COLLECTIVE BARGAINING: INSISTENCE, BUT ONLY TO A POINT

The collective bargaining situation gives rise to a multitude of problems not only for employers and employees, through their labor organizations, but also for their respective legal representatives, the National Labor Relations Board, and the federal courts. This Note will deal with only one small segment of the problems in the area of collective bargaining—the question of to what extent a bargainer may insist upon adoption of his particular proposals and the rejection of his opponent's.

I. INTRODUCTION

Section 8(a)(5)[1] of the National Labor Relations Act,[2] also referred to as the Taft-Hartley Act, imposes upon the employer a duty to bargain collectively with a representative of his employees. A reciprocal provision is provided in section 8(b)(3).[3] Both of these blanket obligations are further refined by the imposition of the duty to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment,"[4] and by the designation of the union representatives as the exclusive agent of the employees for purpose of bargaining with respect to "rates of pay, wages, hours of employment, or other conditions of employment."[5] All authorities appear to agree that both the employers and the unions are only subject to the requirement of good faith when bargaining with respect to wages, hours, and other conditions of employment,[6] but much more difficult questions arise when dealing with proposals which are not easily pigeon-holed into one of these three categories. Four potential problem situations seem readily apparent from these statements. These problems may involve any of the following situations: bad faith bargaining on mandatory subjects; bad faith bargaining on non-mandatory subjects; good faith bargaining on mandatory subjects; and good faith bargaining on non-mandatory subjects.

II. MANDATORY SUBJECTS

A. *Bad Faith*

The statute[7] itself would seem to be dispositive of the question of bad faith

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[1] 29 U.S.C. § 158(a)(5) (1970).
[2] 29 U.S.C. § 151 *et seq.* (1970). Actually known as the National Labor Relations Act as amended by the Labor-Management Relations Act of 1947.
[3] 29 U.S.C. § 158(b)(3) (1970).
[4] *Id.*
[5] *Id.* § 159(a).
[6] *Id.* § 158(d); *See also* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Katz, 369 U.S. 736 (1962).
[7] 29 U.S.C. §§ 158(a)(5), (b)(3), 159(a) (1970).

in the introduction of and bargaining with respect to mandatory subjects. The "good faith" obligation is specifically imposed by the express language of the statute in regard to the mandatory subjects (i.e., wages, hours, and terms of employment). The United States Supreme Court in *NLRB v. Katz*[8] seems to intimate that the introduction of and insistence upon a mandatory subject for the purpose of frustrating negotiations is sufficient evidence of bad faith to constitute on unfair labor practice.

In 1968, the court of appeals for the District of Columbia went even further by holding that "a company (or union) may not assume an intransigent position in bad faith on a mandatory subject of bargaining even though its purpose to frustrate an agreement on that issue coincides with a willingness to reach some overall agreement."[9] In his dissent, Judge, now Chief Justice, Burger refers to the "novel and inconsistent" proposition supported by the majority that bad faith may be found with respect to one particular subject even though there is an overall good faith attempt to reach a binding agreement.[10] In taking exception to the majority's "extension" of *Katz*, Burger points out:

> *Katz* rests on "refusal to negotiate" on the terms in question. This clear violation of the duty to bargain in good faith is a far cry from a violation based upon a subjective analysis of the motives behind a bargaining position on a single issue . . . . Consequently, it is simply not correct to say that it "follows" from *Katz* that a refusal to agree to one bargaining demand even if for an impermissible reason is by itself a failure to bargain in good faith.
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> It may be tempting to suggest that a corollary of the duty to bargain to reach an overall agreement is a duty to bargain with the object of reaching an agreement on each item proposed. But this has never been held to be the law by any court . . . .[11]

B. *Good Faith*

With the possible exception, noted in *Katz*, of an absolute "refusal to negotiate" situation, no degree of insistence with respect to a proposal dealing with mandatory subjects will be too adamant even though an impasse in negotiations eventually results. Ample authority may be found in the holdings of many cases that when dealing with mandatory subjects neither party is obligated to yield.[12] This, of course, is subject to the other possible exception noted above.

III. Non-Mandatory

A. *Good Faith*

It may be an over-simplification to state that good faith with respect to

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[8] 369 U.S. 736 (1962).
[9] United Steelworkers of Am. v. NLRB, 390 F.2d 846, 849 (D.C. Cir. 1967).
[10] *Id.* at 853 (dissenting opinion).
[11] *Id.* at 855.
[12] *See, e.g.*, NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

non-mandatory subjects is simply a lack of bad faith, but that appears to be the general rule. Non-mandatory subjects may be injected into the negotiations so long as their purpose[13] or their effect[14] is not to effectively thwart the negotiations. With respect to these non-mandatory subjects each party is "free to bargain or not to bargain, and agree or not to agree."[15] In the absence of an actual stalemate, the question of intent is largely irrelevant.

B. *Bad Faith*

It will become readily apparent that the question of bad faith with respect to non-mandatory subjects is, by far, the most difficult and often-litigated problem in this area of labor negotiations. The reason being that, in a typical situation, a number of issues arise which must all be resolved before the conflict may be settled. Among the more pertinent issues most often raised are the following: What elements must be shown in order to support a finding of bad faith? Are these elements the same as are necessary to show bad faith with respect to mandatory subjects? Once lack of good faith is shown, what remedies may be prescribed by the NLRB or the courts? The guidelines necessary to adequately answer these questions were most authoritatively set forth in a 1958 case, *NLRB v. Wooster Division of Borg-Warner Corp.*[16]

1. *Pre Borg-Warner Theories*

Since the NLRB only imposed a duty to bargain in good faith with respect to wages, hours, and other conditions of employment, substantial questions arose with respect to bargaining on items not within those classifications. Did the duty of good faith extend to non-mandatory subjects? What were the consequences of insistence upon such non-mandatory subjects to the extent that no bargaining could be had on mandatory subjects, whether such insistence was in good faith or bad? Did bad faith insistence relieve any burdens from the non-insisting party?

Two lines of thought with regard to the non-mandatory subjects found support in the courts of appeals prior to 1958. These two points of view were typified by the holdings in *Allis Chalmers Mfg. Co. v. NLRB*[17] in the seventh circuit and *NLRB v. Darlington Veneer Co.*[18] in the fourth circuit.

The unfair labor practice charge against Allis Chalmers contended that it was an unfair labor practice for the company to insist that any strike vote taken by the employees be passed by a majority of employees, rather than a majority of voting employees and also that any company proposal be submitted

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[13] NLRB v. International Hod Carriers Local 1082, 384 F.2d 55 (9th Cir. 1967), *cert. denied* 390 U.S. 920 (1968); NLRB v. Herman Sausage Co., 275 F.2d 229 (5th Cir. 1960).

[14] *See* text accompanying notes 29-38 *infra.*

[15] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

[16] 356 U.S. 342 (1958).

[17] 213 F.2d 374 (7th Cir. 1954).

[18] 236 F.2d 85 (4th Cir. 1956).

to the rank and file for approval. The union insisted that these matters were clearly not within the mandatory subject area and flatly refused to discuss them further. With the talks thus deadlocked, the union filed an unfair labor practice charge against the company. The seventh circuit, recognizing that these proposals were clearly non-mandatory, stated: "[W]e think there is merit in the Board's [NLRB] contention that the Company was not entitled to insist to the point of impasse upon proposals."[19] It held that the union was still under an obligation to also bargain in good faith on the proposals, thereby intimating that the union had also committed an unfair labor practice. Thus it would seem that the court would have one party bound by the duty to bargain in good faith even though the other party exhibits no willingness to reciprocate.

Darlington Veneer presented a similar situation in response to which the fourth circuit reached a strikingly dissimilar conclusion. Once again the major stumbling block to an agreement involved a management proposal. This proposal required the union membership to ratify, by a majority vote, a proposed contract before it would have a binding effect. This is the same proposal which had been presented to the seventh circuit.[20] Citing a previous fourth circuit decision,[21] the court held that such a ratification requirement would defeat the very purpose of collective bargaining (i.e., to establish a trade agreement between the employer and his employees). In *Darlington Veneer* the union refused to discuss the ratification proposal and the negotiations ceased. In finding an unfair labor practice only against the company, the court held:

> We do not mean to say that the ratification . . . provisions would not be legal and valid if agreed upon by the parties, nor that the mere advancing of such proposals is of itself an unfair labor practice. . . . We think, however, that the insistence upon such provisions as a condition of entering into any agreement is so unreasonable when objected to by the other party as to furnish of itself a sufficient basis for the finding by the Board of failure to bargain in good faith . . . .[22]

In light of these conflicting holdings in the various circuits, it was time for a more definitive and uniform delineation of the rule which the NLRB was to apply in cases of insistence upon inclusion of non-mandatory subjects in a bargaining agreement. The *Borg-Warner* case[23] provided the opportunity for such delineation.

2. *The Borg-Warner Doctrine*

The particular proposals in issue were (1) a "ballot" proposal and (2) a "recognition" proposal. The "ballot" proposal called for the employer's final offer being presented to a vote of all employees before a strike could be called;

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19 Allis Chalmers Mfg. Co. v. NLRB, 213 F.2d 374, 381 (7th Cir. 1954).
20 *Id.*
21 NLRB v. Highland Park Mfg. Co., 110 F.2d 632 (4th Cir. 1940).
22 NLRB v. Darlington Veneer Co., 236 F.2d 85, 88 (4th Cir. 1956).
23 NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

the "recognition" clause, in effect, sought to disregard the international union, the certified agent, and substitute the uncertified local affiliate as the exclusive bargaining agent. The NLRB found that the employer's insistence upon each of these proposals constituted an unfair labor practice and sought enforcement in the United States Court of Appeals for the Sixth Circuit. The sixth circuit granted partial enforcement and both parties appealed.[24]

In ruling on this case, the Court promulgated what has come to be known as the *Borg-Warner* Doctrine. After noting the obligation with respect to collective bargaining imposed on employers by the National Labor Relations Act, which is the obligation to bargain in good faith with respect to wages, hours, and other terms and conditions of employment, the Court points out that in these three areas neither party is legally obligated to yield.[25] The Court states that the employer always exhibits the requisite good faith with respect to the mandatory subjects. However, that good faith does not entitle "the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining."[26] The Court held this adamant stance effectively amounted to a refusal to bargain in good faith on the mandatory subjects.[27] The Court indicates that "[s]ince it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without,"[28] the critical question becomes whether any given proposal is or is not amenable to classification under one of the mandatory headings.

3. *The Borg-Warner Aftermath—Insistence*

Once the NLRB or a court of appeals has cleared the initial hurdle of classifying the particular proposal as either mandatory or non-mandatory,[29] there still remains one final stumbling-block which they must surmount before utilizing a rote application of the *Borg-Warner* doctrine. This stumbling-block involves a determination of the extent to which the proponent of the proposal may insist upon adoption of the proposal before he has committed an unfair labor practice. This essentially involves drawing an arbitrary line beyond which the proponent of a non-mandatory proposal may not safely proceed.

Certainly no one would seriously suggest that the mere introduction of a non-mandatory subject into the bargaining discussion was sufficient to constitute an unfair labor practice. In fact, the prevalent law is quite to the contrary. The introduction of these non-mandatory proposals either for themselves or merely to enhance the overall package proposal[30] is the very fabric of ef-

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24 *Id.*
25 NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).
26 NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).
27 *Id.*
28 *Id.* at 349.
29 *See* text accompanying notes 39-73 *infra.*
30 Oil Workers Local 3-89 v. NLRB, 405 F.2d 1111 (D.C. Cir. 1968).

fective collective bargaining.[31] If this were not the case, it would effectively eliminate any bargaining on non-mandatory subjects. Indeed, any non-mandatory proposal, if legal and agreed to by both parties, is as binding as any mandatory provision of the agreement.[32]

Some courts, basing their reasoning on either a misapplication of the *Borg-Warner* doctrine or just careless use of words, have drawn the line at the point where the proponent "insists" upon the proposal.[33] However, a better draftsman would draw the line at a point further along than mere insistence. That point has been variously described as *insistence to the point of impasse*, positing the proposal as *an ultimatum*, or *as a condition of negotiating an agreement*.[34] When this point of impasse is reached is, of course, a factual question which must be determined on a case-by-case basis.[35] But it is relatively certain that each party "ha[s] a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining,"[36] so long as an effective deadlock in negotiations is not caused by such insistence.[37] With regard to "package proposals" containing both mandatory and non-mandatory subjects the degree of insistence allowed may be significantly higher than strictly non-mandatory subjects so long as discussion continues as to the "package" and does not focus on the non-mandatory proposals.[38]

IV. Mandatory v. Non-Mandatory—Judicial Approach

All of the foregoing discussion is largely academic if one is unable to distinguish between a mandatory subject and a non-mandatory one. This initial determination will dictate the permissible boundaries of the requisite good faith necessary to meet the statutorily-imposed obligation. Since a case-by-case analysis is generally prescribed, a discussion of the present state of the judicial decisions may be helpful to the practitioner.

A. *Criteria for Classification*

In order to be classified as a subject of mandatory bargaining, the specific proposal must be found to be a proposal dealing with wages, hours, or a condition or term of employment.[39] As is often the case when courts are called

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[31] *Id.*
[32] NLRB v. Darlington Veneer Co., 236 F.2d 85, 88 (4th Cir. 1956).
[33] Houchens Market, Inc. v. NLRB, 375 F.2d 208 (6th Cir. 1967); Industrial Union of Marine Workers v. NLRB, 320 F.2d 615 (3rd Cir. 1963), *cert. denied*, 375 U.S. 984 (1964); NLRB v. Davison, 318 F.2d 550 (4th Cir. 1963).
[34] Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964).
[35] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).
[36] International Longshoremen's Ass'n v. NLRB, 107 U.S. App. D.C. 329, 331, 277 F.2d 681, 683 (1960).
[37] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).
[38] Indiana Metal Products v. NLRB, 442 F.2d 46 (7th Cir. 1971); Oil Workers Local 3-89 v. NLRB, 405 F.2d 1111 (D.C. Cir. 1968).
[39] 29 U.S.C. §§ 158(a)(5), (b)(3), 159(a) (1970).

upon to interpret a specific statutory classification scheme, the definitive pronouncements of the legislature tend to become less and less definitive with each subsequent interpretation. At times the courts place a specific proposal into one or another of these categories; at other times the courts find it sufficient to state that the proposal fits into one of the categories without specifying which category is best suited to the proposal. Among the most widely used categories for classification are the following: (1) Those subjects which are related to the performance of the work are mandatory;[40] (2) Those which are of interest to both employer and employee and regulate the relationship between them are mandatory;[41] and (3) Those which do not fit into one of the three categories under any of the proposed criteria are non-mandatory.[42]

1. *Performance of the Work*

The most obvious examples of a mandatory subject because of its relationship to the performance of the work is the question of wages.[43] In this context, wages may include either direct or indirect compensation received in connection with the performance of the work.[44] This has been found to include not only regular pay,[45] but also overtime pay,[46] bonus systems,[47] and merit pay increases.[48] Clearly, the employer must bargain with the employees' representative before any wage change may be effected.[49] Unfair labor practices may arise from either a unilateral wage increase,[50] or a unilateral wage reduction.[51] Some of the more indirect forms of compensation which have been called "wages" include holidays and paid vacations,[52] health and accident insurance,[53] profit-sharing plans,[54] employee stock purchase plans,[55] and retirement and pension plans.[56] There is also authority to the effect that company-furnished rental housing may constitute compensation, provided that the employer furnishes the housing to his employees at a substantially lower rate

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40 *See* text accompanying notes 43-59 *infra.*
41 *See* text accompanying notes 60-73 *infra.*
42 *See* text accompanying notes 74-82 *infra.*
43 Local 164, Painters v. NLRB, 110 U.S. App. D.C. 294, 293 F.2d 133, *cert. denied*, 368 U.S. 824 (1961).
44 NLRB v. Bemis Bros. Bag Co., 206 F.2d 33 (5th Cir. 1953).
45 Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968).
46 NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953).
47 *Id.*
48 NLRB v. United Brass Works, Inc., 287 F.2d 689 (4th Cir. 1961).
49 Leeds & Northrup Co. v. NLRB, 391 F.2d 874 (3d Cir. 1968).
50 *Id.*
51 NLRB v. Huttig Sash & Door Co., 377 F.2d 964 (8th Cir. 1967).
52 NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953).
53 W.W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949).
54 NLRB v. Black-Clawson Co., 210 F.2d 523 (6th Cir. 1954).
55 Richfield Oil Corp. v. NLRB, 97 U.S. App. D.C. 383, 231 F.2d 717, *cert. denied*, 351 U.S. 909 (1956).
56 Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *aff'd on other grounds*, 339 U.S. 382 (1950). It should be noted that the duty to bargain with respect to retirement plans places no obligation on the employer to bargain with already-retired personnel when renegotiating such plans with his present employees. *See* Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 164 (1971).

than would otherwise be available in the community.[57]

The other strictly performance-related subject is the question of hours. The "hours problem" relates to such subjects as the number of hours per day, the number of days per week,[58] and also the particular days of the week when the work must be done. For example, it has been held to be an unfair labor practice for an employer to unilaterally require his maintenance employees to work Tuesday through Saturday instead of Monday through Friday.[59]

2. *Employer-Employee Relationship*

The other major criterion applied in finding a mandatory subject is whether the subject is of interest to both employers and employees and whether it concerns both of them. This criterion is interpreted in a limited sense and does not include every issue of interest to the union or employer.[60] It has been held that a mere "remote, indirect, or incidental impact" is insufficient.[61] The "interesting" proposal must be one which directly concerns the relationship between the employer and employee.[62] Included within this classification are such diverse proposals as union fines for violation of production ceilings,[63] seniority provisions,[64] no-strike clauses,[65] compulsory arbitration procedures,[66] union dues check-off provisions,[67] and certain management functions.

Among the "management functions" classified as mandatory subjects are employee dress codes,[68] lunch breaks,[69] compulsory retirement ages,[70] and the complete closing of an existing business.[71] The decision of whether to cease operations apparently rested solely with the employer prior to 1964, at least if he could supply a sufficient economic reason for the closing.[72] In 1964, the

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[57] NLRB v. Bemis Bros. Bag Co., 206 F.2d 33 (5th Cir. 1953); NLRB v. Lehigh Portland Cement, 205 F.2d 821 (4th Cir. 1953).

[58] Woodworkers Local 3-10 v. NLRB, 127 U.S. App. D.C. 81, 380 F.2d 628 (1967).

[59] *Id.*

[60] Fibreboard Paper Products Co. v. NLRB, 379 U.S. 203 (1964); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

[61] Seattle First Nat'l Bank v. NLRB, 444 F.2d 30 (9th Cir. 1971); American Smelting & Refining Co. v. NLRB, 406 F.2d 552 (9th Cir.), *cert. denied,* 395 U.S. 935 (1969).

[62] *Id.*

[63] Scofield v. NLRB, 394 U.S. 423 (1969); U. O. P. Norplex v. NLRB, 445 F.2d 155 (7th Cir. 1971).

[64] NLRB v. Westinghouse Air Brake Co., 120 F.2d 1004 (3d Cir. 1941).

[65] Allis Chalmers Mfg. Co. v. NLRB, 213 F.2d 374 (7th Cir. 1954).

[66] Indiana Metal Products v. NLRB, 442 F.2d 46 (7th Cir. 1971).

[67] H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). This landmark decision is popularly known as the "Union Dues Check-off Case."

[68] Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968).

[69] *Id.*

[70] Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *aff'd on other grounds,* 339 U.S. 384 (1950).

[71] *See* cases cited notes 72-73 *infra.*

[72] At least seven circuits had so held: NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963); NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962); NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); Jays Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961); NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960); NLRB v.

United States Supreme Court, recognizing the impact that such a closing had on the employees as well as the employers, held that such closing was a proper subject of mandatory bargaining.[73] It appears that a businessman may not now cease operations without bargaining with his employees, notwithstanding the possibility of heavy economic losses.

B. *Criteria Not Met—Non-Mandatory*

As is fairly logical, the same criteria are used to determine non-mandatory subjects as are used to determine mandatory ones. The major difference is that if the criteria are not met, a non-mandatory subject is found. Applying the "performance of the work" test, and the "relationship" test, the following types of clauses have been found to be non-mandatory: a clause which would require a union "ballot" before a strike could be called;[74] a clause requiring the union to maintain a fund to indemnify the employee in case of a strike;[75] a clause requiring the employer to post a performance bond to cover wages;[76] a clause requiring the rank and file to approve any contract;[77] a clause designating certain union members as "supervisors";[78] a clause requiring a change in union representation;[79] a clause calling for reinstatement of certain discharged workers;[80] a clause calling for the lifting of union-imposed fines on "scabs";[81] and a clause pertaining to requirements for members of union committees.[82] All of the above mentioned clauses were deemed to be non-mandatory in character.

V. Remedies

When presented with an unfair labor practice, the Board's generally prescribed remedy is the issuance of a cease and desist order.[83] The statute also provides for any other affirmative relief as may be appropriate.[84] The most popular form of affirmative action taken by the Board is largely negative in character. That remedy is referred to as a return to the *status quo ante*.[85] As

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Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954); Mount Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954).

[73] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

[74] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); Allis Chalmers Mfg. Co. v. NLRB, 213 F.2d 374 (7th Cir. 1954).

[75] NLRB v. Davison, 318 F.2d 550 (4th Cir. 1963).

[76] NLRB v. Hod Carriers Local 1082, 384 F.2d 55 (9th Cir. 1967); NLRB v. American Compress Warehouse, 350 F.2d 365 (5th Cir. 1965); Local 164, Painters v. NLRB, 110 U.S. App. D.C. 294, 293 F.2d 133, *cert. denied*, 368 U.S. 824 (1961).

[77] American Seating Co. v. NLRB, 424 F.2d 106 (5th Cir. 1970); Houchens Market, Inc. v. NLRB, 375 F.2d 208 (6th Cir. 1967); NLRB v. Darlington Veneer Co., 236 F.2d 85 (4th Cir. 1956).

[78] Industrial Union of Marine Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963).

[79] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

[80] Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir. 1964).

[81] NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175 (1967).

[82] Indiana Metal Products v. NLRB, 442 F.2d 46 (7th Cir. 1971).

[83] 29 U.S.C. § 160(c) (1970).

[84] *Id.*

[85] Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Hinson v. NLRB, 410 F.2d 133 (8th Cir. 1970); Trinity Valley Iron & Steel Co. v. NLRB, 410 F.2d 1161 (5th Cir. 1969).

the name implies, this remedy involves a mandatory return to the situation which existed prior to the unfair practice. However, it must be pointed out that this remedy is used to prevent the wrongdoer from profiting from his misdeeds;[86] the courts will refuse to impose this remedy where the party seeking a return to the *status quo* is the party who committed the initial misdeeds.[87] A return to the *status quo* generally involves back pay and a withholding of the fruits of the illegal bargaining.[88]

The one thing that courts will absolutely not do is to impose any conditions upon the parties.[89] Should one party refuse to bargain in good faith after being so ordered by the court, the remedy is a contempt proceeding,[90] although Mr. Justice Douglas feels that in the face of adamant bad faith the court should impose the condition.[91] Query: What of the situation in which a return to the *status quo* effectively imposes a condition on one of the parties? What of the situation where the contract has expired and the employer has decided to cease operations?[92] The closest the courts have come to imposing conditions upon a union involved a second circuit case[93] in which, because of union opposition to an employers' association, the union signed a contract with another association. The court ordered the union to grant a similar contract to the objected-to association.

VI. Conclusion

When his client is faced with an unfair labor practice charge alleging a violation of the obligation to bargain in good faith with respect to mandatory subjects, the practitioner will do well to remember the following pointers:

(1) Initial determination of mandatory or non-mandatory is crucial.

(2) Mandatory subjects may be argued to an impasse; non-mandatory may not.

(3) "Package" proposals containing both mandatory and non-mandatory subjects have their own special problems.

(4) Cease and desist orders are generally issued, but much more economically undesirable remedies may be imposed for bad faith bargaining.

(5) The harshness of the *status quo ante* remedy may be tempered by the inclusion of a severability clause in the bargaining agreement so that only

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86 *Id.*
87 NLRB v. Southern California Pipe Trades Dist. Council No. 16, 449 F.2d 668 (9th Cir. 1971).
88 International Union of Elec. Workers v. NLRB, 138 U.S. App. D.C. 249, 426 F.2d 1243, *cert. denied*, 400 U.S. 950 (1970).
89 H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970); Kayser-Roth Hosiery Co. v. NLRB, 430 F.2d 701 (6th Cir. 1970).
90 H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).
91 *Id.* at 110 (dissenting opinion).
92 *See, e.g.*, Hinson v. NLRB, 428 F.2d 133 (8th Cir. 1970).
93 NLRB v. Local 964, Carpenters, 447 F.2d 643 (2d Cir. 1971).

those provisions unfairly bargained for are returned to the *status quo*.[94]

If one thing is to be kept in mind above all others, make sure the initial mandatory/non-mandatory decision is accurate. A good faith belief that a proposal is mandatory is not sufficient justification for a too-adamant insistence on the proposal.[95]

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[94] *See, e.g.*, NLRB v. Southern California Pipe Trades Dist. Council No. 16, 449 F.2d 668 (9th Cir. 1971).
[95] NLRB v. Katz, 369 U.S. 736 (1962).

CURRENT INTEREST AREAS OF LANDLORD-TENANT LAW IN IOWA

I. INTRODUCTION

In an age of urbanization, the landlord-tenant relationship has become a major area of concern to courts and legislatures alike. An informing look at Iowa's sister states brings about a realization that Iowa is one of the more progressive states in the nation as far as this relationship is concerned. Many new, modern, multiple family dwellings are appearing on the scene. Services, conveniences and varying accessories account for a very comfortable living in these dwellings. However, Iowa, like all other states, is not able to claim these luxury type apartments as its exclusive rental facilities. Indeed, common knowledge of the housing situation in Iowa reveals that possible rental dwellings extend all the way from the desirable species described above, to those one would imagine adorning the typical "skid row" area. Although it is tragic that anyone has to live in an apartment that falls into the latter category, practicality says that this situation is destined to continue in the future. One reason for such a condition is that many people just do not have the financial resources to meet the high rental price of new apartments, or even that of less-expensive dwellings. Another reason is that statistics show that urban areas in the United States are headed toward a major housing shortage. From 1965 to the first quarter of 1970, rental vacancy rates in all urban areas fell from 7.4 per cent to 4.9 per cent.[1] Whatever the reasons, the existence of these "less desirable" apartments is most likely to continue, as well as the existence of the luxury apartments. These are generating factors of interesting and serious areas in the landlord-tenant relationship: eviction, the implied warranty of habitability in housing leases and the rental security deposit.

This article will attempt to analyze these problems and offer some suggestions as to possible effects and legislation.

II. EVICTION

One thing every tenant has in the back of his mind is termination of his tenancy. To what extent is he protected? What rights does he have? And what about the landlord—what are his rights? What procedural steps must be complied with, and what is the effect of non-compliance? These are some questions that arise, and in order to answer them clearly, the statutory law should be thoroughly studied.

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[1] U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, table 1087, at 681 (91st ed. 1970).