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Valparaiso University

COLLECTIVE BARGAINING: THE BOARD AND THE SUBSTANTIVE TERM

INTRODUCTION

The National Labor Relations Act, since its inception, has been unclear as to the behavior to be followed by employers, employees and unions during the bargaining process. One reason for this lack of clarity was Congress' intention that the Act govern not only the labor-management problems apparent in 1935, the year that the Act became law, but also new types of bargaining problems which might arise at some future date. The Court in *Weems v. United States* said:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not therefore be necessarily confined to the form that evil had heretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth.[1]

Thus Congress, realizing that it could not envision all the possible situations which might arise under the Act, wisely allowed enough flexibility to enable the National Labor Relations Board to make its determinations on a case to case basis.[2] But with this flexibility came the inevitable conflict as to the proper scope of Board action under the loosely defined terms of the Act.

Section 8(a)(5) of the NLRA provides that an employer's refusal to bargain collectively with the representatives of his employees shall be an unfair labor practice.[3] In 1936 the Board adopted *Houde Engineering Corp.* which held that lack of good faith was a valid consideration in determining whether the method of collective bargaining used by the employer was proper.[4] The Board continued to determine the propriety of collective bargaining agreements in a manner which led them beyond the door of the bargaining room to consider employers' conduct at all

1. Weems v. United States, 217 U.S. 349, 373 (1910).
2. Fibreboard Paper Products Corp. v. NLRB, 322 F.2d 411 (D.C. Cir. 1963). The Board was to gain experience in their daily working with the developments in industry—experience Congress did not or could not be expected to obtain.
3. 49 Stat. 453 (1935), *as amended*, 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).
4. Houde Engineering Corp., 1 N.L.R.B. (old) 35 (1934), *noted in* 79 CONG. REC. 7571 (1935).

levels. By enacting section 8(d) as an amendment to the NLRA,[5] Congress reaffirmed its position that industrial peace should be maintained without Board intervention into the actual bargaining process. However, the Board continued to extend the scope of its authority over the bargaining process and today scrutinizes not only the conduct of the parties outside the conference room,[6] but also the conduct during negotiations[7] and the reasonableness of the position taken by the parties regarding the subject in issue.[8]

Section 10(c) of the NLRA gave the Board power to use the remedies which would best effectuate the policies of the Act.[9] Since Congress did not change this section in any manner while adding 8(d) to the Act, they may be taken to have impliedly reaffirmed the powers of the Board in this area.[10] However, the recent decision of *H.K. Porter*[11] seems to refute such reaffirmation of 8(d). In that case, the Board was allowed to place a substantive term, a check-off provision, into the parties' contract since the court felt that the circumstances required such action.[12] In *H.K. Porter* the Board actually violated the congressional intent behind section 8(d)—that the Board is not to intervene into the actual bargaining process.[13] But the court of appeals indicated that in this instance there was no other way for the H.K. Porter Co. to show its good faith.[14]

Section 10(c) empowers the Board to prevent unfair labor practices

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5. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964):
> For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives 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. . . .

6. Reed & Prince Mfg. Co., 90 N.L.R.B. 850 (1953); "M" System, 129 N.L.R.B. 527 (1960); Senorita Hosiery Mills, Inc., 115 N.L.R.B. 1304 (1956).

7. Reed & Prince Mfg. Co., 90 N.L.R.B. 850 (1953); Duro Fittings Co., 121 N.L.R.B. 377 (1958); McCullock Corp., 132 N.L.R.B. 201 (1961).

8. Reed & Prince Mfg. Co., 90 N.L.R.B. 850 (1953); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Rhodes-Holland Chevrolet Co., 146 N.L.R.B. 1304 (1964).

9. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964). Section 10(c) states that the Board upon finding an unfair labor practice:
> shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement with or without backpay, as will effectuate the policies of the Act.

10. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

11. United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967). (Hereinafter referred to as H.K. Porter).

12. *Id.*

13. 61 Stat. 142, 29 U.S.C. § 158(d) (1964); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

14. United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967).

of the employer and union alike.[15] This section does not specifically set out the remedies to be used, but rather allows the Board to adopt a reasonable remedy to fit the particular fact situation.[16] The court in *H.K. Porter* interpreted 10(c) to mean that even direct intervention into the bargaining process was allowable in a proper case. This decision, then, presents a direct confrontation between 10(c) and section 8(d) of the Act which proscribes intervention into the actual bargaining process.[17]

This note is concerned with the extent to which the Board may intrude upon the voluntary nature of collective bargaining. More specifically, the power of the Board to formulate a remedy which imposes upon a violator of the Act a substantive term of the contract being negotiated will be discussed.

THE FACTUAL BACKGROUND

In 1961 the United Steelworkers of America was certified as the collective bargaining representative of the production and maintenance employees at H.K. Porter's plant in Danville, Virginia. Contract negotiations were started but an agreement was never reached. The Board found that H.K. Porter Co. had failed to bargain in good faith[18] and summary enforcement of the Board's order was granted.[19] Following this decision, twenty-one meetings took place from October 23, 1963 to September 10, 1964, when negotiations ceased.[20] Three items remained unresolved: wages, accident and health insurance, and check-off procedures.[21] The check-off provision was discussed at practically all of the bargaining sessions. At each session, the company refused the union's proposal that a check-off provision be included in the contract, claiming only that this was "union business" which the company would not promote.[22] The union, on several occasions, offered to withdraw its check-off request if the company would accept an alternative proposal to collect dues,[23] but these alternative proposals were also rejected. The company did have collective bargaining agreements which included check-

15. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

16. Fibreboard Paper Products Corp. v. NLRB, 322 F.2d 411 (D.C. Cir. 1963); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). The usual remedy applied by the Board is a cease and desist order with a directive to once again bargain collectively with the other party. National Labor Relations Act § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

17. United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967).

18. This decision is unreported except as noted in United Steelworkers of America v. NLRB, 389 F.2d 295, 296 (D.C. Cir. 1967).

19. *Id.*

20. 389 F.2d 295.

21. *Id.* at 297.

22. *Id.*

23. *Id.*

off provisions with unions at other plants.[24] There appeared to be little inconvenience to the company involved in effectuating a check-off provision since it already made periodic payroll deductions at its Danville plant for a variety of other purposes.[25]

The Board again found H.K. Porter to be bargaining in bad faith and again issued a cease and desist order.[26] The Board's order was enforced in *United Steelworkers of America v. National Labor Relations Board.*[27] In its opinion, the court noted an inconsistency in the Board's order. The trial examiner in footnote nine of his findings said:

> This is not to say that in the resumed bargaining sessions . . . respondent will be forced to agree to some form of check-off. I only find . . . (that) respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled.[28]

This conclusion of the examiner conflicts with his finding that the company's refusal to grant a check-off provision was for the "purpose of frustrating agreement with the union."[29] The court of appeals said that to permit the company to refuse a check-off for some reason other than that which they had already advanced would make a mockery of the collective bargaining required by the Act.[30] Therefore, the court held that the text of the trial examiner's decision should control and ruled that footnote nine be disregarded.[31] The court also invited the Board to initiate contempt proceedings if the Board's order, as interpreted by the court, was not complied with.[32]

In the ensuing negotiations the company took the position that the decree was another order to bargain in good faith—this time on the issue of dues collections.[33] Accordingly, they offered a table in the payroll room for the union to use in collecting dues. The union, on the other hand, took the position that they were entitled to a check-off

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24. *Id.*
25. *Id.* These included the purchase of United States Savings Bonds, Health and Life Insurance coverage for employee's dependents and contributions to the United Givers Fund.
26. H.K. Porter Co., 153 N.L.R.B. 1370 (1965).
27. 363 F.2d 272 (D.C. Cir. 1966).
28. *Id.* at 276 n.16. The trial examiner's decision was adopted by the Board. *Id.* at 273.
29. *Id.* at 276 n.16.
30. *Id.*
31. *Id.*
32. *Id.* at 276.
33. United Steelworkers of America v. NLRB, 389 F.2d 295, 298 (D.C. Cir. 1967).

provision in the contract; basing this position on their interpretation of the court's holding. Negotiations again failed and the union filed for a clarification of the decree. The court, in denying this motion,[34] again offered the Board the opportunity to bring contempt proceedings. The Board declined to bring these proceedings saying:

> The respondent having satisfactorily complied with the affirmative requirements of the Order in the above entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisions of the Order, the case is hereby closed. Please note the closing is conditioned on continued observance of said Order and does not preclude further proceedings should subsequent violations occur.[35]

The union again filed its motion in the D.C. Court of Appeals, this time asking the court to reconsider its earlier denial of the motion to clarify the decree. The court sustained this motion saying:

> We resolved this contradiction by interpreting the Board's order as foreclosing the company from dreaming up new reasons for refusing a check-off. By this we did not mean to say that the Board order required the company simply to agree to a check-off provision. Though it would not be permitted to proffer new reasons for opposing such a clause, it was still free to seek something in return for granting it. Unless it did so, a presumption of continuing bad faith could not be dispelled.[36]

The court then stated that in an appropriate case the Board could simply *order* the company to grant a check-off provision,[37] thus permitting, for the first time, affirmative intervention by the Board beyond the doors of the conference room and into the substance of the contract itself. The court recognized that the final determination must rest with the Board.[38] However, since the court of appeals in *H.K. Porter* felt the bargaining impasse could continue, some guidance with respect to the circumstances under which a check-off could be imposed as a remedy for bad faith bargaining was in order.[39]

NLRA: Remedy for Breach of Duty to Bargain in Good Faith

The National Labor Relations Act imposes a duty upon the em-

34. *Id.*
35. *Id.* Apparently, the Board accepted the company's interpretation of the court's decree.
36. *Id.*
37. *Id.* at 300.
38. *Id.* at 298.
39. *Id.*

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ployer and union to bargain collectively,[40] and holds that these negotiations must meet certain requirements.[41] Sections 8(a)(5),[42] 8(b)(3)[43] and 8(d)[44] are to be read together as forming the definite rules governing the affirmative duty to bargain collectively.[45]

Section 8(d) secures to the employer and the union the right of freedom of contract by ruling that they are not compelled to agree to a proposal or make a concession.[46] This section has been further interpreted by the courts to mean that the Board is not to impose a substantive term upon the parties involved in collective bargaining either directly or indirectly.[47] Congress attempted to reaffirm the position that collective bargaining was to be voluntary in nature by the enactment of 8(d).[48] Congress had envisioned the Board as only an escort whose influence should end at the doors to the conference room.[49] Section 8(d) was Congress' attempt to curtail any further movement of the Board which would interfere with the bargaining process. Neither the union nor the employer is required to accept a proposal which it *honestly believes* is unreasonable and against its interests.

Thus, the question is presented concerning what the consequence may be to a party who does not act in good faith. Let us assume a specific example. A demand is presented to a party, reasonable under the circumstances, and the party can show nothing against its interests in accepting the proposal except that it would be a promotion of what it considers to be exclusively the concern of the other party. The Board, following the proper charges, generally executes a cease and desist order concerning the violator's actions. Let us assume still further that the violating party has a history of violations under the Act and one violation concerns a prior determination of bad faith in the same contract, a

40. NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960); NLRB v. American National Insurance Co., 343 U.S. 395 (1952).

41. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964). Section 8(d) requires that the parties: 1) meet at reasonable times; 2) confer in good faith; and 3) execute a written agreement incorporating any agreement reached, if requested by either party. *Id.*

42. 49 Stat. 453 (1935), *as amended*, 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964):

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a).

43. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1964).

44. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

45. NLRB v. Wooster Division of Borg-Warner Co., 356 U.S. 342 (1957).

46. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

47. NLRB v. American National Insurance Co., 343 U.S. 395 (1952).

48. The Taft-Hartley Act added § 8(d) to the NLRA in 1947. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

49. 79 CONG. REC. 7660 (1935) (statement of Senator Walsh); note 69 *infra*; NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

contract which has been in the bargaining process for seven years. This is the situation presented by *H.K. Porter*.[50]

Section 10(c)[51] empowers the Board to prevent unfair labor practices of both employer and union. This section was enacted to allow the Board to fulfill the underlying policy of the Act: the maintenance of industrial peace.[52] The Board, under 10(c), is to use a cease and desist order with such affirmative action as will best effectuate the policies of the Act.[53] However, the Act does not set out the specific remedy the Board is to use for each unfair labor practice; rather the Board is to attempt to return the parties to the *status quo* as it existed prior to the unfair labor practice.[54] The Board must, therefore, attempt to undo the violation, considering the full circumstances before issuing an order.[55] The order must also contain a remedy which is reasonably directed to a correction of the wrong.[56] The Board's duty, then, is to restore conditions as they existed prior to the violation without imposing upon the violator either a penalty which is not reasonably directed toward the Board's duty of restoring the *status quo ante*,[57] or a remedy which is punitive in nature.[58] The Act is remedial in nature and should not become punitive.[59] One writer has suggested that the courts may be employing the remedial-punitive distinction to create a test of reasonableness in reviewing the Board's order rather than using the test as a measure of whether the order effectuates the policy of the Act.[60] It is further suggested that determining what action is "remedial" and what

50. United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967).

51. National Labor Relations Act § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964):

> [S]hall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement with or without backpay, as will effectuate this Act.

Id.

52. 49 Stat. 449 (1935), *as amended*, 29 U.S.C. § 151 (1964).

53. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

54. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir. 1964); J. P. Stevens Co., 157 N.L.R.B. 869 (1966); Elson Bottling Co., 155 N.L.R.B. 714 (1965).

55. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

56. *Id.*; Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Fibreboard Paper Products Corp. v. NLRB, 322 F.2d 411 (D.C. Cir. 1963).

57. Fibreboard Paper Products Corp. v. NLRB, 322 F.2d 411 (D.C. Cir. 1963); Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir. 1964).

58. Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir. 1964); Edison Co. v. NLRB, 305 U.S. 197 (1938).

59. Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir. 1964); Edison Co. v. NLRB, 305 U.S. 197 (1938).

60. Note, *Runaway Shop: Enforced Bargaining At a New Location*, 2 VAL. U.L. REV. 379, 383 (1968).

action is "punitive" in nature is merely a matter of semantics.[61]

Further, if the only remedy allowed is a return to the *status quo ante*, then it may be possible for an employer to prevent, for an indefinite time, a union from organizing the employees. The employer could prevent an agreement from ever taking place and defeat the union through a continual showing of bad faith in bargaining. The Board must be allowed to put some "teeth" into the Act to prevent employers and unions from taking advantage of their wrongs[62] and indefinitely skirting the policies of the Act. The Board will have to weigh all the factors involved and impose upon the violator a remedy which will give some meaning to the Act. This remedy must avoid an unreasonable result in relation to the violation and the surrounding circumstances.[63]

Partly because of the great discretion given the Board, Congress placed the power to review the Board's determination in the court of appeals.[64] The court of appeals is to decide whether a remedy executed by the Board is properly supported by the circumstances. Thus, in *H.K. Porter*[66] the question became whether the particular situation justified the intrusion upon the parties' freedom of contract by the imposition of a check-off provision.

The Impact of H. K. Porter

Prelude to H.K. Porter: Developments Under the NLRA Prior to the Enactment of 8(*d*)

Congress, through the NLRA,[67] sought to resolve the problems

61. *Id.*
62. Franks Bros. v. NLRB, 321 U.S. 702 (1944).
63. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).
64. 61 Stat. 147 (1947), 29 U.S.C. § 160(f) (1964).
65. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). In NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318, 342 (1940), the Court stated:

> [I]f the Board . . . (acting) within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a "hearing," which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings upon substantial evidence and has ordered *an appropriate remedy,* a like obedience to the statutory law requires the court to grant enforcements of the Board's order. (emphasis added)

These cases indicate that the courts in their supervisory power have the right to determine if an appropriate remedy has been ordered by the Board. The court in *H.K. Porter* recognized that the final formulation of the order rests with the Board, but felt that because of the peculiar facts in *H.K. Porter* and because the unfair labor practice could continue, some guidance was necessary for the Board to use in this formulation. United Steelworkers of America v. NLRB, 389 F.2d 295, 298 (D.C. Cir. 1967). In essence the D.C. Circuit Court of Appeals rejected the Board's interpretation of their own order as not being an appropriate remedy and suggested to the Board a guide to formulate what the court considers an appropriate remedy under the facts.
66. United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967).
67. The Taft-Hartley Act added § 8(d) to the NLRA in 1947. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

inherent in labor negotiations. The creation of the National Labor Relations Board as a sounding board for these problems and as the administering body of the Act was the initial step toward establishing Congress' goal of industrial peace.[68] Congress felt the best way to obtain this goal was through collective bargaining. Thus, the Board was given the power to escort the employer and the representative of the employees to the doors of the negotiating room.[69]

The Act incorporated the *Houde Engineering* decision of 1934,[70] but did not find it necessary to explicitly use the term good faith.[71] The inference is that the employer must deal reasonably with the employees. Congress intended collective bargaining to be voluntary in nature and rejected the idea of imposing terms or compulsory arbitration on the parties.[72] Thus, the Act does not compel agreement, but does contemplate that the parties will approach the table with an open and fair mind.[73]

The First Annual Report of the National Labor Relations Board indicated that something more was needed to effectuate the policies of the Act than the mere power to bring the parties together.[74] The Board felt that while the manner and extent of the negotiations needed to fulfill the collective bargaining duty may vary from case to case, one essential element remains constant: the serious intent to adjust differences and reach a ground acceptable to both parties.[75] The underlying theory of collective bargaining is to afford free opportunity to negotiate and

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68. 79 CONG. REC. 7573 (1935) (remarks of Senator Wagner).

69. [W]hen the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind these doors is not inquired into, and the bill does not seek to inquire into it.

79 CONG. REC. 7660 (1935) (remarks of Senator Wash). *See also* NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

70. 79 CONG. REC. 7571 (1935) (remarks of Senator Wagner).

71. The Congressional Record indicates acquiesence in the *Houde Engineering Corp.* decision of 1934 and its "incontestibly sound principle," but failed to explicitly include the term *good faith* into the NLRA. *Id.*; *see* NLRB v. Wooster Division of Borg-Warner Co., 356 U.S. 342, 354 (1957).

72. [T]he very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met.

79 CONG. REC. 7571 (1935) (remarks of Senator Wagner). *See also* NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

73. Globe Cotton Mills v. NLRB, 103 F.2d 91 (5th Cir. 1943); NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943); NLRB v. American National Insurance Co., 343 U.S. 395 (1952).

74. 1 N.L.R.B. Ann. Rep. 85 (1936).

75. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936); NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960); Globe Cotton Mills v. NLRB, 103 F.2d 91 (5th Cir. 1943); *see* NLRB v. Truitt Mfg. Co., 251 U.S. 149 (1956).

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bring about the adjustments which the Act does not compel.[76] Therefore, while the Act does not compel that an agreement on specific substantive terms be reached, the Act does contemplate a freely made contract between the representatives of the employees and the employer.[77] This was and is the manifest objective of Congress in providing for collective bargaining.[78]

The Board in *NLRB v. Montgomery Ward*[79] stated that a good faith compliance with the Act requires that the agreement be reduced to writing upon request of one of the parties. The parties must actually cooperate, *e.g.*, when a counterproposal is asked for, one should be offered.[80] The *Montgomery Ward*[81] decision, and those following, began the movement of the Board through the doors and into the negotiating room. The Board was now taking into consideration the conduct of the parties at the conference table, extending the scope of its review to the conduct of the parties during bargaining.

The Act was not amended during the first ten years of its existence. However, changes in economic conditions and the relative strength of management and labor had created the feeling that the Act should be updated. In amending the Act, Congress reaffirmed some of the old positions by clarification in new subsections[82] and created a new section of the Act to prevent the unions from using their newly acquired strength unfairly.[83]

Reaffirming its position that collective bargaining was to be voluntary in nature, Congress enacted section 8(d):

> For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives 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

76. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936); NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

77. NLRB v. Montogmery Ward & Co., 133 F.2d 676 (9th Cir. 1943); *In re* Highland Park, 12 N.L.R.B. 1238 (1939), *enforced*, 110 F.2d 632 (4th Cir. 1940).

78. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

79. 133 F.2d 676 (9th Cir. 1943).

80. NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943); *see also* Globe Cotton Mills v. NLRB, 103 F.2d 91 (5th Cir. 1943).

81. 133 F.2d 676.

82. National Labor Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964); *see also* NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960); NLRB v. American National Insurance Co., 343 U.S. 395 (1952).

83. Section 8(b) of the NLRA, as amended in 1947, sets out specific acts which the Board considers to be union unfair labor practices. 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1964).

> 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. . . .[84]

Section 8(d), then, imposes specific duties concerning collective bargaining on employer and union alike. Section 8(d) also gave the employer and union certain rights; specifically the right during collective bargaining to reject a proposal or to refuse to grant a concession.

The Board's Power Over Substantive Terms

Congress placed a limitation upon Board action in section 8(d) by stating that parties were not compelled to agree to proposals or to make concessions on positions fairly maintained.[85] This section reaffirms Congress' position that the Act was not meant to regulate the substantive terms discussed in collective bargaining. In other words, the Board is not to write labor contracts or to set itself up as judge of concessions or proposals the parties may or may not make.[86] Yet, the Board has consistently, in the guise of determining good faith, found it necessary to extend the area it must consider.

The essence of collective bargaining is that either party may decide if the proposals made to it are satisfactory. The decision of employer and union alike should not be inhibited as long as there is a *bona fide* effort to arrive at a collective bargaining agreement.[87] The Board's power is limited in that the Board may not directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.[88] The term "bargain collectively" was expressly used by Congress and supported by the enactment of section 8(d). The Board is foreclosed from passing on the desirability of the substantive terms of labor contracts—what the contract should contain is an issue to be determined across the bargaining table, *not by the Board.*[89] The holding in *H.K. Porter,* the imposition of a check-off provision in return for a reasonable concession, is a direct contradiction of *this* intent of Congress.

The Board has, especially in recent years, developed criteria for the determination of good faith. This determination of good faith is based on an over-all view of the prior history of the parties' behavior in bar-

84. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).
85. *Id.*
86. NLRB v. American National Insurance Co., 343 U.S. 395 (1952).
87. *Id.*
88. NLRB v. Herman Sausage Co., Inc., 275 F.2d 229 (5th Cir. 1960); NLRB v. American National Insurance Co., 343 U.S. 395 (1952).
89. NLRB v. American National Insurance Co., 343 U.S. 395 (1952).

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gaining,[90] the reasonableness of the parties' conduct at the negotiations,[91] and the reasonableness of the proposals and/or counterproposals of the parties.[92] The Board has adopted a policy of studying the substance of the terms set out by the parties in order to determine the existence of good faith. This is necessary because of the reference in section 8(d) to "hours, wages and other terms and conditions of employment. . . ."[93] The Act, in failing to fully define these terms, gave the Board the opportunity to divide the issues to be discussed at the bargaining table into three categories: mandatory, voluntary and illegal. Illegal subjects are those specifically outlawed by the Board, *e.g.*, the terms stated in 8(d). Voluntary subjects are those which the Act does not cover under its express terms in 8(d), but which are not illegal. Illegal subjects are those specifically outlawed by the Board; e.g., the parties may not bargain as to the inclusion of a closed shop clause in their contract.[95] A mandatory subject is the only one of the three which may carry the bargaining to an impasse.[96] Neither party may press a voluntary subject to an impasse, nor negotiate on an illegal subject without violating the Act.[97] The Board must, therefore, look to the substantive terms to decide under which category they fall and then apply the proper standards in order to correctly determine whether proper bargaining and good faith existed.

Recently, in *White v. NLRB*,[98] the court refused to enforce an order of the Board. The Board, on the basis of the employer's proposal, had found the employer's position on a specific term to be bad faith bargaining. The court of appeals in reversing the finding said:

> We do *not* hold that the mere content of proposals and counterproposals would *not* be sufficient evidence of bad faith, but here there is insufficient evidence to enforce a finding of bad faith.[99]

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90. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953); "M" System, 129 N.L.R.B. 527 (1960); Senorita Hosiery Mills, 115 N.L.R.B. 1304 (1956).

91. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953); "M" System, 129 N.L.R.B. 527 (1960).

92. Rhodes-Holland Chevrolet Co., 146 N.L.R.B. 1304 (1964); White v. NLRB, 255 F.2d 564 (5th Cir. 1958) (dictum).

93. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

94. NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1957).

95. National Labor Relations Act § 8(a)(1), (3) and (b)(1)(A), (2), *as amended*, 29 U.S.C. § 158(a)(1), (3) and (b)(1)(A), (2) (1964).

96. NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1957); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

97. National Labor Relations Act § 8(a)(1), (3) and (b)(1)(A), (2) *as amended*, 29 U.S.C. § 158(a)(1), (3) and (b)(1)(A), (2) (1964).

98. 255 F.2d 564 (5th Cir. 1958).

99. *Id.* at 569 (emphasis added).

The case is not cited for the proposition that the content of proposals and counterproposals would not be sufficient for a finding of bad faith. However, *White* did reaffirm the position taken by the court in *American National Insurance v. NLRB*[100] in stating that the Board should not pass upon the desirability of the substantive terms of the agreement. The Board had extended its scope of review in making good faith determinations by viewing the content of proposals made by the parties to the collective bargaining.[101]

The Board has, on occasion, imposed a substantive term on the parties, but this type of action by the Board has been limited to one type of fact situation. An example of this type of action is presented by a previous H.K. Porter Co.[102] violation. The company had argued for a no-strike clause to be included in the contract, but the union felt this entitled them to the inclusion of an arbitration clause. An impasse was reached and charges of violation of the Act were brought. The Board held that insistence upon gaining a specified bargained-for provision in certain cases carries with it the duty to accept the Board's determination that the corollary of that position must be granted.[103] The Board held the arbitration clause to be the *quid pro quo* of the no-strike clause,[104] and that the union was entitled to this provision in the contract. This does not mean that both clauses must be present in the contract. The union could offer other proposals; but, through the power of the Board, the union could place an arbitration clause in the contract if the employer insists on a no-strike clause.[105] If the Board makes a determination that one party's right will be infringed upon by a bargaining proposal insisted upon by the other, the Board is empowered to make a determination as to the *quid pro quo* of that proposal. The party whose right will be infringed upon is entitled to have a proposal, as determined by the Board, included in the contract unless the other party withdraws its original proposal.[106] The Board-determined provision may also be used to bargain in relation to other proposals made by the opposing party and not just the proposal *quid pro quo* alone. In other words, the *quid pro quo* of the first proposal may be bargained away on another subject and is

100. 343 U.S. 395 (1952).
101. White v. NLRB, 255 F.2d 564 (5th Cir. 1958); NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1957).
102. The violation and decision of the trial examiner is unreported, but is noted in United Steelworkers of America v. NLRB, 389 F.2d 295, 296 (D.C. Cir. 1967).
103. *Id.*; *accord*, "M" System, 129 N.L.R.B. 527, 550 (1960).
104. United Steelworkers of America v. NLRB, 389 F.2d 295, 296 (D.C. Cir. 1967); "M" System, 129 N.L.R.B. 527, 550 (1960).
105. United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967); "M" System, 129 N.L.R.B. 527 (1960).
106. "M" System, 129 N.L.R.B. 527 (1960).

not mandatorily included within the parties' final contract. This demonstrates only one of the intrusions which the Board has seen fit to make on the parties' right of freedom of contract. A definite intrusion upon this right is again shown when a company is found in bad faith because the employer can find no proposal with which he can agree in an ordinary modern day contract submitted to him.[107] This is often held to be evidence of "a desire not to reach an agreement with the union."[108] Although this does not subject the parties to a particular proposal, it does mean that they must agree to something. This runs contra to the voluntary nature of collective bargaining and demonstrates the use of the substantive term by the Board to determine whether the parties' positions have been fairly maintained.

H.K. Porter[110] may be a logical extension of this trend. There, the Board made a determination that the company's only reason for refusing the check-off provision was "to frustrate the making of an agreement with the union." The Board based its holding primarily on the position which the company maintained at the negotiating table.[111]

The check-off provision is included in ninety-two percent of all contracts in the manufacturing industry[112] and most of those contracts in the remaining eight percent provide for some alternative method of collecting dues.[113] The check-off can be of great value to the union in many instances. For example, the employees' homes may be scattered over a wide area, thus presenting a tremendous problem of intra-union communication, especially if the company employs a great number of people. At the same time, the check-off is of small consequence to the employer.[114] A recommendation has been made that the simple refusal to agree to a check-off, paid for by the union, should itself be recognized "as a criteria of bad faith bargaining."[115] On the other side, it has been argued that the right of the union to collect dues on company property during non-working hours does not necessarily give the right to have a check-off proposal in-

107. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953); Senorita Hosiery Mills, 115 N.L.R.B. 1304, 1312 (1956).

108. Senorita Hosiery Mills, 115 N.L.R.B. 1304, 1313 (1956).

109. The trial examiner in *H.K. Porter* found that the company's position was not fairly maintained. 153 N.L.R.B. 1370, 1372 (1965).

110. United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967).

111. *Id.* at 299.

112. *Id.* at 302 n. 14.

113. *Id.*

114. Generally speaking, the check-off would only be an additional wage deduction from the employees' wages, and of very small expense to the company. In the situation where the cost might be significant, it is possible to request the union pay the cost of the convenience which this provides to the union.

115. United Steelworkers of America v. NLRB, 389 F.2d 295, 302 n.16 (D.C. Cir. 1967).

cluded as a provision of the collective bargaining contract.[116] However, the Board has determined that the check-off provision is a *mandatory subject* of bargaining.[117] The Act created the opportunity for the Board to classify the check-off as another mandatory, voluntary or illegal subject according to its special treatment of the category: wages, hours, and other terms and conditions of employment.[118] The action by the Board and the treatment by the Act, considered in connection with the union's right existing even without a contract provision, means that the Board may contemplate the reaching of something more than an impasse when the subject of a check-off proposal is negotiated.[119]

All these factors point, in the proper situation, to the imposition of a check-off provision with a reasonable concession by the non-violating party as a logical extension of the trend of the labor cases.[120]

Collective bargaining is the core of the National Labor Relations Act. If the Board cannot require the employer and the employees' representatives to meet in such a manner as to give effect to collective bargaining, then the Act will fail.[121] The employer could otherwise continually avoid the strictures of the Act by again bargaining in bad faith after complying with the Board's cease and desist order regarding its eariler bad faith dealings. The decisions of the courts say that a position fairly maintained is not required to be yielded.[122] The definition of "fairly maintained" is evidently left for Board determination. Taking all factors into consideration the Board must execute the proper remedy to uphold the intent of the Act. Another factor to consider is the court's statement in *H.K. Porter* that given the right circumstances, a check-off provision could be imposed without requiring a reasonable concession

116. *Id.* at 297; United Steelworkers of America v. NLRB, 363 F.2d 272 (D.C. Cir. 1966).

117. NLRB v. Darlington Veneer Co., 236 F.2d 85 (4th Cir. 1956); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953).

118. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

119. United Steelworkers of America v. NLRB, 389 F.2d 295, 302 (D.C. Cir. 1967).

120. In United Steelworkers of America v. NLRB, 390 F.2d 846 (D.C. Cir. 1968), the court rejected the union's contention that the only adequate remedy would be to require the company to accept a voluntary check-off. The court reasoned that Congress intended that the Board exercise a certain amount of discretion. Failure to order the employer to install a voluntary check-off was not an abuse of this discretion. *Id.* at 853.

121. White v. NLRB, 255 F.2d 564, 569 (5th Cir. 1958), *citing in the dissent* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

122. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964); NLRB v. My Store, Inc., 345 F.2d 494 (7th Cir. 1965); NLRB v. Herman Sausage Co., Inc., 275 F.2d 229 (5th Cir. 1960); White v. NLRB, 255 F.2d 564 (5th Cir. 1958) (dissent); "M" System, 129 N.L.R.B. 527 (1960).

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on other terms by the union.[123] This would be yet another step by the Board toward making its influence felt at the negotiating table.

Effective Compliance with the NLRA

The Board, while it is not to sit in judgment on the substance of contract terms,[124] is not to be blinded by mere surface bargaining or empty talk.[125] In *NLRB v. Reed & Prince Mfg. Co.*[126] the court approved a Board test which allowed consideration of prior history of the parties as well as reasonableness of their positions on particular bargaining subjects in determining compliance with the Act.[127] Compliance requires the parties to act in good faith. In *"M" System,*[128] the Board maintained that it was to consider the total conduct of the parties and not just their actions during the negotiations. Good faith requires something more than the mere meeting of the parties; it requires an open and fair mind[129] and presupposes a desire to reach an ultimate agreement.[130] The Act does not require the yielding of a position fairly maintained, but section 8(d) may not be used as a cloak to protect the employer where bad faith elsewhere appears. A company could otherwise continue to violate the Act and could succeed in ousting the union despite the Board's issuance of a cease and desist order concerning its actions. If the remedies are insufficient to prevent the employer from taking advantage of his wrongdoing, a new union, struggling to gain support, could be fatally handicapped by a long delay in accomplishing its promised goals to the employees.[131]

The Act attempts to remove this danger by the use of section

123. United Steelworkers of America v. NLRB, 389 F.2d 295, 300 (D.C. Cir. 1967).

124. NLRB v. American National Insurance Co., 343 U.S. 395 (1952); NLRB v. Herman Sausage Co., Inc., 245 F.2d 229 (5th Cir. 1960); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953).

125. NLRB v. My Store, Inc., 345 F.2d 494 (7th Cir. 1965); NLRB v. Almeida Bus Lines, Inc., 331 F.2d 729 (1st Cir. 1964); NLRB v. Herman Sausage Co., Inc., 245 F.2d 229 (5th Cir. 1960); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953); "M" System, 129 N.L.R.B. 527 (1960).

126. 205 F.2d 131.

127. *Id.* The Board is to take into account the prior history of the parties while viewing the reasonableness of the position on a particular bargaining subject.

128. 129 N.L.R.B. 527, 550 (1960).

129. *In re* Highland Park, 12 N.L.R.B. 1238 (1939), *enforced,* 110 F.2d 632 (4th Cir. 1940); Globe Cotton Mills v. NLRB, 103 F.2d 91 (5th Cir. 1943).

130. NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

131. Ross, *Analysis of Administrative Process Under the Taft-Hartley Act* in 63 LAB. REL. REP. 132 (BNA 1966). The United Steelworkers of America would have a substantial problem of communications: their closest office was eighty-five miles from the Porter plant and the employees were scattered over a wide area. United Steelworkers of America v. NLRB, 389 F.2d 295, 302 n.15 (D.C. Cir. 1967).

10(c).[132] This section empowers the Board to formulate an *affirmative* order to remedy unfair labor practices. In dealing with section 10(c) it may be emphasized that this section is unchanged in form from its original enactment.[133] Since the enactment of the section, several standards have been adopted by the Board as a guide in executing the proper order to remedy a violation. The Board is to bear in mind its duty to effectuate the policies of the Act.[134] In formulating a remedy, the Board is also to take into account the social factors involved and the knowledge it has gained from prior experience.[135] The order should stand "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[136] Thus, the Board should follow closely the direction of the Act by considering whether its proposed order does or does not bear appropriate relation to the policies of the Act.[137] In *NLRB v. Katz*,[138] the court said:

> The Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process or discussion, or which reflects a cast of mind against reaching an agreement.[139]

The Board is, then, to tailor its remedies to the unfair labor practices, taking the necessary measures to recreate the relationship that would have existed had there been no unfair labor practice.[140] This requires a "constant re-evaluation of the Board's remedial arsenal so that the 'enlightment gained from experiences' can be applied to the 'actualities of individual relations.' "[141]

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132. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).
133. *Id.*
134. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).
135. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); Republic v. NLRB, 311 U.S. 7 (1940); Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940); Elson Bottling Co., 155 N.L.R.B. 714 (1965).
136. United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967), *citing* Virginia Electric & Power Co. v. NLRB, 319 U.S. 533 (1943); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964); *see also* NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).
137. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
138. 369 U.S. 736 (1962).
139. *Id.* at 747.
140. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Elson Bottling Co., 155 N.L.R.B. 714 (1965).
141. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); Elson Bottling Co., 155 N.L.R.B. 714 (1965).

The repeated violations of the Act by H.K. Porter Co. indicated that the prior order of the Board, drawn in terms requiring the company to bargain in good faith, was ineffective.[142] The court indicated that a succession of section 8(a)(5) unfair labor practice charges is not the answer when a refusal to bargain persists.[143] A mere cease and desist order may serve only to represent a formal acknowledgment of a violation of the law, while the violator keeps the full fruits of his actions.[144]

The *H.K. Porter* remedy provided that the company was to negotiate for a concession in return for the check-off provision.[145] The company's right to freedom of contract under section 8(d)[146] was thereby infringed upon. H.K. Porter Co. felt that the collection of dues was union business and that the company should not be required to aid the union.[147] The Board's function is to enforce the Act, but it is not allowed to formulate the terms of the collective bargaining agreement.[148] H.K. Porter, however, had violated the Act three times[149] and the contract with the United Steelworkers of America had been in the process of negotiation for four years, thereby depriving the employees of the benefit of a contract for that entire period. The check-off provision would be of little consequence to the company since it already made other deductions for the employees.[150] The union, on the other hand, had a definite need for the inclusion of the provision. The nearest union office was eighty-five miles from the Porter plant and the employees were scattered over a wide area.[151] The infringement upon the freedom of contract was deemed to be the only way to make sure the workers' rights were not

142. United Steelworkers of America v. NLRB, 389 F.2d 295, 301 (D.C. Cir. 1967).
143. *Id.* at 301-02.
144. Montgomery Ward & Co. v. NLRB, 339 F.2d 889, 894 (6th Cir. 1965).
145. 389 F.2d 295.
146. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).
147. United Steelworkers of America v. NLRB, 363 F.2d 272, 275 (D.C. Cir. 1966).
148. NLRB v. American National Insurance Co., 343 U.S. 395 (1952).
149. The H.K. Porter Co. had been found by the Board to have committed unfair labor practices in connection with the representation election of the United Steelworkers in 1961. H.K. Porter, 131 N.L.R.B. 1383 (1961). The company was held to have failed to bargain in good faith in an unreported decision, noted in United Steelworkers v. NLRB, 389 F.2d 295, 296 (D.C. Cir. 1967). A second bad faith violation was committed in 1964. 153 N.L.R.B. 1370 (1965).
150. In United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967), the court stated:

> [A]t the hearing the company's representative admitted that it made many deductions from volunteering employees' wages for a variety of charitable causes and that there would be no inconvenience involved in checking off union dues; that, in fact, the company does check off union dues at certain of its other plants.

Id. at 297.
151. *Id.* at 302 n.15.

nullified. The Board is empowered by Congress to prevent just such a nullification.[152]

The affirmative duty of collective bargaining is placed on the employer and the union when section 8(d)[153] is read in conjunction with sections 8(a)(5)[154] and 8(b)(3).[155] Most courts agree that a proposal or concession cannot be compelled, directly or indirectly, so long as the party fairly maintains his position during the bargaining process.[156] However, section 8(d) by its own terms[157] does not apply to section 10(c)[158] and the formulation of remedies by the Board.

H.K. Porter Co. was found to have violated section 8(a)(5) of the Act in that it had not fairly maintained its position in rejecting the check-off proposal.[159] The order granting the remedy—an imposition of a check-off provision with a reasonable concession by the union—as interpreted by the court of appeals, was held to be within the power of the Board under the proper circumstances.[160] Thus, the remedy granted by the Board was deemed to be the only effective one and the only manner in which the company would now be able to demonstrate good faith.

CONCLUSION

The impact of *H.K. Porter*[161] may not be as sudden a departure from accepted labor law as it first appears. The decision does present one manner in which the Board is able to extend its influence at the bargaining table and to sit in judgment upon a substantive term. The peculiar, rather extreme, type of fact situation present in *H.K. Porter* allowed the

152. National Labor Relations Act § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

153. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

154. 49 Stat. 453 (1935), 29 U.S.C. § 158(a)(5) (1964).

155. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1964); *see* NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1957).

156. NLRB v. My Store, Inc., 345 F.2d 494 (7th Cir. 1965); NLRB v. Herman Sausage Co., Inc., 275 F.2d 229 (5th Cir. 1960).

157. Limiting its application, section 8(d) reads specifically:

For the purpose of this section. . . . (emphasis added).

61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

Section 8(d) continues to define collective bargaining, but its first phrase limits its application to section 8 and should not be deemed a limitation on the power of the Board in formulating appropriate remedies.

158. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

159. United Steelworkers of America v. NLRB, 389 F.2d 295, 299 (D.C. Cir. 1967). The Board adopted the trial examiner's findings. 153 N.L.R.B. 1370 (1965).

160. United Steelworkers of America v. NLRB, 389 F.2d 295, 299 (D.C. Cir. 1967). The Board is granted wide remedial powers under section 10(c), which it is to use to give effect to the policies of the Act as set out in section 1. The Board is to try to restore the *status quo* as closely as possible. *See* NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); Elson Bottling Co., 155 N.L.R.B. 714 (1965).

161. 389 F.2d 295 (D.C. Cir. 1967).

Board to act as an indirect arbitrator of the dispute over the check-off provision. The result is an intrusion upon H.K. Porter's freedom of contract, which was compensated for by the granting of a right to a reasonable concession from the union on the issues remaining to be decided. Of course, H.K. Porter must also place the check-off into the final agreement between the United Steelworkers of America and the company. Support for the result may also be found in the fact that the company was found not to have "fairly maintained" its position in bargaining. This factor should also support the decision of the Board to deny to the company its rights under section 8(d),[162] thus eliminating any conflict between the sections of the Act. Yet, the underlying theory of the Act—that collective bargaining is to be voluntary in nature—has been strained in order to reach the desired result. There also seems to be a departure from the long line of cases which hold that the Board is not to directly or indirectly impose a substantive term upon the parties to collective bargaining,[163] and that the issues concerning the bargaining subjects are to be decided over the negotiating table, not by the Board.[164]

Collective bargaining is the core of the NLRA. Effective collective bargaining is an essential element in contract negotiation. The loss of this element would destroy the policy of industrial peace. Collective bargaining is the method Congress has chosen to establish this policy; without it the Act becomes nothing. *H. K. Porter*[165] presented facts of an outstanding nature and was viewed by the court in that light. Unless the proper facts are present, the normal procedure and remedy for bargaining in bad faith should be followed by the Board. The District of Columbia Court of Appeals, in indicating that in the proper circumstances the imposition of the check-off alone would be proper, did not specify the facts which could give rise to the proper circumstances. This question is one which can only be resolved in the future.

162. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).
163. NLRB v. American National Insurance Co., 343 U.S. 395, 407-08 (1952).
164. *Id.*
165. 389 F.2d 295 (D.C. Cir. 1967).