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LABOR LAW—DUTY TO BARGAIN—PERFORMANCE BOND NOT A MANDATORY SUBJECT OF BARGAINING.

Local 164, Bhd. of Painters v. NLRB (D.C. Cir. 1961).

Appellant labor union submitted a new contract to the Cheatham Painting Company at a bargaining meeting held prior to the expiration of an existing contract. Section 12 of the proposed agreement provided for the posting of a five thousand dollar performance bond by the company, which bond was to be forfeited to the union in the event of any substantial breach[1] of the agreement by the company. With one exception,[2] all the other provisions of the contract were agreed upon and the union and the company became deadlocked over section 12. Because of the impasse, strikes were called by the union at all Cheatham jobs in Florida. The company's ensuing charge of an unfair labor practice resulted in the issuing of a complaint by the General Counsel of the National Labor Relations Board, charging the union with violating section 8(b)(3) of the Labor Management Relations Act (Taft-Hartley Act),[3] on the ground that it had refused to sign a contract in which wages, hours, and other terms and conditions of employment had been agreed upon. The National Labor Relations Board held that the union had refused to bargain collectively with the employer in refusing to sign the agreement unless the performance bond provision was included, and ordered the union to cease and desist from insistence upon its inclusion in the agreement.[4] The United States Court of Appeals, District of Columbia Circuit, with one judge dissenting, *held* that, in insisting upon the performance bond, the union had left the sphere of "terms and conditions of employment" and conditioned its willingness to sign the agreement on a matter outside the statutory area of compulsory collective bargaining.[5] A petition to set aside the Board's order was denied and

1. The determination of whether or not an alleged breach was substantial was to be made by a Joint Trade Board as provided for elsewhere in the agreement. 293 F.2d 133, 134 (1961).

2. There was also some disagreement between the union and the company over section 13 which related to the employment of painters in areas outside of Jacksonville, Fla. The dispute on that point was settled to the satisfaction of the parties by the Board's order and therefore was not in issue in the instant case. 293 F.2d 133, 134, n.1 (1961).

3. 61 Stat. 136 (1947), 29 U.S.C. § 158 (1958): "(b) It shall be an unfair labor practice for a labor organization or its agent . . . (3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title; . . . "

4. 126 N.L.R.B. 997 (1960).

5. 61 Stat. 136 (1947), 29 U.S.C. § 158 (1958): "(d) For the purposes of this section, to bargain collectively is the performance of *the mutual obligation of the employer and the representative of the employees* to meet 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. . . . " [Emphasis added].

enforcement was ordered. *Local 164, Bhd. of Painters v. NLRB,* 293 F.2d 133 (D.C. Cir. 1961).

One of the effects of the Labor Management Relations Act of 1947 (Taft-Hartley Act), in amending the National Labor Relations Act of 1935 (Wagner Act), was to place the employer and employee on a nearer-to-equal footing in the area of collective bargaining.[6] The protection from unfair labor practices previously enjoyed only by the employee and the union became available to the employer as well. The instant case is concerned with the duty of the union to bargain collectively in good faith with regard to mandatory subjects of bargaining as provided in the statute. Thus, it is essential to bear in mind that the identical nature of the union's duty and the employer's duty in this area, as defined by Section 8(d) of the Act,[7] is such as to permit judicial and administrative precedent in one case to be applied without reservation to the other. Of primary importance to the decision in the instant case was the five to four decision of the United States Supreme Court in *NLRB v. Wooster Division of Borg-Warner Corp.*[8] There, in holding that a clause regulating the manner in which the union could call a strike[9] was not a "term or condition of employment", and that insistence upon the inclusion thereof in a collective bargaining agreement constituted a refusal to bargain, the Court introduced a new concept into the law of collective bargaining. Certain subjects which previously would have been deemed mandatory or non-mandatory, as determined by the good faith or lack thereof of the insisting party,[10] could now be classified as voluntary subjects, that is, subjects which may be bargained over if both parties are willing, but upon which neither party can be compelled to bargain. The instant case came in the wake of that decision and was found to be controlled by it. Like the pre-strike ballot clause in *Borg-Warner,* the performance bond clause was labeled a non-mandatory, voluntary subject of collective bargaining.

In a determination of whether or not it was correct for the court to conclude in the instant case that a performance bond proposal is not a "term or condition of employment", it is necessary to consider the re-

6. For Congressional declaration of purpose and policy see 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1958); Findings and declaration of policy, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958).

7. See note 5 *supra.*

8. 356 U.S. 342, 78 S. Ct. 718 (1958).

9. A certified international union submitted a proposed bargaining contract. The employer made a counter-proposal, recognizing the local union only as bargaining agent and providing that a strike could not be called, or the contract terminated or modified, unless a majority of employees in the unit, including non-union members, approved such action by secret ballot.

10. In NLRB v. Montgomery Ward & Co., 37 N.L.R.B. 100, enforced 133 F.2d 676 (9th Cir. 1943), it was held that the refusal of the employer to agree to a proposal whereby discrimination based upon union affiliation would be prohibited, demonstrated bad faith. The abandonment of this approach is indicated by the Court in *Borg-Warner,* citing the *Dalton* case, *infra,* note 20, in support of the proposition that good faith is immaterial if the subject is not within the area of mandatory bargaining.

action of the Board and the courts to such a provision in the past. While the Board's decision in the instant case indicates that this is only the second case in its history involving a *union's* insistence on a performance bond,[11] cases involving insistence by an employer will serve equally well to illustrate the Board's position. Performance bond clauses have been before the Board on numerous occasions and without exception have been treated as being beyond the scope of mandatory collective bargaining.[12] As early as 1940, the Board pronounced unequivocally, in speaking of a company's insistence that a union post a ten thousand dollar performance bond:

> The respondent, in refusing to execute a signed agreement binding upon both parties, unless the union posted a bond, sought to prefix the fulfillment of its statutory obligation with a condition not within the provisions, and manifestly inconsistent with the policy of the Act.[13]

Admittedly this decision was pre-Taft-Hartley, but it is demonstrably clear from a later decision of the Board that no fundamental change occurred in its approach subsequent to the passing of the Act. In 1951, the Board was confronted by a case wherein the respondent employer insisted that those earlier decisions of the Board which indicate that insistence upon a performance bond was unlawful were not controlling under the amended Act. In the words of the Board: "The Respondents clearly revealed that a performance bond was still a condition precedent to agreement. By such insistence we find that Respondents violated section 8(a)(5) and (1) of the Act".[14] More recently, in 1959, the Board found that an employer refused to bargain in violation of section 8(a)(5) and (1) of the Act by its insistence, as a condition to entering into a contract, that the certified union, a local, post a one hundred thousand dollar performance bond or, in lieu thereof, that the international parent union also sign the contract.[15] Another post-*Borg-Warner* decision of the Board that is significant involved a provision that liability for violation of the contract's no-strike clause should extend to the full resources of the local's international parent. The Board found that the respondent employer had violated section 8(a)(5) and (1) of the Act by insisting on the inclusion of such a clause as a condition to signing.[16] This last-mentioned case is of special interest for two reasons: (1) it specifically

11. The earlier case, Teamsters (Conway's Express) 87 N.L.R.B. 972 (1949), was the subject of judicial proceedings, 195 F.2d 906 (2d Cir. 1952), but the Board's ruling on the bond issue was not contested.

12. Brown and Root, Inc., 86 N.L.R.B. 520 (1949); Cookeville Shirt Co., 79 N.L.R.B. 667 (1948); Benson Produce Co., 71 N.L.R.B. 888 (1946); Interstate Steamship Co., 36 N.L.R.B. 1307 (1941); Scripto Manufacturing Co., 36 N.L.R.B. 411 (1941); Jasper Blackburn Products Corp., 21 N.L.R.B. 1254 (1940).

13. Jasper Blackburn Products Co., 21 N.L.R.B. 1240, 1254 (1940).

14. I.B.S. Manufacturing Co., 96 N.L.R.B. 1263, 1269 (1951).

15. Casco Products Co., 123 N.L.R.B. 766 (1959).

16. North Carolina Furniture, Inc., 121 N.L.R.B. 41 (1958).

cites *Borg-Warner* as controlling its decision; (2) unlike the Trial Examiner, the Board found it unnecessary to consider the good or bad faith of the employer[17] but rather based its finding of an unfair labor practice squarely on the fact that the provision in question did not relate to "wages, hours, and conditions of employment" within the meaning of section 8(d) of the Act. The validity of this analogy drawn between a liability clause and a performance bond clause cannot be questioned; indeed, it is insisted upon in a previously discussed case.[18] The two clauses function identically; they insure the insisting party to some degree against the possibility of a financial loss in the event of a breach by the other party to the agreement.

Unfortunately for the purposes of this analysis, cases involving performance bonds and the duty to bargain collectively have not been frequently before the courts.[19] The court in the instant case found it necessary to rely for support on a 1951 decision of the Fifth Circuit involving an employer's insistence that the union register under a Georgia statute so as to make it an entity amenable to suit in the state courts.[20] Some difficulty lies in determining the validity of the application of such cases to a post-*Borg-Warner* situation. It is true that for all practical purposes the courts and the Board prior to *Borg-Warner* were unable to conceive of insistence to the point of impasse upon a non-mandatory subject of collective bargaining as being compatible with the requirement of good faith. A violation of section 8(a)(5) or 8(b)(3) by the mere fact of uncompromising insistence, without any reference to good or bad faith, was unknown before the *Borg-Warner* decision. It is submitted, however, that it need not be a necessary consequence of this fact that such cases are sapped of all vitality as precedent. Two propositions remain true in spite of the modified approach of the courts under *Borg-Warner:* (1) traditionally, provisions relating to *enforcement* of a bargaining agreement have not been considered within the statutory mandate; (2) the financial responsibility of one of the parties to the agreement (usually the union) has consistently been considered a matter beyond the scope of mandatory bargaining. Oftentimes, as in the instant case, the two co-exist in the same clause; performance of the contract is sought to be secured by incorporating the financial liability of a party directly into the contract.

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17. It is interesting to contrast Economy Stores, Inc., 120 N.L.R.B. 1 (1958), with the case cited in note 15, *supra.* In the few months between the decisions, the *Borg-Warner* case was decided by the Supreme Court; its effect can be detected in the Board's regard for the element of good faith in the two cases.

18. Casco Products Co., note 15, *supra.*

19. In one of the few cases involving performance bonds to get beyond the Board, Taormina Company, 94 N.L.R.B. 884 (1951), the Court of Appeals, in enforcing, relied on grounds other than the performance bond provision. 207 F.2d 251 (5th Cir. 1953).

20. NLRB v. Dalton Telephone Co., 187 F.2d 811 (5th Cir. 1951), *cert. denied,* 342 U.S. 824, 72 S. Ct. 43 (1951).

Immediately after the *Borg-Warner* decision, it was not possible to tell whether the effect of that decision would be to lead the Board and the courts to exchange their role as usher to the bargaining table for that of referee.[21] Having decided that a category should exist of bargaining proposals that may properly be introduced at the bargaining table but which cannot be insisted upon to the point of impasse, it remained only for the Court to specify those subjects that may be considered voluntary. It would seem that if the instant case were to be reviewed by the Supreme Court, the decision would do much to indicate whether it was the intention of the Court to (1) narrowly construe "terms and conditions of employment", by characterizing provisions such as a performance bond clause as a voluntary subject, or (2) construe the phrase broadly to include nearly all reasonable proposals insisted upon in good faith at the bargaining table. The District of Columbia Circuit, upon the authority of the Fifth Circuit in *Dalton,* has, at least at first glance, committed itself to a position favoring governmental regulation of the substantive solution of labor-management differences. The case of *NLRB v. Insurance Agent's International Union,* decided subsequently to *Borg-Warner,* militates strongly against the taking of that position.[22] In that case the Supreme Court said:

> [I]t remains clear that section 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the *terms* of collective bargaining agreements. . . . Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental powers to regulate the *substantive solution* of their differences. . . . Our labor policy is not presently erected on a foundation of government control of the results of negotiations.[23] [Emphasis added.]

This decision, uttered by the Court while still standing in the shadow of *Borg-Warner,* indicates clearly that the use of economic pressure by the parties to a bargaining agreement was not intended to be curtailed as a result of the *Borg-Warner* decision. The Court was explicit in holding that tactics bringing economic pressure to bear upon a party already bargaining in good faith over a mandatory subject would not adversely affect the good faith of the other party at the bargaining table. Taking the *Borg-Warner* and *Insurance Agents'* decisions together, it appears that the Court hopes to tread a middle path, at once restricting the area of collective bargaining (to a degree yet undetermined), while preserving the cornerstone of collective bargaining — the use of economic pressure. As long as the question of good or bad faith at the bargaining table is uninfluenced by the simultaneous exercise of economic pressure, it would seem that

21. See Cox, *Labor Decisions of the Supreme Court at October Term, 1957,* 44 VA. L. REV. 1057, 1074-1086 (1958).

22. 361 U.S. 477, 80 S. Ct. 419 (1960). Edgerton, J., dissenting in the instant case, relies to some extent on this decision of the Supreme Court.

23. *Id.* at 487, 488, 490, 80 S. Ct. 426, 427.