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Labor Law - Unfair Labor Practices - Union Duty to Bargain in Good Faith - "Harassing Tactics"

John S. White Jr.

the plea to be made as of right up to the time of trial.[16] The statute of that state, however, clearly distinguishes the plea from those which must be made at arraignment and the case law turns on that point.[17]

It is believed that *State v. Watts* erroneously removed the insanity plea from the pattern established in the Code articles. A judicial reversal of the *Watts* case could be accomplished conveniently in view of the fact that the language of article 267 relied on by the court has been repealed.[18] An alternative solution to the problem lies in amending article 265 as follows:

> "The defendant may at any time, with the consent of the court, withdraw his plea of not guilty and then set up some other plea to the merits, or file some preliminary plea such as a demurrer or motion to quash the indictment."

The amended article would specifically include every change which could be made from a plea of not guilty. If there were a valid reason why an insanity plea was not made at arraignment, the judge would have to permit the plea under penalty of reversal.[19] But if the delay were merely a dilatory tactic, the defendant would forfeit his right to the insanity defense.

Jessie Anne Lennan

LABOR LAW — UNFAIR LABOR PRACTICES — UNION DUTY TO BARGAIN IN GOOD FAITH — "HARASSING TACTICS"

Company and defendant union were negotiating for a new collective bargaining contract to replace the old contract when it expired. Negotiations were held without evidence of a "take it or leave it" attitude on the part of the union at the bargaining table. The union, nevertheless, had its members engage in slowdowns, unauthorized extensions of rest periods, and walkouts

(1914); Morell v. State, 136 Ala. 44, 34 So. 208 (1903); Sheppard v. State, 257 Ala. 626, 60 So.2d 329 (1952); *California*: People v. Young, 26 Cal.App.2d 613, 80 P.2d 138 (1938); *Colorado*: Mendy v. People, 105 Colo. 547, 100 P.2d 584 (1940); *Washington*: State v. McLain, 199 Wash. 664, 92 P.2d 875 (1939).

16. Indiana: IND. REV. STAT. § 9-1701 (1933).

17. Swain v. State, 215 Ind. 259, 18 N.E.2d 921 (1939); Barber v. State, 197 Ind. 88, 149 N.E. 896 (1925).

18. See note 10 *supra*.

19. See note 14 *supra*. The validity of a reason would be determined by the court. The writer suggests that if the defendant did not have counsel at arraignment, or if counsel did not then know of the insanity, a late plea should be permitted.

or partial strikes for portions of shifts or entire shifts; induced employees of other concerns not to perform work for the company; and refused to permit work during special hours, or overtime. The company filed a complaint before the NLRB, contending that these "harassing tactics" constituted a refusal to bargain in good faith and thus were a union unfair labor practice under section 8(b)(3) of the Taft-Hartley Act. The union responded that its conduct was an unprohibited form of economic pressure in the collective bargaining process. The NLRB in a unanimous decision ordered the union to cease and desist this conduct and the union appealed. The United States Court of Appeals for the District of Columbia *held,* order set aside. "There is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants." Since the union could have totally withheld its services by calling a strike without violating its duty to bargain in good faith, a partial withholding of services in order to put economic pressure on the employer is permissible and is not a union unfair labor practice.[1] *Textile Workers Union v. NLRB,* 227 F.2d 409 (D.C. Cir. 1955).

Under the Wagner Act, only employers were subject to the unfair labor practice charge of a refusal to bargain collectively.[2] This provision was interpreted to require that the employer must confer in good faith.[3] With the adoption of the Taft-Hartley amendments, a refusal to bargain collectively was also made a union unfair labor practice.[4] In addition, the phrase "to bargain collectively" was statutorily defined to include the same good faith requirement.[5] A single standard of what constitutes good faith is therefore indicated for both employer and employees, and decisions applying the principle to employers

1. The NLRB had also found that the union had threatened employees with "reprisals" for working overtime and for giving testimony in the proceedings before the Board, and had blocked plant entrances so as to prevent ingress and egress of employees. The part of the NLRB's order to cease and desist from these practices was based on section 8(b)(1)(a) of the act, which makes restraint and coercion of employees by a union an unfair labor practice. The union did not contest this part of the order, and the court left it undisturbed.

2. 49 STAT. 452 (1935), 29 U.S.C. § 158 (1946).

3. Globe Cotton Mills v. NLRB, 103 F.2d 91 (5th Cir. 1939).

4. 61 STAT. 140(b)(3) (1947), 29 U.S.C. § 158(b)(3) (1952).

5. "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet together at reasonable times and [to] confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." 61 STAT. 140(d) (1947), 29 U.S.C. § 158(d) (1952).

may be used as significant guideposts in determining the responsibility of unions.[6] Lack of good faith is usually based on a pattern of conduct rather than on a single act.[7] The test to determine what constitutes good faith seems to be whether or not there is an intent or a desire to reach an agreement.[8] The most common union bad faith bargaining has been found in union insistence, as a condition precedent to bargaining, that the employer agree to a provision made unlawful by the amended act.[9] No case found has held that a union is guilty of a refusal to bargain in good faith because of a strike.

The decision of the instant case is that the harassing tactics employed by the union do not constitute the unfair labor practice of a refusal to bargain in good faith. The conduct is described as economic pressure unregulated by the act. The majority opinion relied on the *International Union, UAWA* case[10] in which the Supreme Court upheld state regulation of similar activity on the ground that Congress had not regulated this kind of conduct.[11] The dissent in the instant case stressed the "unprotected" nature of the harassing tactics, that is, the *employer* has not been held to commit an unfair labor practice in discharging or taking retaliatory action against employees who engage in "harassing tactics."[12] The dissenting judge felt that

6. National Maritime Union, 78 N.L.R.B. 971, 980 (1948).

7. Reed and Prince Manufacturing Co., 96 N.L.R.B. 850 (1951); I.B.S. Manufacturing Co., 96 N.L.R.B. 1263 (1951).

8. NLRB v. Griswold Mfg. Co., 106 F.2d 713, 723 (3d Cir. 1939); NLRB v. Boss Mfg. Co., 118 F.2d 187 (7th Cir. 1941). For a discussion written shortly after the Taft-Hartley amendments on what characteristics of negotiations constitute good or bad faith, see Note, 61 HARV. L. REV. 1224 (1948). For a recent discussion of the duty to bargain in good faith, see Dupres and Golden, *The Duty To Bargain*, U. ILL. L. FORUM, Spring 1955, pp. 1, 44.

9. International Union, UMW, 83 N.L.R.B. 916 (1949) (unauthorized union shop); Great Atlantic and Pacific Tea Co., 81 N.L.R.B. 1052 (1949) (closed-shop); National Maritime Union of America, 78 N.L.R.B. 971 (1949) (hiring hall practice).

10. International Union, UAWA, AFL, Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949), Justices Douglas, Black, Rutledge, and Murphy dissenting.

11. *Id.* at 264. "We think that this recurrent or intermittent unannounced stoppage of work *to win unstated ends* was neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effects on that interstate commerce which Congress may regulate. Labor Board v. Jones and Laughlin, 301 U.S. 1; Bethlehem Steel Co. v. Board, 330 U.S. 767.

"We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device." (Emphasis added.)

12. Such action has been upheld in the following cases: NLRB v. Electrical Workers, 346 U.S. 464 (1953) ("disloyal" attack on employer's product); South-

the harassing tactics of the employees in this case, considered with the other evidence offered,[13] was enough to constitute a refusal to bargain in good faith. To the dissenter, the case on which the majority relied had considered only the question of state jurisdiction to regulate harassing tactics, not the question of whether those tactics constitute bad faith.[14]

The Supreme Court in the *International Union, UAWA* case commented that "it is the objective only and not the tactics of a strike which bring it within the power of the Federal Board."[15] The Court in that case based its decision largely upon the fact that the NLRB had no jurisdiction because the employer was not informed of either any specific demands or what concessions could be made to avoid the union conduct. It is somewhat misleading that the court in the instant case termed the harassing tactics "economic pressure to get the kind of agreement" the union wanted,[16] because this defintion of the *purpose* of the union's conduct is inconsistent with the court's recognition that the union in the instant case did not notify the employer of any specific demands.[17] The similarity of the fact situations of the two cases would seem to justify the decision, if not the language, of the instant case. It could be argued that the *International Union, UAWA* case should not control the instant decision because the conduct involved in the former case occurred in 1945 and 1946, before enactment of the Taft-Hartley amendments.[18] In addition, it was there specifically found that the NLRB had no fixed policy to apply the act to this type of conduct,[19] but in the instant case the court reversed a unanimous NLRB decision. In spite of this, however, the Court in the *International Union, UAWA* case considered the effect of the Taft-Hartley amendments and held that the union was subject to state control in that case because its conduct was "neither

ern Steamship Co. v. NLRB, 316 U.S. 31 (1942) (strike in violation of mutiny laws); NLRB v. Fansteel Metalurgical Corp., 306 U.S. 240 (1939) (sitdown strike); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939) (strike in violation of a collective bargaining contract); C. G. Conn, Ltd. v. NLRB, 108 F.2d 390 (7th Cir. 1939) (refusal to work overtime); Terry Poultry Co., 109 N.L.R.B. 1097 (1954) (leaving plant in disregard of plant rule); Pacific Telephone Co., 107 N.L.R.B. 1547 (1954) ("hit-and-run" or intermittent strikes); Elk Lumber Co., 91 N.L.R.B. 333 (1950) (slowdowns and "partial strikes").

13. See note 1 *supra*.
14. 227 F.2d 409, 411 (D.C. Cir. 1955).
15. 336 U.S. 245, 263 (1949).
16. 227 F.2d 409, 410 (D.C. Cir. 1955).
17. *Ibid.*
18. 336 U.S. 245, 249 (1949).
19. *Id.* at 256.

made a right under federal law nor a violation of it."[20] The result of these two decisions is to define an area which is outside the jurisdiction of the NLRB, thus tracing the reverse side of the *Garner* doctrine.[21] Assuming that the decision in the instant case is correct, employers must seek relief from "harassing tactics" either by discharging employees or by proceeding under state statutes. The courts may also have the problem of determining what types of economic pressure by *employers* are beyond the pale of the employer's duty to bargain in good faith under section 8(a) (5).[22]

John S. White, Jr.

LEGAL PROFESSION — DISBARMENT PROCEEDINGS — PRIVILEGE AGAINST SELF-INCRIMINATION

Defendant attorney appeared before a United States Senate subcommittee, but refused to answer questions relating to his past and present membership in the Communist Party. His refusal to answer was based on the protection against self-incrimination in the first and fifth amendments of the Federal Constitution and sections 12 and 13 of the Declaration of Rights of the Constitution of Florida. Subsequently, the Florida State Attorney filed a motion to disbar defendant for misconduct and unprofessional acts, alleging that defendant was a member of the Communist Party and that he had refused to answer questions regarding his membership. It was also contended that invoking the privilege against self-incrimination is evidence of misconduct by an attorney. During the trial of the case defendant was again questioned as to his communist affiliations. He refused to answer, again claiming the privilege against self-incrimination of the Federal and State Constitutions. The trial court entered an order of disbarment and defendant appealed. The Florida Supreme Court *held,* reversed.[1] "There may be circumstances under which claiming the privilege against self-incrimination would be cause for discipline or even disbarment,

20. *Id* at 265.

21. Garner v. Teamsters Union, AFL, Local 776, 346 U.S. 485 (1953). In that case, it was held that state courts may not enjoin union picketing for the purpose of coercing employers to compel their employees to join a union, because such conduct was regulated by section 8(b) of the act.

22. Section 8(a) provides: "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

1. Jones, J., dissenting.