible was at cross purposes with the policy of the English courts, which were by tradition in favor of freedom of alienation.[2] Although the

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with the advancement of working conditions and employee benefits without the prodding of collective bargaining can no longer improve the lot of their employees without first bargaining with their union. This is not conductive to further voluntary improvement of the employee's status because the employer will have to await the union's demand because he knows that if he makes an offer, the union will pyramid something on top of that offer so that they can claim credit for it. Employers, knowing this, will make no voluntary offers and will give way slowly to the union demands and will make every effort short of having a strike to keep the benefits at the least possible level consistent with the industry level. They cannot afford to volunteer any improvements or grant any more benefits because if they make an offer of X amount, they know the union will demand X plus." *Id.* at 10.

[59] See *Hearings before Committee on Education and Labor of the House of Representatives*, 83d Cong., 1st Sess. 1080-1082, 1100-1102, 2208, 3545-3546 (1953).

[1] See GRAY, THE RULE AGAINST PERPETUITIES 297 (4th ed. 1942); POWELL, CASES AND MATERIALS ON THE LAW OF TRUSTS 299 (1940).

[2] See 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW 193-202 (2d ed. 1937); CASNER AND LEACH, CASES AND TEXT ON PROPERTY 275 (1951).