

# Federal Labor Laws

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## XVIII. Standards Defining the Concept of Bad Faith Bargaining

### A. The Totality of the Conduct Doctrine

1. In determining whether parties are negotiating in good faith, there are no precise standards which may be used. The Board looks at the "totality of the conduct"<sup>1</sup> to determine whether it appears that, all things considered, the party is making a legitimate effort to reach an agreement.<sup>2</sup>
2. Under Section 8(d), neither party is required to make concessions or agree to a proposal. As a result, hard bargaining by itself is legal. Even regressive economic proposals that would leave employees worse off than before the contract is not per se illegal, but it may be illegal when it is reinforced by bad faith behavior away from the bargaining table.<sup>3</sup>
3. There are several approaches for establishing evidence of bad faith. One very broad method for looking at the totality of the parties conduct is to compare that conduct to a similar situation in which it is clear that the parties want to reach an agreement. If it appears that a party is approaching negotiations with an intent to avoid reaching an agreement, the evidence may suggest bad faith.<sup>4</sup>
4. The absence of good faith is often characterized through a showing that the employer is going through the motions of negotiating, but with no intent to reach an agreement. Surface bargaining, as this tactic is often called, is evidence of bad faith if it appears that the intent of the employer is to avoid agreement rather than to reach agreement.<sup>5</sup>
5. A classic example of the minimal elements of bad faith bargaining is the tactic of Boulwareism, named after a former executive of the

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<sup>1</sup> Originally articulated in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941).

<sup>2</sup> *NLRB v. Reed and Prince Manufacturing Co.*, 205 F.2d 131 (1st Cir. 1953).

<sup>3</sup> *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002). See, also, *Clarke Mfg., Inc.*, 352 NLRB No. 25 (2008).

<sup>4</sup> Compare, *St. George Warehouse*, 349 NLRB No. 84 (2007)(no violation) with *Regency Service Carts*, 345 NLRB 671 (2005)(violation).

<sup>5</sup> *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

General Electric Corporation. Board and court review of the tactics of General Electric under Boulware established a benchmark test of bad faith. Even if the individual bargaining tactics used by a party are legal, bad faith may be established by looking at the combined effect of those tactics.<sup>6</sup>

6. Bad faith bargaining, either on the union or company's part, can be established either through evidence of independent unfair labor practices, the combined effect of tactics that would be legal if used in isolation, or a combination of both.

## **B. Evidence of Bad Faith**

1. An important decision of the National Labor Relations Board identified seven distinct indicators of surface bargaining.<sup>7</sup> While this list is not dispositive, it provides a good summary of the types of elements that will suggest a finding of surface bargaining. These common tactics include:
  - a. Delaying tactics,<sup>8</sup>
  - b. Proposing unreasonable bargaining demands,<sup>9</sup>
  - c. Implementing unilateral changes in conditions of employment,<sup>10</sup>
  - d. Direct-dealing, or implementing steps to by-pass the union,<sup>11</sup>
  - e. Failure to designate an agent with sufficient authority to negotiate,<sup>12</sup>
  - f. Withdrawal of proposals after tentative agreement has been reached on those items,<sup>13</sup>
  - g. Arbitrary scheduling of meetings.<sup>14</sup>

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<sup>6</sup> *General Electric Co.*, 150 NLRB 192 (1964), *enf'd sub nom, NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

<sup>7</sup> *Atlantic Hilton & Tower*, 271 NLRB 1600 (1984).

<sup>8</sup> *Wonder State Mfg. Co.*, 147 NLRB 179 (1964).

<sup>9</sup> *Holmes Tuttle Broadway Ford*, 186 NLRB 73 (1970).

<sup>10</sup> *Fitzgerald Mills Corp.*, 133 NLRB 877 (1961).

<sup>11</sup> *Cal-Pacific Poultry*, 163 NLRB 716 (1967).

<sup>12</sup> *Billups Western Petroleum Co.*, 169 NLRB 964 (1968). *See, also, Provident Nursing Home*, 345 NLRB 581 (2005).

<sup>13</sup> *Valley Oil Co.*, 210 NLRB 370 (1974).

2. Some of the tactics outlined in the *Atlantic Hilton* case are potential unfair labor practices independent of a showing of bad faith. For example, unilateral changes cannot be implemented unless a bargaining impasse has been reached. Other independent unfair labor practices that may be evidence of bad faith include:
  - a. Failure to provide information, or unreasonable delays in providing required information,
  - b. Insistence to the point of impasse on settlement of non-mandatory subjects of bargaining,<sup>15</sup>
  - c. Refusal to sign an agreement after the union accepted a comprehensive employer proposal,<sup>16</sup>
  - d. Threats, discriminatory discharges, or other violations of § 8(a)(1) or 8 (a)(3), that are designed to undermine the bargaining process.<sup>17</sup>
  
3. Other tactics employed in bargaining may be legal if used in isolation, but will still be taken as evidence of bad faith. Examples of such tactics include:
  - a. Causing long delays or postponements in scheduling bargaining sessions,
  - b. Refusing the union even minor access to workers (posting of notices on bulletin boards) before formal negotiations have begun,
  - c. Giving minor concessions on some items with no negotiations over major items,
  - d. Making no counterproposals at all to the union,
  - e. Insisting on procedural formalities for bargaining with little discussion of mandatory items,
  - f. Making direct appeals to the membership,<sup>18</sup>

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<sup>14</sup> *Moore Drop Forging Co.*, 144 NLRB 165 (1963).

<sup>15</sup> See, e.g., *Mid-Continent Concrete*, 338 NLRB 258 (2001).

<sup>16</sup> *Gadsden Tool, Inc.*, 327 NLRB 164 (1998).

<sup>17</sup> *Overnite Transportation Co.*, 296 NLRB 669 (1989). However, it is important to distinguish between that unlawful activity away from the table that is designed to frustrate the bargain process and the use of economic weapons away from the table that are designed to augment bargaining power. See, *American National Shipbuilding v. NLRB*, 380 U.S. 300 (1965), and *NLRB v. Insurance Agents International Union*, 361 U.S. 477 (1960).

<sup>18</sup> These tactics are based substantially on the *Reed & Prince* case, at note 2.

- g. Rejecting proposals with no explanation,
- h. Submitting last minute, surprise proposals to thwart negotiations,
- i. Engaging in regressive bargaining, or following one proposal with a subsequent proposal offering lesser terms.<sup>19</sup>

### C. Problems of Proof of Bad Faith -- Boulwareism

1. **Case XVIII-A:** This case is based on the famous management bargaining tactic known as Boulwareism. Lemuel Boulware was the chief management negotiator for the General Electric Corporation from the 1940's through the 1950's and 1960's. He devised and implemented a bargaining strategy which epitomized the minimum standards of the absence of good faith in collective bargaining.
  - a. Part A of this case outlines the basic tactics of Boulwareism which became the foundation for the legal dispute over the tactic. The essential elements of Boulwareism, for legal purposes were:
    - 1) Offering to the union a packaged proposal on an "all or nothing, take it or leave it" basis.
    - 2) Exhibiting, at the table, a willingness to explain its proposal and to listen to counterproposals, but refusing *pro forma* to make any changes in the complete package, and
    - 3) Appealing directly to the workforce to encourage acceptance of the package, by providing detailed information on the basis for the unilaterally established package.<sup>20</sup>
  - b. Boulwarism was determined by the Board and the appellate court to represent bad faith bargaining.<sup>21</sup> In the court decision, the critical issue was the combination of tactics, each of which might have been legal in the abstract. By combining specific tactics which may be legal into an overall effort to circumvent the union, the company had engaged in bad faith bargaining.

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<sup>19</sup> *E.g., Chester County Hospital*, 320 NLRB 604 (1995).

<sup>20</sup> *General Electric Co.*, 150 NLRB 192 (1964).

<sup>21</sup> *NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969).

### Case XVIII-A: Bad Faith Bargaining

1. Megalomania Industries and the Extrusion Workers have begun negotiations for the second contract between the parties. After a few preliminary meetings in which ground rules and other procedural issues are resolved, the union presents its proposals. Instead of discussing the union proposals, the company counters by offering its own package. The company offers detailed economic data which it claims represents a thorough corporate study of its ability to pay. It also agrees to discuss any of the items in the package and to listen to any counterproposals of the union, but makes it clear that it has no intention of making any changes in its package because the package is "the best it can offer." After the union tries unsuccessfully to get the company to move on any issue, the company begins a publicity campaign in the plant to "explain" its position in the negotiations. The publicity campaign makes it clear to represented workers that the package is the best the company can do and suggests that the union is being unreasonable in its refusal to submit the package to the membership. Has the company engaged in bad faith bargaining?

2. As these negotiations continue, the union learns that the same strategy is being used at other Megalomania plants throughout the country. The same economic package is being offered to other union committees with substantially the same economic justifications and information being provided to bargaining committees and represented workers. At the Hoosierville Works, after the strategy continues for several weeks, the company comes back into negotiations with a revised proposal, offering a slightly better medical insurance package and an additional 10 cents per hour. After preliminary checks, the local committee can find no other local union that has been offered the improved package. What should the union do now? Why?

2. **Case XVIII-A (Part B):** The strategy behind Boulwareism was actually much broader than outlined in the legal dispute. Boulware developed an overall bargaining strategy designed to force company dominated pattern bargaining on the unions while vehemently resisting union efforts to establish a coordinated bargaining strategy.
- a. After the expulsion of the United Electrical Workers Union from the Congress of Industrial Organizations in 1949, the union representation of General Electric workers became fragmented. Thirteen international unions negotiated sixty different contracts covering 150,000 represented workers. This fragmentation made the overall strategy of Boulwarism attractive to the corporation.
  - b. In addition to his "take it or leave it," hard bargaining strategy, Boulware assessed the relative strength of the various bargaining committees representing the GE workforce. Identical packages were offered to each committee, and the circumvention of the union was duplicated everywhere.

- c. By holding firm in all negotiations, Boulware was able to break the inevitable impasse by going to what he perceived to be the weakest union committee and offering them a slightly better package than was on the table elsewhere. When that union accepted the "sweetened" package, the ability of the other unions to maintain their resistance was undermined and a predictable downward spiral of settlements occurred.
- d. It was not until the 1970's that the unions involved were able to establish a pattern of coordinated bargaining. By that time, electrical worker wage levels were significantly less than workers in other industries who enjoyed approximately the same degree of unionization in 1946.<sup>22</sup>

#### D. Evaluation of Specific Union Tactics

1. **Case XVIII-B (Part 1):** This strategy is based on a tactic used by insurance agents in their 1956 negotiations with Prudential Insurance. In that case the agents refused to write new insurance policies and engaged in other harassing tactics in a concerted "Work Without Contract" strategy for applying pressure on the management bargaining committee.<sup>23</sup>
  - a. The Court ruled in the *Insurance Agents* case that the standard for determining whether a party is engaged in good faith bargaining is based on what takes place in the negotiations themselves. The use of economic weapons away from the table is not inconsistent with good faith bargaining.
  - b. It should be noted, however, that the company could have taken disciplinary action against the workers who were engaged in the slowdown. The use of a slowdown is considered to be an unprotected tactic.
2. **Case XVIII-B (Part 2):** This tactic is part of the union response to Boulwareism in the development of bargaining strategies to deal with General Electric. This coordinated strategy was used in 1966 negotiations with GE.<sup>24</sup>
  - a. As long as the local negotiators confine their efforts to negotiation over local issues, the union has the right to

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<sup>22</sup> For a discussion of the economics of Boulwareism, see Craypo, C. *The Economics of Collective Bargaining*, at 31-33 (Bureau of National Affairs, Washington, 1986). For Boulware's version, see Boulware, L.R. *The Truth About Boulwareism: Trying to Do Right Voluntarily*. (BNA: Washington D.C. 1969).

<sup>23</sup> *NLRB v. Insurance Agents International Union*, *supra* at note 16.

<sup>24</sup> *McLeod v. General Electric Co.*, 257 F.Supp. 690 (S.D.N.Y. 1966)

select its own representative for purposes of collective bargaining. Had the committee attempted to negotiate an agreement covering conditions in other plants, the company could probably refuse to bargain. In this case, the company simply refused to negotiate and the union was insisting on negotiation of mandatory items only.

- b. Movement from a single plant unit to a coordinated bargaining unit is a permissible subject of bargaining. However, simultaneous insistence on common expiration dates at a variety of local negotiations is probably a mandatory subject.<sup>25</sup> Common expiration of contracts is an essential prerequisite for union coordinated bargaining strategies.

### **Case XVIII-B: Union Bargaining Tactics**

1. After weeks of negotiations for the second contract with Megalomania, the Extrusion Workers are reaching a point of frustration. Knowing that their local is in a weak position to strike, the union devises a "work without a contract" plan to be implemented after expiration of the old agreement. The plan includes a series of job actions designed to disrupt the normal operation of the plant. Among the strategies considered are refusals to process warehouse orders, rallies in break areas where workers taking breaks together sing union songs, the use of union bulletin boards to encourage workers not to volunteer to do any overtime, refusals to attend mandatory departmental meetings, and any other harassing tactics the creative works committee can devise. The company files charges against the union alleging a failure to bargain in good faith. Who wins?

2. The Extrusion Workers and Megalomania reach agreement on terms that the union believes to be unfortunate. Other plants are having the same poor contracts forced upon their local committees. Throughout the term of the second contract, the shop chair, Fred Tomkins, has been attending coordinated bargaining strategy meetings with chairs from locals of different national unions representing Megalomania plants. Pursuant to a strategy devised in the coordination sessions, Fred invites representatives of seven other international unions to sit in on local negotiations for a third contract at the Hoosierville works. R.P. Megalomania walks into the first bargaining session, sees the representatives from other unions and walks out, saying to Fred, "If you think I am going to negotiate on a coordinated bases, you are crazy." Fred sends R.P. a letter offering to meet to discuss local issues only, but R.P. again refuses to meet if anyone other than the Extrusion Workers committee is present. The company files Section 8(b)(3) charges against the union and the union files Section 8(a)(5) charges against the company. Who wins? Why? Does it matter that one of the union's local demands is the same expiration date as the date other unions' contracts with Megalomania expire?

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<sup>25</sup> *AFL-CIO Joint Negotiating Committee v. NLRB (Phelps Dodge Corp.)*, 459 F.2d 374 (3rd Cir. 1972).