STAYING ABOVE THE SURFACE – SURFACE BARGAINING CLAIMS UNDER THE NATIONAL LABOR RELATIONS ACT

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I. INTRODUCTION

Under section 8(a)(5) of the National Labor Relations Act ("NLRA" or "the Act"), employers must bargain collectively with the unions that represent their employees or risk unfair labor practice ("ULP") charges.[1] Under section 8(d), employers are further obligated to confer in good faith with respect to wages, hours and other terms and conditions of employment and to the negotiation of agreements between the parties, and read together, sections 8(a)(5) and 8(d) require parties in a collective bargaining relationship to negotiate in good faith with regard to terms and conditions of employment.[2]

The concept of bargaining in good faith is a broad notion in labor relations, and governs facets of collective bargaining as simple as reducing an agreement to writing and as complex as bargaining to impasse. This article will explore how the National Labor Relations Board ("NLRB" or "the Board") and judicial determinations of good faith govern the concept of "surface bargaining," *i.e.*, seemingly engaging in arms length negotiations while concealing a purposeful strategy to make bargaining futile and to avoid reaching an agreement.[3] Using Board determinations and judicial decisions as its framework, this article will identify the different types of conduct that have been deemed either violative of, or consistent with, good faith standards, and will attempt to offer guidance on conduct that falls into uncertain middle

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1. 29 U.S.C. § 158(a)(5) (2000).
2. 29 U.S.C. § 158(a)(5), (d).
3. *See* NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir. 1953).

ground in an attempt to keep bargaining parties above the surface.

II. THE EMPLOYER'S DUTY TO BARGAIN IN GOOD FAITH

Section 8(d) of the NLRA defines the duty to bargain collectively as an obligation 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.[4]

The express language of the statute prohibits certain types of conduct – refusing to meet at reasonable times and refusing to put agreed-upon terms into writing – and requires parties to confer with respect to wages, hours and other terms and conditions of employment – "mandatory subjects of collective bargaining."[5] If an employer fails to comply with these express statutory requirements, the Board may view the conduct as a per se violation of the Act.[6]

While it may appear that such a violation also, by nature, lacks good faith, the Board treats these failures as express violations of section 8(a)(5), the duty to bargain collectively, and not necessarily as a failure to bargain in good faith under section 8(d).[7] For example, an employer who refuses to bargain at all over wages, hours, and other terms and conditions of employment, is quite clearly not demonstrating the requisite good faith under section 8(d). Such conduct, however, is viewed as an outright violation of the Act rather than as evidence of bad faith.[8] Thus, collective bargaining under the NLRA has two essential elements: 1) conferring with respect to the mandatory subjects of bargaining and 2) ensuring that such deliberations are carried out in good faith.[9] The NLRA, as originally enacted in 1935, did not include

4. 29 U.S.C. § 158(d) (2000).

5. NLRB v. Wooster Div. of Borg-Warner Corp, 356 U.S. 342, 347-48 (1958) (discussing § 158(d)).

6. *Id.* at 347.

7. 25 AM. JUR. 2D *Proof of Facts* § 1, at 340-41 (1981).

8. *Id.* at 342; *see infra* Section III.

9. *Id.* § 2, at 343.

the good faith requirement.[10] Rather, the good faith concept was developed by the Board as a means to balance the perceived inequitable bargaining status between unions and employers in the first half of the twentieth century.[11]

"Good Faith" Defined and the "Totality of the Circumstances" Standard

There is no single established definition of good faith in the context of labor relations. Determining whether a party's conduct at the bargaining table "evinces an unlawful failure to abide by the [NLRA's] mandate to bargain in good faith" can be "an inescapably elusive inquiry."[12] Determining good faith requires the Board and the courts to draw inferences concerning a party's state of mind from many facts, no one of which may have great significance standing alone.[13] Collective bargaining, then, is not simply an attitude of "take it or leave it"; rather, "it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract."[14] "Discussion conducted under the standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take."[15]

As part of its determination of good faith, the Board employs a "totality of the circumstances" test when examining the various indicia of bad faith bargaining, reviewing an employer's conduct as a whole both at and away from the bargaining table.[16] For example, in *NLRB v. Pacific Grinding Wheel Co.*,[17] the Board, in reversing the Administrative

10. *Id.*

11. *Id.*; *see* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

> The bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition. . . . As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of collective bargaining without the substance.

Id. at 1413.

12. NLRB v. Big Three Indus., Inc., 497 F.2d 43, 46 (5th Cir. 1974).

13. NLRB v. Milgo Indus., Inc., 567 F.2d 540, 543 (2d Cir. 1977).

14. NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 485 (1960).

15. *Id.* at 488.

16. Regency Serv. Carts, Inc., 345 N.L.R.B. No. 44, at 1 (Aug. 27, 2005) (citing Pub. Serv. Co. of Okla., 334 N.L.R.B. 487, 487 (2001), *enforced*, 318 F.3d 1173 (10th Cir. 2003); Overnite Transp. Co., 296 N.L.R.B. 669, 671 (1989), *enforced*, 938 F.2d 815 (7th Cir. 1991)).

17. 572 F.2d 1343 (9th Cir. 1978).

Law Judge ("ALJ"), drew adverse inferences from the employer's conduct, including making regressive wage offers and withdrawing a union security provision it had previously proposed.[18] The Board accordingly found that the employer had failed to bargain in good faith from the date it made the first regressive proposal.[19] On appeal, the Ninth Circuit considered the Board's findings, but required additional evidence before it would accept the Board's inference that the employer failed to bargain in good faith.[20] However, the court drew additional negative inferences from the employer's conduct, including its violation of a settlement agreement covering an earlier ULP charge, its continuing pattern of communicating directly with employees, and its initial refusal to release wage data to the union – concluding that, "[v]iewed separately, each of these actions indicates only hard bargaining by the company. However, viewing these actions cumulatively, as we must, we find that there is substantial evidence to support the Board's conclusion that . . . the company [bargained in bad faith]."[21]

Examples of seemingly harmless acts that have contributed to a finding of bad faith bargaining when viewed in concert with other questionable conduct include delays in bargaining sessions blamed on negotiators' pre-planned vacations,[22] insistence on the presence of a stenotypist,[23] refusing to allow a union to post notices regarding union matters on the company bulletin board,[24] and refusing to provide a water cooler.[25] Conversely, isolated instances of misconduct are generally not viewed as a failure to bargain in good faith.[26]

Thus, "[t]he significance of the totality [of the circumstances] rule is that the combined effect of a number of seemingly innocuous acts, both at the bargaining table and away from it, can lead to a finding of bad faith."[27] However, the Board has been "reluctant to find bad-faith

18. *Id.* at 1346-47.

19. *Id.* at 1347.

20. *Id.* at 1349.

21. *Id.*

22. Reed & Prince Mfg. Co., 96 N.L.R.B. 850, 852-53 (1951).

23. *Id.* at 854. In a precursor to the Pacific Grinding Wheel decision, the Reed & Prince Board described its application of the "totality of the circumstances" rule as "[a]lthough no one of the separate elements in this case is in itself conclusive evidence of bad-faith bargaining, when the entire bargaining pattern of the [employer] is viewed in its totality and the individual items are appraised together, the picture is clear . . . the [employer] did not participate in the bargaining negotiations with the good faith required of it by law." *Id.* at 857.

24. NLRB v. Milgo Indus., Inc., 567 F.2d 540, 545 (2d Cir. 1977).

25. *Id.*

26. *See, e.g.*, UAW Local No. 1712 v. NLRB, 732 F.2d 573, 578-79 (7th Cir. 1984).

27. 25 AM. JUR. 2D *Proof of Facts* § 17, at 369 (1981).

bargaining exclusively on the basis of a party's misconduct away from the bargaining table."[28] Instead, the Board has generally considered "away from the table" misconduct only in conjunction with conduct at the bargaining table, and will look to whether a nexus exists between the two in deciding surface bargaining cases.[29] For example, in *St. George Warehouse, Inc.*,[30] the Board found the employer's conduct at the bargaining table did not evince an intent to frustrate agreement where the employer attended frequent meetings with the union, made concessions and reached agreement with the union on a number of issues, proposed wage increases and gave reasons for rejecting certain union proposals.[31] Thus, despite finding that the employer committed away from the table violations - unilaterally transferring bargaining unit work and refusing to provide information to the union - the Board concluded that those violations alone did not warrant a finding of surface bargaining absent more persuasive evidence of misconduct at the bargaining table.[32] The Board's rationalization in declining to find liability for surface bargaining where it found away from the table misconduct, was a lack of evidence that the unilateral changes affected negotiations or proved that the employer had a mindset to bargain in bad faith.[33]

However, an employer's away from the table misconduct can sometimes have the opposite effect, tipping the scales in favor of a finding of employer liability. In *NLRB v. Overnite Transportation Co.*,[34] the employer argued that it was merely engaged in "hard bargaining" when it maintained its bargaining stance over the course of six negotiating sessions with the union.[35] The Seventh Circuit noted that "[i]f the company's behavior at the bargaining table were the only evidence of its state of mind, then it might have been difficult for the Board to support a finding that Overnite had no real desire to reach an

28. St. George Warehouse, Inc., 341 N.L.R.B. 904, 911 (2004) (citing Litton Sys., 300 N.L.R.B. 324, 330 (1990), *enforced*, 949 F.2d 249 (8th Cir. 1991).

29. *Id.* at 907 (citing Litton Sys., 300 N.L.R.B. 324, 330 (1990), *enforced*, 949 F.2d 249 (8th Cir. 1991) ("[W]ithout evidence that [a] party's conduct at the bargaining table itself indicates an intent [not] to reach agreement, [misconduct away from the table] has not been held to provide an independent basis to find bad-faith bargaining.")).

30. 341 N.L.R.B. 904 (2004).

31. *Id.* at 906.

32. *Id.* at 907.

33. *St. George Warehouse*, 341 N.L.R.B. at 908.

34. 938 F.2d 815 (7th Cir. 1991).

35. *Id.* at 822.

agreement."[36] However, in upholding the Board's finding that Overnite was guilty of surface bargaining, the court considered declarations made by the employer's vice president indicating Overnite's unlawful intentions prior to the commencement of bargaining.[37] When those statements were viewed alongside the employer's behavior at the bargaining table, "there [arose] a fair inference" that Overnite was not bargaining honestly and in good faith.[38] According to the Seventh Circuit, the employer "was not 'persuaded' because it never had any intention to be 'persuaded'; the company was making good on a promise never to cooperate with the Union."[39]

Evaluating these circumstances is a significant challenge for the Board, considering that inferences must be drawn from conflicting testimony and facts.[40] In conducting its totality of the circumstances examination, the Board may examine the parties' substantive proposals.[41] Although the Board does not evaluate the substance of particular proposals, it has explicitly retained the right to examine specific proposals and determine "whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract."[42] That is, the Board strives to avoid making subjective judgments concerning the substance of proposals – whether they are acceptable or unacceptable – when determining a party's intent from the aggregate of its conduct.[43] The Ninth Circuit has held that, while the Board must exercise caution in inferring motivation from the content of bargain proposals, where the entire spectrum of proposals put forward by a party is so consistently and predictably unpalatable to the other party, such proposal content supports an

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *See, e.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149, 150-51 (1956) (determining if an employer acted in good faith when it claimed it could not afford a wage increase, but refused to disclose financial statements).

41. NLRB v. F. Strauss & Son, Inc., 536 F.2d 60, 64 (5th Cir. 1976) (citing NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953)).

42. Reichhold Chemicals, 288 N.L.R.B. 69, 69 (1988), *enforced in part*, 906 F.2d 719 (D.C. Cir. 1990); Liquor Indus. Bargaining Group, 333 N.L.R.B. 1219, 1220 (2001), *enforced*, 50 Fed. Appx. 444 (D.C. Cir. 2002). In *Reichhold*, the Board granted motions for reconsideration following an earlier decision, in part to emphasize the Board's right to examine specific proposals that may be relevant in determining good faith. *Reichhold*, 288 N.L.R.B. at 69. The Board noted in the supplemental decision that language in its prior decision "could lead to the misconception that under no circumstances will the Board consider the content of a party's proposals in assessing the totality of its conduct during negotiations." *Id*.

43. *See Liquor Indus. Bargaining Group*, 333 N.L.R.B. at 1220.

inference of intent to frustrate agreement because the proposing party should know that agreement is impossible.[44]

The Board's Role Overseeing Bargaining

The Board's findings must be upheld if they are supported by substantial evidence on the record as a whole.[45] The Board must be aware of the reasonableness of the positions taken by the employer in the course of bargaining negotiations if it "is not to be blinded by empty talk and by the mere surface motions of collective bargaining."[46] However, under section 8(d), "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[47]

These competing principles demonstrate the inherent tension within the NLRA between the obligation to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," and the proviso that "such obligation does not compel either party to agree to a proposal or require the making of a concession."[48] The duty imposed on the parties under section 8(d) to bargain collectively does not obligate a party to make concessions or yield a position fairly maintained.[49] "Nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position."[50] Good faith bargaining is all that is required, so long as the proposals are not unusually harsh and unreasonable.[51]

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44. NLRB v. Mar-Len Cabinets, Inc., 659 F.2d 995, 999 (9th Cir. 1981). *See also infra* text accompanying notes 204-11 (discussing *NLRB v. A-1 King Size Sandwiches* and circumstances where the content of bargaining proposals – specifically harsh and unreasonable management rights clauses – evinces an intent to frustrate the bargaining process).

45. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-91 (1951).

46. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953) (citing Wilson & Co. v. NLRB, 115 F.2d 759, 763 (8th Cir. 1940)).

47. H.K. Porter Co. v. NLRB, 397 U.S. 99, 106 (1970) (quoting NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 404 (1952)).

48. 29 U.S.C. § 158(d) (2000).

49. *Am. Nat'l*, 343 U.S. at 404 (citing 29 U.S.C. § 158(d)).

50. Pease Co. v. NLRB, 666 F.2d 1044, 1050 (6th Cir. 1981) (quoting McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1200 (6th Cir. 1979)).

51. *See* NLRB v. Wright Motors, Inc., 603 F.2d 604, 609 & n.7 (7th Cir. 1979). The positions the Seventh Circuit found to be unreasonably harsh would have put the employees in a far worse position with the union than without it and would have damaged the union's ability to function as the employees' bargaining representative. *Id.* at 608 n.5. They included a guaranteed open shop, a lengthy management rights clause not subject to the grievance procedure, an "extraordinary" no strike-no lockout clause, and limited and permissive arbitration. *Id.*

At the same time, parties are obligated to do more than merely "go through the motions" of negotiation. There must be a "serious intent to adjust differences and to reach an acceptable common ground."[52] Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement."[53] The "performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences."[54] "However, a party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree."[55]

III. CONDUCT THAT ALONE CONSTITUTES BAD FAITH BARGAINING

The duty to bargain collectively, set forth in section 8(a)(5), is defined by section 8(d) as the duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[56] Based on the express language of the statute, an employer may violate this duty without a general failure of subjective good faith, since there is no occasion for the Board or the courts to even consider the issue of good faith if a party has refused to negotiate in fact – "to meet and confer" – about any of the mandatory subjects.[57] A refusal to actually negotiate over any subject within section 8(d), which the union seeks to negotiate, violates section 8(a)(5) even if the employer has every desire to reach an agreement with the union and sincerely and in good faith bargains to that end.[58] The Supreme Court has identified certain specific conduct as consistent with a failure to bargain in good faith: unilateral changes in terms or conditions of employment, direct dealings with employees, and refusing to sign an agreed-upon contract.[59]

52. NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 485 (1960).

53. NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960) (quoting Globe Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939)).

54. NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 402 (1952).

55. St. George Warehouse, Inc., 341 N.L.R.B. 904, 906 (2004) (citing Atlanta Hilton & Tower, 271 N.L.R.B. 1600, 1603 (1984)).

56. 29 U.S.C. § 158(d) (2000).

57. NLRB v. Katz, 369 U.S. 736, 742-43 (1962) (citing NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir. 1948)).

58. *Id.* at 743.

59. *See, e.g.*, *id.* at 747-48 (holding that unilateral changes in employment conditions without prior discussion with the union may be an unfair labor practice in violation of the Act if no justifying or excusing circumstances are presented); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944) (stating that bargaining directly with employees and ignoring the union as the

First, an employer may not unilaterally change a term or condition of employment without first bargaining with the union. In *NLRB v. Katz*, the Supreme Court held that unilateral action by an employer without prior discussion with the union amounts to a refusal to negotiate about the affected conditions of employment under negotiation, and is by definition inconsistent with a sincere desire to reach agreement with the union.[60] The Board found that the employer unilaterally granted numerous merit increases, automatic wage increases and changes in sick leave policy before negotiations with the union were discontinued and before an impasse occurred.[61] The employer argued that the Board could not conclude that it had violated section 8(a)(5) based on "unilateral actions alone, without making a finding of the employer's subjective bad faith at the bargaining table;" i.e. the unilateral actions were merely evidence relevant to good faith.[62] The Court held that an employer's unilateral change in conditions of employment under negotiation with the union violates section 8(a)(5), regardless of whether or not the employer is found guilty of overall subjective bad faith, as the implementation of unilateral changes circumvents the employer's duty to negotiate, which frustrates the objectives of section 8(a)(5) as much as a flat refusal.[63]

Second, an employer's duty to treat a union as the exclusive bargaining representative of its employees precludes the employer from dealing directly with its employees with respect to terms and conditions of employment. In *Medo Photo Supply Corp. v. NLRB*,[64] the Supreme

employees' exclusive bargaining representative is a violation of the Act); H. J. Heinz Co. v. NLRB, 311 U.S. 514, 526 (1941) (finding that when an employer and union reach an agreement with regard to the terms and substance of an employment contract, it is an unfair labor practice if the employer refuses to sign the contract).

60. *Katz*, 369 U.S. at 745-47.

61. *Id.* at 741-47.

62. *Id.* at 742.

63. *Id.* at 747. The Second Circuit later expounded upon the theory behind the impermissible ills of unilateral changes:

> [T]here are serious objections to permitting one party to an agreement unilaterally to hold out this type of inducement to the other. It creates divisive tensions within the [u]nion . . . . Whichever way the [u]nion moves, it loses ground with some part of its constituency. Union democracy is not furthered by permitting the [employer] to pick the [u]nion apart piece by piece. The same point may be made where there are both union and non-union employees. If the [u]nion refuses the benefit, then it may appear, at least in the short run, to have disadvantaged its members vis-à-vis nonmembers.

NLRB v. Gen. Elec. Co., 418 F.2d 736, 747 (2d Cir. 1969).

64. 321 U.S. 678 (1944).

Court held that an employer that bargains directly with employees who have not revoked their designation of the union as their bargaining agent subverts the requirements to bargain in good faith.[65]

The Second Circuit elaborated on the nature of direct dealings with employees as a violation of the Act, not requiring a good faith determination, in *NLRB v. General Electric Co.*[66] *General Electric* is widely known as the seminal decision prohibiting Boulwareism; that is, the tactic introduced by General Electric ("GE") vice president Lemuel R. Boulware, which involved the two-prong bargaining strategy of refusing to bargain with the union while simultaneously selling management's offer directly to the employees.[67] While the Second Circuit ultimately concluded that Boulwareism violated the employer's duty to bargain in good faith, as an initial matter, the court found that GE committed a ULP when it surreptitiously offered separate settlements to local officials without negotiating with national union negotiators.[68] The Second Circuit explained that: "Such tactics are inherently divisive; they make negotiations difficult and uncertain; they subvert the cooperation necessary to sustain a responsible and meaningful union leadership. The evil, then, is not in offering more. It is in the offer [to employees] itself."[69] Thus, while an employer's direct negotiations with employees rather than the union can be a factor in determining the employer's good faith, a lack of good faith is not a prerequisite to a finding that an employer violated the Act by dealing directly with employees.

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65. *Id.* at 684.

66. 418 F.2d 736 (2d Cir. 1969).

67. *Id.* at 740-41. Specifically, the Board found, and the Second Circuit affirmed, that:

> GE's bargaining stance and conduct, considered as a whole, were designed to derogate the Union in the eyes of its members and the public at large. This plan had two major facets: first, a take-it-or-leave-it approach ("firm, fair offer") to negotiations in general which emphasized both the powerlessness and uselessness of the Union to its members, and second, a communications program that pictured [GE] as the true defender of the employees' interests, further denigrating the Union, and sharply curbing [GE's] ability to change its own position.

Id. at 756.

68. *Id.* at 753-55.

69. *Id.* The Supreme Court's decision in *General Electric* did not prohibit employers from communicating with their employees regarding unions. Four months prior to *General Electric*, the Court stated in *NLRB v. Gissel Packing Co.* that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" 395 U.S. 575, 618 (1969). *See also* Sheridan Manor Nursing Home, Inc. v. NLRB, 225 F.3d 248, 253 (2d Cir. 2000) (following *Gissel*).

Third, an employer may not refuse to sign a written contract once the agreement has been negotiated and voluntarily agreed-upon. For example, in *H.J. Heinz Co. v. NLRB*,[70] the employer reached an agreement with the union concerning wages, hours and employee working conditions, but refused to sign any contract embodying the terms of the agreement.[71] The Board opined that the refusal to sign a written contract was a common means of frustrating the bargaining process and a method of refusing to recognize a union as a legitimate bargaining representative.[72] The Supreme Court held that while the Act does not compel an employer to enter into bargaining agreements, it does not follow that after reaching an agreement, an employer may refuse to sign it.[73] While employers may refuse to agree on substantive terms during collective bargaining, refusing to sign a previously agreed-upon contract only serves to undermine the union and frustrate the bargaining process, and as such violates the duty to bargain in good faith.[74]

IV. SURFACE BARGAINING

In *NLRB v. Reed & Prince Mfg. Co.*,[75] the First Circuit framed the ultimate issue in surface bargaining cases as:

> whether it is to be inferred from the totality of the employer's conduct that [the employer] went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union.[76]

The Act does not say, however, "that any 'agreement' reached will validate whatever tactics have been employed to exact it."[77] Rather, the Act clearly envisions productive bargaining; that is, the parties making a

70. 311 U.S. 514 (1941).

71. *Id.* at 523.

72. *Id.* at 523-24.

73. *Id.* at 525.

74. *Id.* at 526, *cited in* Shaw's Supermarkets, Inc., 337 N.L.R.B. 499, 504 (2002).

75. 205 F.2d 131 (1st Cir. 1953).

76. *Id.* at 134. "Reed & Prince submitted a woefully inadequate and demeaning 'offer' of a contract." NLRB v. Gen. Elec. Co., 418 F.2d 736, 761 (2d Cir. 1969). The court held that, under section 8(a)(5), the employer "is obligated to make *some* reasonable effort in *some* direction to compose his differences with the union. *Reed & Prince*, 205 F.2d at 134-35.

77. *Gen. Elec. Co.*, 418 F.2d at 761.

"serious attempt to resolve differences and reach a common ground."[78] The Second Circuit in *General Electric* recognized that this "herculean task" arises out of legislating a state of mind, and will never be so precise that a trier of fact will always know the exact limits of what is allowed and what is forbidden.[79]

To make a charade or sham of conducting negotiations by acting with the intention of evading an actual agreement violates section 8(a)(5) and is tantamount to "bad faith" bargaining.[80] It is one thing, however, to declare that sham negotiations are prohibited, and another entirely to actually determine whether the negotiations are, in fact, a sham. Judge John R. Brown cogently described the difficulty in making such a determination: "to sit at a bargaining table . . . or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail."[81] The Second Circuit determined that the proper means of resolving a charge of bad faith bargaining is to ascertain the state of mind of the party charged as it bears upon the party's negotiations.[82] Of course, no party to negotiations is going to admit to bad faith intentions. Thus, such motive must be ascertained from circumstantial evidence.[83]

In one respect, certain types of specific conduct possibly constitute per se violations of the duty to bargain in good faith since they in effect amount to a refusal to negotiate *in fact*.[84] Absent such evidence, however, the Board must determine intent based upon the party's overall conduct and the totality of the circumstances. The relevant inquiry in surface bargaining cases is whether, from the context of a party's total conduct, the party is lawfully engaged in hard bargaining to achieve a contract it desires or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.[85] When considering a party's good faith bargaining, the Board examines not only the parties' behavior at the negotiating table, but also any conduct away from the table.[86]

78. *Id.* at 762 (citing NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 486-88 (1960)).

79. *Id.*

80. Cont'l Ins. Co. v. NLRB, 495 F.2d 44, 48 (2d Cir. 1974).

81. NLRB v. Herman Sausage Co., 275 F.2d 229, 232 (5th Cir. 1960).

82. *Cont'l Ins. Co.*, 495 F.2d at 48.

83. *Id.* (citing NLRB v. Patent Trader, Inc., 415 F.2d 190, 197 (2d Cir. 1969)).

84. *See* NLRB v. Katz, 369 U.S. 736, 743 (1962).

85. Pub. Serv. Co. of Okla., 334 N.L.R.B. 487, 487 (2001) (citations omitted), *enforced*, 318 F.3d 1173 (10th Cir. 2003); J. D. Lunsford Plumbing, 254 N.L.R.B. 1360, 1370 (1981) (quoting W. Coast Casket Co., 192 N.L.R.B. 624, 636 (1971) (citations omitted), *enforced in part*, 469 F.2d 871 (9th Cir. 1971)).

86. Port Plastics, Inc., 279 N.L.R.B. 362, 382 (1986).

With respect to hard bargaining techniques, it is important to understand that, for example, "[a] company's adamant insistence on strong pro-management terms also cannot alone support a finding of failure to bargain."[87] The Supreme Court has held that "[w]hether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board."[88] The Fifth Circuit has noted that if the employer has the legal right to insist upon the terms of its proposal, a court cannot construe an exercise of this right as evidence of bad faith.[89] Additionally, the Act does not require an employer to abandon a position because a union offers concessions, regardless of the quantity or quality of concessions offered for abandonment.[90]

Elements of Surface Bargaining

The Board and courts have held that bargaining conduct that does not rise to the level of a per se violation of the obligation to bargain in good faith may still support an inference of bad faith or surface bargaining when considered in conjunction with all of the other evidence of the party's bargaining behavior.[91] Thus, a finding of surface bargaining necessarily results from a totality of the circumstances review. In *Atlanta Hilton & Tower*,[92] the Board set forth seven factors that signal a refusal to bargain in good faith:

(1) delaying tactics;
(2) unreasonable bargaining demands;
(3) unilateral changes in mandatory subjects of bargaining;
(4) efforts to bypass the union;
(5) failure to designate an agent with sufficient bargaining authority;
(6) withdrawal of already agreed-upon provisions; and
(7) arbitrary scheduling of meetings.[93]

87. NLRB v. Pac. Grinding Wheel Co., 572 F.2d 1343, 1348 (9th Cir. 1978) (citing Chevron Oil Co. v. NLRB, 442 F.2d 1067, 1072-73 (5th Cir. 1971)).

88. NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 409 (1952).

89. NLRB v. Cummer-Graham Co., 279 F.2d 757, 760 (5th Cir. 1960).

90. NLRB v. United Clay Mines Corp., 219 F.2d 120, 126 (6th Cir. 1955).

91. Cont'l Ins. Co. v. NLRB, 495 F.2d 44, 48 (2d Cir. 1974); *see also* NLRB v. Pac. Grinding Wheel Co., 572 F.2d at 1348 (citations omitted).

92. 271 N.L.R.B. 1600 (1984).

93. *Id.* at 1603; *see also* Regency Serv. Carts, Inc., 345 N.L.R.B. No. 44, at 2 (Aug. 27, 2005) (citing *Atlanta Hilton & Tower*, 271 N.L.R.B. at 1603); St. George Warehouse, Inc., 341 N.L.R.B.

One need not engage in all of these activities to be found to have bargained in bad faith; rather, surface bargaining occurs when a party's overall conduct, as defined by the *Atlanta Hilton* factors, reflects an intention to avoid reaching agreement.[94] As discussed above, two of these factors – unilateral changes in mandatory subjects of bargaining and efforts to bypass the union by negotiating directly with employees – may, on their own, violate other provisions of the Act.[95] When adopting bargaining positions, making proposals and strategizing how "hard" to bargain, restraint with respect to these two factors should be considered, based on the potential for liability under the Act.

The remainder of this article will examine types of conduct that the Board and Courts of Appeal have deemed to be either violative of, or consistent with, surface bargaining, although any such inquiry is fact-sensitive. There is no hard and fast rule for finding surface bargaining, and no "cure all" exists that can insulate a party from such a finding.

Conduct that Violates the Duty to Bargain in Good Faith: Delaying Tactics, Unreasonable Demands and Take-It-Or-Leave-It Offers

The following cases provide examples of individual conduct that, when reviewed under the totality of the circumstances approach, have resulted in findings of surface bargaining:

In *Continental Ins. Co. v. NLRB*,[96] the Second Circuit found that the employer:

> pursued a pattern of tactics designed to delay the negotiations as long as possible, to denigrate and undermine the Union, to make it impossible for the Union to reach a collective bargaining agreement without virtually surrendering its right to represent the employees in disputes over working conditions, and to make it appear to the employees that they would be worse off with Union representation and a collective bargaining agreement than if they had neither.[97]

Although the employer withdrew or modified some of its more

904, 926 (2004) (citations omitted); Hardesty Co., 336 N.L.R.B. 258, 259-60 (2001), *enforced*, NLRB v. Hardesty Co., 308 F.3d 859 (8th Cir. 2002) (citations omitted).

94. Altorfer Mach. Co., 332 N.L.R.B. 130, 148 (2000).

95. *See, e.g.*, NLRB v. Katz, 369 U.S. 736, 747-48 (1962); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944).

96. 495 F.2d 44 (2d Cir. 1974).

97. *Id.* at 48.

extreme and confusing proposals after considerable delay, the court nonetheless concluded that it had caused "unconscionably protracted negotiations [that] made a mockery of [the] bargaining procedure."[98]

Employing the totality of the circumstances approach, the court was persuaded by a number of especially insincere actions by the employer. First, the employer unnecessarily prolonged the bargaining process by insisting on duplicative negotiation sessions with two bargaining units, both of which had identical bargaining proposals.[99] From this evidence, the Board properly inferred that the employer's objective was to delay and frustrate the bargaining process.[100] Second, the employer made unreasonable demands regarding matters outside the scope of mandatory subjects of bargaining, *e.g.*, that the union agree not to organize or represent any of the employer's other employees.[101] Third, the employer insisted on language in the CBA that would essentially waive any union right to grieve or strike over any matter not specifically covered in the agreement.[102] Not coincidentally, the employer then insisted on including only a limited number of subjects in the contract.[103] The employer also insisted on the exclusive right to select an arbitrator.[104] The court concluded that these proposals would have placed employees in a worse position than if they had no contract at all because the proposals would have effectively waived the union's right to represent employees in disputes over employment conditions.[105]

The Second Circuit employed similar reasoning in the more recent, analogous case *Bryant & Stratton Business Institute, Inc. v. NLRB*.[106] Although the parties met sixteen times over approximately fourteen months, the court found that the employer violated section 8(d) by failing to meet at reasonable times because it repeatedly refused union requests to meet on weekends or to have consecutive meetings.[107] The employer grudgingly made itself available about one day per month, in the late afternoons, and normally only for abbreviated durations.[108] When the parties did meet, Bryant's negotiator was frequently

98. *Id.* at 50.
99. *Id.* at 48.
100. *Id.* at 49.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. 140 F.3d 169 (2d Cir. 1998).
107. *Id.* at 182.
108. *Id.*

unprepared and unable to meaningfully discuss the proposals.[109] In addition, the employer failed to provide timely counterproposals, and when it did provide them, they were unresponsive to the union's proposals.[110] Based on these facts and testimony from former Bryant employees – who stated that the employer's bargaining strategy was to "engage in conduct that would undermine the union and lead to its decertification" – the court concluded that Bryant's main focus was to prospectively terminate its bargaining obligation by weakening member support, not on successful collective bargaining negotiations.[111] As a result, the court affirmed the Board's finding of surface bargaining.[112]

While there is no rule outlining the exact frequency with which bargaining sessions must occur in order to insulate an employer from a potential unfair labor practice charge, the cases do provide guidance. In *NLRB v. Milgo Industrial, Inc.*,[113] despite being described by the Second Circuit as "nowhere near so clear against the employer as *Continental Ins. Co.*," the court nonetheless found substantial evidence that the employer was responsible for delays in holding bargaining sessions.[114] The employer conferred primary negotiating authority on a busy outside attorney, which resulted in one to three month gaps between bargaining sessions.[115] Despite union requests for longer and more regular bargaining sessions, the parties only met seventeen times over a fifteen month period, each session lasting only a few hours.[116] The court concluded that a lawyer's busy schedule was not an acceptable excuse for failing to meet and bargain at reasonable times.[117]

109. *Id.* at 183.
110. *Id.*
111. *Id.* at 183-84.
112. *Id.* at 184.
113. 567 F.2d 540 (2d Cir. 1977).
114. *Id.* at 544.
115. *Id.* at 544.
116. *Id.* at 544-45.
117. *Id.* at 545 n.6 (citing NLRB v. Exch. Parts Co., 339 F.2d 829, 832-33 (5th Cir. 1965)); *see also* Radisson Plaza Minneapolis v. NLRB, 987 F.2d 1376, 1382 (8th Cir. 1993) (affirming the Board's finding that the employer's conduct supported an inference of a failure to bargain in good faith where employer's chief negotiator engaged in a pattern of dilatory conduct, including canceling three bargaining sessions, terminating five of eleven sessions significantly earlier than planned, and refusing union requests for more frequent sessions without explaining his unavailability, all of which resulted in only eleven meetings over eight months). *But see* Horsehead Res. Dev. Co. 154 F.3d 328, 339 (6th Cir. 1998) (finding that where employer participated in nine days of bargaining over a three-week period, offered a significant and innovative wage increase in response to union demands for more money, bargained late into the evening at the deadline and offered to continue bargaining the next day under the old contract, "[t]hese [were] simply not the acts of a company uninterested in reaching agreement on a contract.").

Also contributing to the finding of surface bargaining in *Milgo* was evidence that the employer lacked a sincere desire to reach agreement. Among other things, the employer objected to a union proposal which required the employer to do little more than obey federal law prohibiting age discrimination, was reluctant to allow the union to post notices "relating to Union matters" on the bulletin board and refused to provide a water cooler instead of merely providing water to employees.[118] The court characterized the employer's actions as a case of sham bargaining where "each episode 'gained color from each of the others'" and "the Board could legitimately conclude that the whole was greater than the sum of the parts."[119]

More recently, the Tenth Circuit reached a similar conclusion in *Public Service Co. of Oklahoma v. NLRB*.[120] Throughout six months of regular meetings, the employer insisted on proposals granting it greater management rights.[121] Following an impasse, the Board found that Public Service Co. had violated section 8(a)(5) by insisting on proposals that undermined the union's representative function.[122] The Board inferred bad faith from the company's conduct away from the bargaining table, including an email it sent to its employees aimed at obtaining a decertification election.[123] The Tenth Circuit, affirming the Board, concluded that the employer's rigid adherence to such proposals demonstrated that it could not seriously have expected meaningful collective bargaining.[124]

In August of 2005, the Board found that the combination of "take-it-or-leave-it" comments made by the employer's negotiators, delay in providing information to the union and other dilatory tactics demonstrated that the employer unlawfully aimed to frustrate the possibility of arriving at agreement in *Regency Service Carts, Inc.*[125] The negotiator drew several "lines in the sand" concerning various contractual provisions, including when he literally drew a line on the back of his notepad and said, "there won't be any contract with a prohibition on subcontracting."[126] He also stated that, "we're not going

118. *Milgo Indus.*, 567 F.2d at 545 (citing 29 U.S.C. § 621 (2000)).
119. *Id.*
120. 318 F.3d 1173, 1178 (10th Cir. 2003).
121. *Id.* at 1176.
122. *Id.*
123. *Id.* at 1177 n.3.
124. *Id.* at 1180.
125. 345 N.L.R.B. No. 44, at 2-3 (Aug. 27, 2005).
126. *Id.* at 2.

to be reasonable. We want what we want and I'll sit here for the next three years," and in response to a union request to schedule a future meeting, said that he would be willing to meet but that he was "going to say no to everything."[127] According to the Board, these comments implied that the employer had no intention to compromise and was negotiating with a closed mind.[128]

Although the parties held twenty-nine bargaining sessions over thirty-two months, the sessions decreased in frequency.[129] The Board found that this was due to the claimed unavailability of the employer's negotiator, who cancelled eight of the twenty-nine scheduled sessions, frequently arrived late when he did show, left sessions to take telephone calls, and excused himself early despite the union's expressed desire to continue negotiating.[130] Moreover, when scheduling future sessions, the dates suggested by the union were consistently rejected by the employer, who preferred instead to meet after the last date the union provided.[131]

Additionally, the employer's negotiator was unwilling to explain its proposals and refused to describe current shop practices.[132] The negotiator demanded that the union ask its employee members to answer its inquiries about current conditions of employment, delaying bargaining, and claimed that this information was irrelevant because the employer did not intend to change its position.[133] Finally, the employer delayed submitting requested information to the union concerning various safety and personnel issues.[134] The employer would initially make spurious and frivolous objections to clearly relevant requests, and then eventually supply the information only after an unreasonable amount of time had passed.[135] The Board held that the totality of the employer's conduct demonstrated an intent to frustrate negotiations in violation of section 8(a)(5).[136]

In *United Technologies Corp.*,[137] the Board determined that the employer refused to bargain in good faith after reviewing the totality of

127. *Id.* at 2-3.
128. *Id.* at 3 (citing Mid-Continent Concrete, 336 N.L.R.B. 258, 259 (2001)).
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 5.
135. *Id.*
136. *Id.* at 6.
137. Hamilton Standard Div. of United Techs. Corp. (United Technologies Corp.), 296 N.L.R.B. 571 (1989).

the employer's conduct, which included delay tactics and threats that bargaining could be done on a "take-it-or-leave-it" basis.[138] The employer delayed the bargaining process by submitting single proposals to the union and soliciting feedback regarding each individual proposal before presenting its next proposal.[139] Additionally, after almost a year of bargaining and repeated prompting from the union, the employer still failed to present any economic proposals.[140] When the union objected to the employer's proposal method, the employer's chief negotiator replied that if the union preferred, negotiations could be postponed until the employer had a full contract proposal, which the employer would then present on a "take-it-or-leave-it" basis.[141] The Board found the employer's piecemeal submission of proposals and insistence on resolving all non-economic issues before turning to more pressing concerns to be delaying tactics designed to frustrate the bargaining process.[142] The chief negotiator's "take-it-or-leave-it" response to the union's opposition confirmed the employer's bad faith intentions, according to the Board.[143]

By contrast, in *Hartz Mountain Corp.*,[144] the Board cleared the employer of surface bargaining allegations where the employer presented the union with comprehensive, timely counterproposals, including proposals regarding economic issues.[145] Furthermore, in determining whether an employer maintains good faith standing, the Board will consider whether the employer has defined, explained and advocated its position rather than attempting to thrust provisions on the union in a "take-it-or-leave-it" manner.[146] The employer's conduct towards the union at the bargaining table was a determining factor in these two cases, decided by the Board in the same year: in *United Technologies Corp.*, the employer's negotiator clearly meant his "take-it-or-leave-it" comment as a threat to thwart the union's dissatisfaction with the employer's dilatory bargaining techniques,[147] whereas in *Hartz Mountain Corp.*, the employer explained, advocated and gave reasons

138. *Id.* at 572.
139. *Id.* at 571.
140. *Id.* at 572.
141. *Id.* at 571.
142. *Id.* at 572.
143. *Id.*
144. 295 N.L.R.B. 418 (1989). For a further discussion of this case, *see infra* text accompanying notes 185-89.
145. *Id.* at 425-26.
146. *Id.* at 426 (citing AMPAC, 259 N.L.R.B. 1075, 1084-85 (1982)).
147. *United Techs. Corp.*, 296 N.L.R.B. 571, 571 (1989).

for its position on each unresolved item.[148]

The Seventh Circuit also had the opportunity to evaluate take-it-or-leave-it bargaining tactics in *NLRB v. Schwab Foods, Inc.*,[149] where the employer vehemently resisted the union's attempt to organize one of its four grocery stores.[150] The Seventh Circuit upheld a Board ruling that the employer demonstrated an intent to avoid any agreement with the union by presenting wage increase proposals to the union under threat of immediate implementation at all stores.[151] The wage increases were immediately implemented at the three nonunion stores and, after some delay, imposed non-retroactively at the unionized store.[152] The actions by the company created a wage disparity between the represented and non-represented employees.[153] The Board found that the employer's tactic of confronting the union with an eleventh-hour "last offer" put the union in a position where it was forced to either accept implementation, thereby acknowledging the company's right to unilaterally determine wage rates, or accept the consequences of partial implementation, which no doubt would have reflected poorly on the union in the eyes of its members.[154] Further, the employer's opposition to full retroactivity at the union store for the same benefits granted at the nonunion locations strongly suggested an intent to subvert bargaining.[155] *United Technologies Corp.*, *Hartz Mountain Corp.* and *Schwab Foods* thus make it clear that fully and completely explaining reasonably adopted positions to the other party, rather than blatantly forcing their positions, may be required to avoid a finding of surface bargaining.

Conclusions Regarding Violative Conduct

As the preceding cases and Board decisions illustrate, avoiding the following types of bargaining conduct will decrease the likelihood of facing liability for surface bargaining under section 8(a)(5), especially where such conduct occurs at the bargaining table:

148. *Hartz Mountain Corp.*, 295 N.L.R.B. at 426.

149. 858 F.2d 1285 (7th Cir. 1988).

150. *Id.* at 1287.

151. *Id.* at 1292-93.

152. *Id.* at 1292.

153. *Id.* at 1293.

154. *Id.* The employer recognized as much when it told the union that if it did not timely approve implementation of the wage increase, "'there would have to be some explanation to the employees as to why the raise was not given'" – insinuating that the employer was poised to place the blame for the wage disparity on the union. *Id.*

155. *Id.*

- Dilatory tactics that delay bargaining efforts, including:
    - Limiting available meeting times and decreasing the frequency of meetings. While the Board has not established a rule for what is and is not an acceptable rate of bargaining sessions, case law indicates that meeting once per month may be considered inadequate. Additionally, the decisions indicate an expectation that the frequency of meetings should increase as the parties get closer to the expiration of a CBA.
    - Canceling bargaining sessions or leaving early without reasonable explanation.
    - Being unprepared for negotiation sessions.
    - Presenting counterproposals that are not responsive to union proposals.
    - Requiring duplicative session for similar bargaining units.
    - Submitting proposals on single issues and refusing to discuss other relevant topics.
- Making statements that indicate unlawful intentions.
- Making unreasonable bargaining demands or adopting untenable negotiating positions (*e.g.* refusing to acquiesce to union proposals that are required by federal law).
- Issuing take-it-or-leave-it "offers" that essentially leave the union with only two options: acquiesce or file a ULP charge.

Conduct that is Consistent with the Duty to Bargain in Good Faith*: Insistence on a Bargaining Position, Statements Made by Employees, Careful Review of Union Proposals & Willingness to Make Concessions*

The following cases provide examples of conduct where the Board and the courts have determined that the employer engaged in hard

bargaining, rather than surface bargaining, and thus did not violate section 8(a)(5):

After laying out the seven surface bargaining factors in *Atlanta Hilton & Tower*, the Board concluded that the employer had not engaged in surface bargaining.[156] The Board cited evidence of the employer's good faith, including its appearance at thirteen negotiating sessions, its offer of a wage increase, its agreement in principle to the union's sick leave proposal, and the prior successful bargaining relationship between the parties.[157] Under the seven-factor test, the Board found no indication of any bad faith conduct.[158] In addition, the Board concluded that the employer's firmness in insisting on a one-year extension of the current contract did not of itself constitute bad faith.[159]

The Board applied this logic in subsequent decisions. In *Reichhold Chemicals, Inc.*,[160] the Board reaffirmed its earlier decision finding that the employer's overall conduct was consistent with hard bargaining as opposed to surface bargaining.[161] The employer willingly met and bargained with the union, attended all scheduled meetings, exchanged proposals, and fulfilled its procedural obligations.[162] Shortly after the last meeting, the employer notified a federal mediator that it was willing to bargain.[163] During the course of twenty-nine bargaining meetings held over thirteen months, the employer made concessions that led to agreement between the parties on numerous subjects.[164] Although the employer adhered to its demands for comprehensive management rights and no-strike provisions, as was its right, it did make some movement on those subjects in an attempt to reach an agreement.[165]

Similarly, in *Coastal Electric Cooperative, Inc.*,[166] the Board held that the employer's positions, although indicative of hard bargaining, were not inherently unlawful, and that the employer's failure to make concessions, in the absence of other indicia of bad faith, was not sufficient evidence of bargaining with intent to avoid agreement.[167]

156. Atlanta Hilton & Tower, 271 N.L.R.B. 1600, 1603 (1984).
157. *Id.* at 1603.
158. *Id.*
159. *Id.*
160. 288 N.L.R.B. 69 (1988).
161. *Id.* at 69.
162. *Id.* at 70.
163. *Id.*
164. *Id.*
165. *Id.*
166. 311 N.L.R.B. 1126 (1993).
167. *Id.* at 1127.

Although the employer insisted upon, *inter alia*, a broad management rights clause, it explained its proposals in detail, complied with the union's information requests, met with the union at reasonable times and places, and reached agreement on numerous proposals, sometimes after making concessions to address the union's concerns.[168] The Board distinguished Coastal Electric's conduct from that of the employer in *Bethea Baptist Home v. NLRB*,[169] decided earlier that year, where the employer used evasive tactics to avoid providing requested information, refused to put agreements in writing, pretended to make concessions while preserving its proposals in other parts of the contract, and insisted on proposals that left the union with fewer rights than provided by law without the contract.[170] Further, the Board found no evidence of anti-union animus away from the bargaining table that would indicate Coastal Electric's intent to frustrate agreement.[171] The Board also considered it probative that the union remained as firm in its basic positions as did the employer.[172]

Statements made by management negotiators and officials are often debated as evidence of an employer's lack of good faith in surface bargaining cases. In *Chevron Oil Co. v. NLRB*,[173] the employer's production superintendent made a series of oral and written communications to its employees regarding the company's position on the union.[174] While the Board determined that these communications were indicia of bad faith, the Fifth Circuit disagreed, concluding that the evidence did not justify the inference that the company was not prepared to accept and deal in good faith with the union if it won the election.[175] The court found that, although the production superintendent conducted an active campaign to defeat the union and made it clear to employees that the company would rather they remain unorganized, management was entitled to its opinion.[176] The fact that the employer made its position clear was not sufficient, in itself, to create a presumption that subsequent contract negotiations were made in bad faith.[177]

In contrast, statements by the employer that create the impression

168. *Id.* (citations omitted).
169. 310 N.L.R.B. 156 (1993).
170. *Coastal Elec.*, 311 N.L.R.B. at 1127 n.5.
171. *Id.* at 1127.
172. *Id.*
173. 442 F.2d 1067 (5th Cir. 1971).
174. *Id.* at 1070.
175. *Id.*
176. *Id.*
177. *Id.*

that the employer will never recognize the union or sign a collective bargaining agreement are more likely to be considered in finding that the employer engaged in bad faith bargaining. For example, in *Overnite Transportation Co.*,[178] the Seventh Circuit based a finding of liability from declarations made by the employer's vice president that he would never sign a contract with the union and that he would do everything in his "extreme power" to keep the union out.[179] In addition to potentially leading to liability for surface bargaining under section 8(a)(5), comments made by management regarding its position on the union may negatively impact employee morale, create negative publicity and ultimately have the opposite of the intended effect.

Although statements by negotiating parties may reflect an intention not to bargain in good faith, the Board has attempted to not penalize parties for remarks made in the give-and-take atmosphere of collective bargaining.[180] "To lend too close an ear to the bluster and banter of negotiations would frustrate the Act[]."[181] For example, in *St. George Warehouse, Inc.*, the Board reversed a finding of surface bargaining based in part on a statement made by the employer's counsel after a bargaining session: "[W]e both know what's going to happen here; you're not going to get a contract, and the Union [is] going to end up abandoning the shop."[182] The Board concluded that this isolated comment, uttered after a difficult bargaining session, appeared to be nothing more than a frustrated prediction indicating that the parties would not be able to reach agreement.[183] Thus, as the Sixth Circuit succinctly stated, "to determine the existence of bad faith, we look to bargaining conduct, not bargaining rhetoric."[184]

Hartz Mountain Corp. provides guidance on the type of detailed review of bargaining proposals that insulate employers from allegations

178. 938 F.2d 815 (7th Cir. 1991); s*ee supra* text accompanying notes 34-39.

179. *Overnite Transp. Co.*, 938 F.2d at 816-17.

180. Logemann Bros., 298 N.L.R.B. 1018, 1021 (1990).

181. Allbritton Commc'ns, Inc., 271 N.L.R.B. 201, 206 (1984), *enforced*, 766 F.2d 812 (3d Cir. 1985).

182. St. George Warehouse, Inc., 341 N.L.R.B. 904, 908 (2004).

183. *Id.*

184. Pleasantview Nursing Home, Inc. v. NLRB, 351 F.3d 747, 758 (6th Cir. 2003) ("Where the overall bargaining conduct indicates good faith and willingness to negotiate, a stray statement indicating inflexibility will not overcome the general tenor of good faith negotiation."). *But see* NLRB v. Hardesty Co., 308 F.3d 859, 866 (8th Cir. 2002) (stating that the Board properly considered statements made by supervisors and managers around the time of the company's proposals that, when viewed in conjunction with the its regressive and largely unexplained bargaining positions, reasonably indicated the employer's intent to wait a year and seek decertification of the union, a violation of section 8(a)(5)).

of surface bargaining.[185] At an early bargaining session, the employer's negotiator suggested that the parties review seriatim each of the union's proposed contract provisions for clarification and discuss all questions as they arose.[186] The union agreed to this procedure, which lasted for an additional nineteen bargaining sessions over then next nine months.[187] Based on this evidence, the Board rejected the General Counsel's contention that the employer engaged in prolonged questioning in bad faith, concluding instead that the purpose of the questioning was to gain a complete understanding of the union's proposals.[188] Similarly, the Board found that it was reasonable for the employer to secure answers from the union on the union's proposal before submitting its counterproposal.[189]

Bridgestone/Firestone, Inc.[190] provides another example of bargaining techniques that are not considered surface bargaining. The Office of the General Counsel found that the employer presented proposals "in a timely and comprehensive format while giving the [u]nion full opportunity to reject, suggest changes or counter-propose alternatives."[191] These findings included:

- The employer gave evidence of why it believed that improving production was necessary, pointing to its accumulated losses and debt and its capital investments.

- When the union subsequently raised concerns about some of the employer's proposals, the employer fully addressed those concerns and repeatedly asked the union to propose alternative methods of addressing the employer's need for productivity improvements.

- Procedurally, the employer's formal written proposal accurately reflected the items previously presented orally, and the employer gave the union an annotated copy of the existing

185. *See supra* text accompanying notes 144-48.

186. Hartz Mountain Corp., 295 N.L.R.B. 418, 419-20 (1989).

187. *See id.* at 419-22.

188. *Id.* at 425.

189. *Id.*

190. No. 25-CA-23416, N.L.R.B. Gen. Couns. Adv. Mem., 1995 N.L.R.B. GCM LEXIS 23, at *1 (May 11, 1995), *available at* http://www.nlrb.gov/shared_files/advice%20memo/1995/b051195_bridge.html.

191. *Id.* at *38.

agreement.

- The employer did not engage in dilatory or other obstructive tactics at the bargaining table. Rather, the employer bargained with the union forty-six times over almost four months and made some concessions throughout.

- While the employer did not respond to the union's request to narrow the issues by taking off the table any provisions it did not need, the employer openly discussed with the union each of its concerns.

- When the union complained of time constraints on the negotiations, the employer quickly agreed to the union's proposal to indefinitely extend the existing contract.[192]

The General Counsel concluded that the employer had bargained in good faith because there was no basis to find that the employer frustrated the agreement with its demands.[193]

Conclusions Regarding Consistent Conduct

As the preceding cases and Board decisions illustrate, the following types of bargaining conduct decrease the likelihood of liability for a finding of surface bargaining under section 8(a)(5):

- Attending frequent meetings with the union.

- Explaining management's position on issues to be bargained.

- Making concessions and agreeing on some issues.

- Fully explaining rejection of union proposals.

- Proposing wage increases.

- Making timely, comprehensive counterproposals.

192. *Id.* at *39-40.
193. *Id.* at *41-42.

- Expressing willingness to continue bargaining even after expiration of CBA (*e.g.* by agreeing to temporarily extend current CBA or work with federal mediator).

Additionally, demonstrating a willingness to consider at least some union proposals can offset or counter the risk of surface bargaining liability resulting from insisting on a particular lawful position. Finally, making statements regarding the party's position on negotiations, and/or predictions on the outcome of bargaining, do not necessarily form the basis of liability for surface bargaining.

Other Types of Conduct that have Surface Bargaining Implications

Management Rights and Union Security Clauses

Negotiation of management rights and union security clauses both have implications for surface bargaining. Management rights are those rights that are essential to management in carrying out the function of the enterprise.[194] Management rights clauses typically reserve for management all rights not modified by the contract or specifically enumerated therein.[195] Union security clauses require employees to become members of a union as a condition of employment.[196] Section 8(a)(3) of the Act permits employers and unions to enter into agreements requiring all employees to become union members.[197] However, the Supreme Court has interpreted section 8(a)(3) to mean that the only "membership" a union can require is the payment of fees and dues,[198] and that section 8(a)(3) does not permit unions to exact dues or fees over the objection of nonmembers for activities that are not germane to collective bargaining, grievance adjustment, or contract administration.[199]

Insistence on a broad management rights clause is not itself

194. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 634 (Alan Miles Ruben ed., 6th ed. 2003). There are varying views on how broadly to interpret management rights. *See id.* at 635-41.

195. *Id.* §13.3, at 661.

196. Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 37 (1998) (citing 29 U.S.C. § 158(a)(3) (2000); Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 744-45 (1988)).

197. 29 U.S.C § 158(a)(3).

198. NLRB v. Gen. Motors Corp., 373 U.S. 734, 742-43 (1963) (quoting Radio Officers' Union of Commercial Tels. Union, A. F. L. v. NLRB, 347 U.S. 17, 41 (1954)).

199. *Commc'ns Workers of Am.*, 487 U.S. at 745, 762-63 (citing Ellis v. Bhd. of Ry., 466 U.S. 435, 448 (1984)).

inherently unlawful or evidence of bad faith.[200] However, because management rights clauses reserve rights exclusively for the employer, the Board and the courts have adopted a position safeguarding the rights of the employee.[201] This position is not dissimilar from that taken with respect to the drafter in contract law: just as ambiguities are interpreted against the drafter of a contract, management rights clauses are often viewed with a cautious eye. The Board has held that management proposals that seek to secure the employer's right to act in a unilateral and unrestricted fashion on key terms and conditions of employment – such as establishing total employer discretion over wages and the assignment of unit work, diminishing or abolishing grievance and arbitration processes – create a fundamental shift in the bargaining relationship and may effectively nullify the union's ability to carry out its statutory function as the employees' bargaining representative.[202] The Board and the courts have tended to be skeptical of management rights proposals that are so comprehensive they essentially preempt the union's representative function, and, if accepted, would leave employees with less protection than they had prior to electing a collective bargaining representative.[203]

An example of a decision analyzing the negotiation of management rights clauses as it relates to surface bargaining is *NLRB v. A-1 King Size Sandwiches, Inc.*[204] The Eleventh Circuit found that the Board correctly inferred bad faith from the company's insistence on proposals, including a management rights clause, that were so unusually harsh and unreasonable that they were predictably unworkable.[205] The management rights clause at issue controlled virtually all significant terms and conditions of employment, including promotions, demotions, discharge, discipline, layoff, recall, subcontracting and assignment of unit work to supervisors, leaving the union's "participation" in the process meaningless.[206] The employer focused its efforts on requiring

200. Coastal Elec. Coop., Inc., 311 N.L.R.B. 1126, 1127 (1993) (citing Hostar Marine Transp. Sys., Inc., 298 N.L.R.B. 188 (1990); Logemann Bros., 298 N.L.R.B. 1018 (1990); Commercial Candy Vending Div., 294 N.L.R.B. 908 (1989)).

201. *See, e.g.*, Hydrotherm, Inc., 302 N.L.R.B. 990 (1991). The court held that where an employer's insistence on broad management rights clauses would leave employees and their representative with less than they would otherwise have without an employment contract, the employer's insistence is evidence of bad-faith bargaining. *Id.* at 995 (citations omitted).

202. *See id.* at 990-95.

203. *See id.* at 995 (citations omitted).

204. 732 F.2d 872 (11th Cir. 1984).

205. *Id.* at 873.

206. *Id.* at 875.

employees to surrender their statutory rights to bargain, strike, and subject matters to grievance and arbitration procedures, without offering any real incentive for the surrender of such rights, and refused to give the union any voice whatsoever concerning employee work and safety rules, overtime assignments, transfers, retirement and other mandatory subjects of bargaining.[207]

The court ultimately held that the combination of the broad management rights and zipper clauses,[208] along with the employer's demand for a no-strike clause without any concessions, "clearly demonstrated surface bargaining used as a cloak to conceal the employer's bad faith."[209] The *A-1 King Size Sandwiches* court distinguished the employer's behavior from that in *Chevron Oil Co. v. NLRB*, where the employer did not demand unilateral control over every significant term and condition of employment.[210] Also of note in *A-1 King Size Sandwiches* was that the employer responded to the union's objections to the breadth of its original management rights clause by submitting new proposals that were even broader, a tactic the Eleventh Circuit found to clearly indicate the employer's lack of desire to work towards an agreement.[211]

Negotiation of union security clauses may lead to the same pitfalls. For example, in *Hospitality Motor Inn, Inc.*,[212] the Board found that the employer had a fixed intent not to reach agreement as to union security.[213] The employer took the position that the union's request for a union-security clause would preclude reaching an agreement, even if the parties could reach resolution of all other issues.[214] The employer went so far as to state that it would not agree to the clause even if 100% of the employees signed authorization cards.[215] The Board found that the employer's intransigent intent not to reach agreement on union security was but one aspect of a totality of conduct evincing a failure to bargain

207. *Id.* at 875-77.

208. A zipper clause may take "the form of either an acknowledgment that the written contract constitutes the parties' entire agreement and is a waiver of the right to bargain about other conditions, or a specific affirmation that management rights are not limited by prior practices." ELKOURI & ELKOURI, *supra* note 194, at 620-21.

209. *A-1 King Size Sandwiches*, 732 F.2d at 878 (quoting NLRB v. Johnson Mfg. Co., 458 F.2d 453, 455 (5th Cir. 1972)).

210. *Id.*

211. *Id.* at 877.

212. 249 N.L.R.B. 1036 (1980), *enforced*, 667 F.2d 562 (6th Cir. 1982).

213. *Id.* at 1036 n.1.

214. *Id.* at 1038-39.

215. *Id.* at 1039.

in good faith.[216] However, the tipping point for the Board in concluding that the employer did not satisfy its statutory obligation to bargain in good faith was that the employer's "philosophical" opposition to the union security clause was absolute and obstructionist.[217]

Bargaining to Impasse

When labor negotiations reach an impasse or deadlock, an employer's implementation of unilateral changes in working conditions do not necessarily violate the Act, as they would in the absence of an impasse.[218] The exploitation of this rule by sabotaging negotiations to "manufacture" an impasse while giving the appearance of negotiating in good faith may constitute surface bargaining.[219] "The touchstone for determining whether a genuine 'impasse' or 'deadlock' existed at the time the employer instituted unilateral changes is the absence of any realistic possibility that continuation of the negotiations would have been fruitful."[220]

In *ConAgra, Inc. v. NLRB*, the Board agreed with the ALJ that the employer entered negotiations with a predetermined resolve not to budge from its initial position and that the employer engaged in surface bargaining by manufacturing an impasse.[221] While the D.C. Circuit agreed that there was evidence that the employer thought that the union would likely resist the proposed concessions vigorously, it concluded that preparing for a potential breakdown in negotiations is quite different from intentionally causing one.[222] The existence of an employer-created contingency plan did not fairly lead to the inference that the employer *wanted* to create an impasse and force the union to strike; rather, the contingency plan simply showed the employer's judgment that the union was likely to consistently refuse any attempt to reduce wages.[223] The court held that the employer was entitled to act on this judgment and prepare for a possible strike.[224] This same principle applied to the employer's plans to improve security and hire replacement workers –

216. *Id.* at 1040 (citations omitted).
217. *Id.* (citing Sweeney & Co. v. NLRB, 437 F.2d 1127, 1134-35 (5th Cir. 1971)).
218. Am. Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622, 624 (D.C. Cir. 1968).
219. ConAgra, Inc. v. NLRB, 117 F.3d 1435, 1444 (D.C. Cir. 1997).
220. *Id.* (citing Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967)).
221. *Id.* (citations omitted).
222. *Id.*
223. *Id.*
224. *Id.*

while the employer took these actions in anticipation of a strike, it does not follow that such actions constitute evidence that the employer intended to bring about the anticipated strike.[225]

Duty to Disclose Information

The *ConAgra* court also found the employer's behavior consistent with good faith bargaining with regard to the duty to provide information to the union.[226] The Supreme Court has held that employers are obligated to provide the union with information relevant to the collective bargaining process in certain circumstances under section 8(a)(5).[227] This duty to disclose relevant information is also construed as an element of the duty to bargain in good faith.[228] When a union makes a request for relevant information, the applicable legal standard is that the employer has a duty to provide the information in a timely fashion or to adequately explain why the information will not be furnished.[229] Although information concerning the terms and conditions of employment is presumed relevant, no such presumption applies to information regarding an employer's financial structure and condition.[230] A union must demonstrate that any requested financial information is relevant to the negotiations before the employer will be required to supply such information.[231]

Following the Supreme Court's decision in *Truitt*, the Board heard a series of cases that explored the circumstances under which an employer's statements and conduct during negotiations can cause the employer's financial information to become relevant to the negotiations. Ultimately, the Board announced in *Nielsen Lithographing Co.*[232] that it would distinguish between employer claims of "inability to pay" union proposals and employer statements and conduct, suggesting, in a more

225. *Id.* at 1444-45 (citations omitted).

226. *Id.* at 1442-44.

227. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-54 (1956).

228. Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979) (citing *Truitt Mfg. Co.*, 351 U.S. at 152-54; NLRB v. Acme Indus. Co., 385 U.S. 432, 435-38 (1967)).

229. Regency Serv. Carts, Inc., 345 N.L.R.B. No. 44, at 3-4 (Aug. 27, 2005) (citations omitted); Bryant & Stratton Bus. Inst., 321 N.L.R.B. 1007, 1044 (1996) (citations omitted), *enforced*, 140 F.3d 169 (2d Cir. 1998); *see also id.* at 1012-17 (discussing the duty to provide information).

230. *ConAgra*, 117 F.3d at 1439 (citing Ohio Power Co., 216 N.L.R.B. 987, 991 (1975); Int'l Woodworkers v. NLRB, 263 F.2d 483, 484-85 (D.C. Cir. 1959)).

231. *Id.* (citing *Int'l Woodworkers*, 263 F.2d at 484-85).

232. 305 N.L.R.B. 697 (1991).

general fashion, that accession to union demands would create "economic difficulties or business losses or the prospect of layoffs."[233] In *Nielsen*, the Board held that the company's negotiating statements and conduct clearly were not susceptible to the "inability to pay" interpretation that would trigger an obligation to turn over financial data.[234] The employer repeatedly stressed that it continued to turn a profit (although it claimed to be losing business to competitors), disavowed any claim of inability to pay, and said only that it would face difficulties meeting union–proposed labor costs in the future.[235] The Seventh Circuit subsequently modified the Board's reasoning, extending employers' duty to substantiate "claims of poverty, or any other substantiatable factual claim," if the union so demands.[236]

In *ConAgra*, as in *Nielsen*, the employers' representatives informed the union that the companies were profitable, but claimed that wage concessions were still necessary so that the companies could protect and improve their ability to compete.[237] ConAgra's representatives made comments such as, "[i]f we do not take immediate measures there are probabilities we will not be here in the future" and "I have seen the Company's decline during the last four years . . . [i]f we are not competitive we cannot survive," which the court deemed not to be alarmist and below the "inability to pay" threshold.[238] The *Nielsen* line of cases thus instruct that statements that cannot reasonably be interpreted as assertions that an employer is unable to pay the wages demanded by a union are consistent with good faith bargaining.

V. CONCLUSION

The Board decisions and Court of Appeals interpretations outlined in this article should provide guidance as to what bargaining conduct gives rise to a finding of surface bargaining. However, good faith determinations in any practice of law are by nature fact-sensitive, and, as evidenced by some of the outcomes discussed herein, cases with remarkably similar factual criteria have sometimes resulted in significantly different results.

So how is one to know what types of bargaining conduct it can and

233. *Id.* at 700.
234. *Id.* at 700-01.
235. *Id.*
236. Graphic Commc'ns Int'l Union v. NLRB, 977 F.2d 1168, 1171 (7th Cir. 1992).
237. ConAgra, Inc. v. NLRB, 117 F.3d 1435, 1442 (D.C. Cir. 1997).
238. *Id.* at 1442-43.

cannot (or should and should not) engage in? A common sense approach appears best – if it looks like it is not in good faith and smells like it is not in good faith, it likely is not in good faith. And as many of the largest, most sophisticated employers have learned through adverse outcomes, the Board and the courts are unlikely to be misled by even the most complex strategies aimed at undermining good faith bargaining.

Certainly, "hard" bargaining is lawful. But under the Act, even employers that utilize permissible "hard" bargaining techniques must leave room to reasonably contemplate adapting their position towards an end of reaching agreement with the union. The danger for an employer is in allowing a "hard" bargaining stance to crystallize into a "win at all costs" mentality, which could lead to the use of unlawful surface bargaining tactics.