Vanderbilt Law Review

Volume 22
Issue 2 *Issue 2 - March 1969*

Article 1

3-1969

School Board Authority and the Right of Public School Teachers to Negotiate--A Legal Analysis

Reynolds C. Seitz

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Education Law Commons, and the First Amendment Commons

Recommended Citation
Reynolds C. Seitz, School Board Authority and the Right of Public School Teachers to Negotiate--A Legal Analysis, 22 *Vanderbilt Law Review* 239 (1969)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol22/iss2/1

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

VANDERBILT LAW REVIEW

VOLUME 22 | MARCH, 1969 | NUMBER 2

School Board Anthority and the Right of Pnblic School Teachers to Negotiate— A Legal Analysis

*Reynolds C. Seitz**

Since 1935 with the passage of the National Labor Relations Act (Wagner Act) creating the National Labor Relations Board, millions of workers in the private sector of employment have been given the right to organize and to bargain or negotiate collectively with their employers on "wages, hours and other terms and conditions of employment." Today the right is widely exercised in the field of private employment. The opportunity for public employees to negotiate with their employers was not demanded too frequently until after World War II. At that time public employees, including teachers, began to press for the right, and the pressure has been increasing greatly year by year. The demand is identical to that made by employees in the private sphere, which resulted in the Wagner Act. The pressure is for the right to join organizations, including unions, and through such organizations to negotiate on wages, hours and other terms and conditions of employment.

Realistically, the hurdle erected at one time by some courts[1] and legislative bodies[2] to prevent public employees from joining employee organizations, including unions, no longer exists. Today it seems certain that the first amendment, through its protection of freedom to assemble, insures the right to join an employee organization.

The issue with which this article deals still remains: whether there

* Professor (Dean 1953-1965), Marquette University Law School; member, National Academy of Arbitrators; formerly assistant to superintendent of public schools in Omaha and St. Louis; president, National Organization on Legal Problems of Education (currently editor-in-chief of quarterly newsletter published by NOLPE and reporting on school law decisions).

1. Perez v. Board of Police Comm'rs, 78 Cal. App. 2d 638, 178 P.2d 537 (1947); People *ex rel.* Fursman v. City of Chicago, 278 Ill. 318, 116 N.E. 158 (1917); King v. Priest, 357 Mo. 68, 206 S.W.2d 547 (1947).

2. ALA. CODE tit. 55, §§ 317(1)-(4) (Supp. 1957); GA. CODE ANN. §§ 54-909, 54-9923 (1961); N.C. GEN. STAT. §§ 95-97 to 95-100 (Supp. 1959); VA. CODE ANN. §§ 40.65 to 40.67 (1950).

is an infringement on the legislative power of the school board if it is required to negotiate with teachers through representatives of their choosing.

A logical approach to a discussion of the right of teachers to negotiate versus school board authority requires an effort to give some meaning to the term "negotiation." If the term carried only a connotation that teachers through their representatives can present certain requests to a school board or its representatives and both sets of representatives may talk about the requests to the extent the school board permitted and for such length of time as the board made available, there would be no need for this article. The law cannot prohibit any individual or group from making a request of an employer—even if the employer is a public employer. The law cannot keep the public employer from discussing the matter presented if it elects to do so. There is nothing new about representatives of teachers and school boards carrying on talks prompted by requests made by teachers. Indeed, in certain school districts this has occurred since the formation of the district.

If, however, "negotiation" means imposing a procedure which (1) removes from a school board the sole discretion as to whether to discuss with teachers their requests and how much time to make available for such talks and (2) dictates to the board certain responsibilities by way of responses, it becomes necessary to determine the legality of such imposition; that is, whether the procedure results in an infringement upon school board authority. Certainly, if the imposed procedure takes away from the school board the ultimate authority to fix hours, wages and conditions of work, it can validly be argued that there is an illegal infringement upon the legislative power of the school board.

The issue of infringement on school board authority can arise realistically only when a state has passed a statute which reflects the intent of requiring a school board to negotiate or bargain collectively[3] in good faith on wages, hours and other conditions of employment with a union or association that properly represents the teachers. Statutes which merely give the right to teacher organizations to "meet and confer" or to engage in "conferences and negotiations" with

3. Educators would prefer to have a statute use the term "professional negotiations." If instead the term used is "collective bargaining" or just "negotiations", the legislation is using synonymous terms. The insertion of the word "professional" does not legally dictate any different approach to negotiations or bargaining. If the representatives are men of integrity, it will not direct any different ethical approach.

school boards on hours, wages and working conditions are easily susceptible to the construction that they lack an intent to require professional negotiations or collective bargaining.[4] Terms such as "meet and confer" and "conferences and negotiations" do not necessarily connote any particular technique. Therefore, it can be argued logically that such terms do not give rights to teachers which infringe upon school board authority.

The chief justice of the Wisconsin Supreme Court in writing the majority opinion in *Joint School District No. 8 v. Wisconsin Employment Relations Board*[5] shows clearly that such is his belief. It would require a very clear legislative history to import into "meet and confer" or "conferences and negotiations" the imposition of any particular bargaining or negotiating technique.

The type of statute which clearly shows a legislative intent to prescribe a certain negotiating technique for the school board is one which requires the parties to negotiate or bargain in good faith on wages, hours or other terms and conditions of employment. It is the term "good faith" which imparts intent into such a statute. These statutes do not require bargaining with individual employees; rather, they require exclusive bargaining either with the association or union selected by a majority vote or with a council comprised according to some proportional formula of individuals from the various organizations which teachers have selected as their representatives.[6] Such statutes avoid the constitutional attack that every individual has a right to present a gricvance or demand to his governmental employer by reserving specifically such a right. The public employer is not, however, obligated to bargain with the individual. The right given to the individual employee is, nevertheless, a valuable one because the public employer can have the attitude of the individual in mind when it carries on negotiations with the representatives of the employees.

The National Labor Relations Board, the lower federal courts and the United States Supreme Court have given meaning to the good faith requirement in collective bargaining, which was dictated by Congress in the Labor Management Relations Act (Taft-Hartley Act).[7]

---

4. Such was the interpretation of WIS. STAT. § 111.70 (1961) (which uses the words "conferences and negotiations") by the 2 to 1 majority of the Wisconsin Employment Relations Board in Moes v. City of New Berlin, Case IV, Doc. # 7293 (1966).

5. 37 Wis. 2d 483, 155 N.W.2d 78 (1967).

6. The California statute presents an example of a proportional representation scheme. CAL. GOV'T CODE § 3501 (1966), *as amended*, (Supp. 1968) and CAL. EDUC. CODE §§ 13080-88 (Supp. 1968).

7. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1964).

It appears improbable that the state labor boards and courts will require any more by way of negotiating techniques than what is required by the federal courts and the NLRB in construing the good faith bargaining requirement.

It becomes necessary, therefore, to look at the NLRB and federal court decisions delineating the techniques required by the dictate of good faith bargaining in order to predict the probable judicial construction of a state statute which orders good faith negotiating in the field of public employment. This study should permit a conclusion as to whether the requirements of such statutes constitute an infringement on school board authority.

Initially, the crucial question is whether the direction of a statute to bargain in good faith on wages, hours and working conditions imposes upon the school board a duty to make concessions. If the statute were to dictate to the school board a bargaining technique which required capitulation or concessions on certain demands of the representative of the teachers, it would be difficult to defend against the charge of infringement upon the legislative power of school boards.

Statutes are likely to speak out specifically against the making of concessions. The pattern followed by the statute may be that enunciated by the Taft-Hartley Act, which pointedly states that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession."[8]

There is no decision on record which holds that good faith bargaining requires the making of a concession. This was, indeed, the attitude of courts even under the Wagner Act, which did not contain the specific pronouncement that good faith bargaining did not compel either party to make a concession. The United States Supreme Court in the *Jones & Laughlin Steel Corporation* case which upheld the constitutionality of the Wagner Act, stated:

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever . . . . The theory of the Act is that free opportunity for negotiations with accredited representatives of the employees is likely to promote industrial peace and *may* bring about the adjustments and agreements which the Act itself *does not attempt to compel*.[9]

The NLRB and the courts did, however, tussle with another question which arose by reason of the directive of good faith bargaining in the Wagner Act. The question was whether the

8. *Id.*
9. 301 U.S. 1, 45 (1937) (emphasis added).

employer was obligated to make a counterproposal when it received the demands from the representative of the employees. Could counterproposals be equated to concessions, or were they something different?

In early cases interpreting the Wagner Act, the NLRB and the courts indicated an unwillingness to state flatly that counterproposals were not required. In enforcing an NLRB order which required the employer to bargain with the union and in reacting to the employer's refusal to make a counterproposal following rejection of the union's proposals, the United States Court of Appeals for the Fifth Circuit stated:

> A counter proposal is not indispensable to a bargaining, when from the discussion it is apparent that what the one party would thus offer is wholly unacceptable to the other. Still when a counter proposal is directly asked for, it ought to be made, for the resistance in discussion may have been only strategy and not a fixed final intention.[10]

The United States Court of Appeals for the Third Circuit commented:

> There must be common willingness among the parties to discuss freely and fully their respective claims and demands, and when they are opposed, to justify them on reason. When the proffered support fails to persuade, or if, for any cause, resistance to the claim remains, it is then that compromise comes into play. But, agreement by way of compromise cannot be expected unless the one rejecting a claim or demand is willing to make a counter suggestion. Refusal of an employer to make counter proposals on invitation of the union after rejecting the union's proposals *may* go to support a want of good faith on the part of the employer and hence a refusal to bargain under the Act. . . .[11]

The United States Court of Appeals for the Ninth Circuit uttered quite the same philosophy relative to counterproposals.[12] At the time the Taft-Hartley Amendments to the Wagner Act were being discussed, the chairman of the NLRB made it clear that he did not want to remove from the possibility of an unfair labor practice the failure to make a counterproposal. He argued that the failure to make such a proposal may be evidence of bad faith, whereas a failure to make a concession is not such evidence.[13]

The appearance of the provision in the Taft-Hartley Amendments specifically indicating that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the

10. Globe Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939).
11. NLRB v. George P. Pilling & Son Co., 119 F.2d 32, 37 (3d Cir. 1941) (emphasis added).
12. NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943).
13. Paul Herzog at *Hearings on S. 55 and S.J. Res. 22, Before the Senate Committee on Labor and Public Welfare*, 80th Cong. 1st Sess. 1886 (1947).

making of a concession"[14] did not directly answer the question as to whether the failure to make counterproposals was evidence of a failure to bargain in good faith. In *Landis Tool Co.*,[15] the NLRB was concerned about employer unwillingness to comply with a request for a counterproposal when the union indicated it was willing to consider "any counterproposal the employer might make."[16] A close analysis of all of the cases speaking of the failure to make counterproposals as evidence of bad faith bargaining, both under the Wagner Act and later, reveals that the failure to make a counterproposal is just one piece of evidence in the totality of employer conduct which may point to the fact that the employer did not come to the bargaining table with an open mind and a sincere desire to reach an agreement—which is the fundamental requirement of good faith bargaining.[17]

It is necessary now to relate the state of the law on the need to make counterproposals to our basic interest as to whether the statutory directive of good faith bargaining invades the legislative power of the school board. If state courts were to be influenced by certain broad language of decisions facing up to the need to make counterproposals in response to demands of the representatives of teachers and were to hold that a counterproposal must be made to presented demands, it would be difficult not to agree that a technique is being required that does infringe upon the legislative authority of the school board. If, however, independent evidence reveals that the school board has no intention of negotiating an agreement, it would not be improper for a state employment relations board or a court to find that a refusal to offer a counterproposal bolsters the evidence which adds up to a refusal to bargain in good faith. Such a holding would not seem to invade school board authority.

In most cases, of course, it should be recognized that if parties approach the bargaining table, counterproposals will be made voluntarily. The United States Supreme Court in speaking of collective bargaining has said: "[A]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of

14. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1964).

15. 89 N.L.R.B. 503 (1950).

16. The Third Circuit read the facts differently and felt that counterproposals had been made. NLRB v. Landis Tool Co., 193 F.2d 279 (3d Cir. 1952).

17. Highland Park Mfg. Co., 12 N.L.R.B. 1238 (1939), *enforced*, 110 F.2d 632 (4th Cir. 1940).

collective negotiation."[18] Similar philosophy prompts the prediction that if the school board enters the negotiations with an attitude of good faith, it will very frequently voluntarily make counterproposals. Since compulsion is not involved, there can be no issue of infringement on school board authority.

The dictates of good faith bargaining will always impose upon the school board, without any possibility of infringing upon authority, the duty to explain its position and give reasons for the stand it takes.[19]

A problem closely allied to the problem of counterproposals is raised by a fact situation which makes it possible to conclude that the representative of the employees comes away from the negotiating table with little of value. Can an employment relations board or a court in such circumstances infer bad faith in bargaining? The Fifth Circuit responded to this question in *White v. NLRB*. In that case the court said: "[W]e may assume that the Board could find that the terms of the contract insisted upon by the company . . . would in fact have left the union in no better position than if it had no contract."[20] The court was unwilling to find bad faith just because of such outcome. It quoted with approval the comment of the United States Supreme Court that "Congress provided expressly that the Board should not pass upon the desirability of the substantial terms of labor agreements."[21] The Fifth Circuit was careful, however, to qualify its position by stating that it did "not hold that under no possible circumstances can the mere content of the various proposals and counter proposals of management and union be sufficient evidence of a want of good faith to justify a holding to that effect."[22] It continued: "[W]e can conceive of one party to such bargaining procedure suggesting proposals of such a nature or type or couched in such objectionable language that they would be calculated to disrupt any serious negotiations."[23] It is important to understand that the facts in the *White* case revealed that the company showed a willingness to discuss all union proposals and explain its position on all points. The one dissenting judge in *White* cautioned against the need to protect against merely going through the motions of collective

18. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 214 (1964).

19. *See* Capital Aviation, Inc., 152 N.L.R.B. 745 (1965); Dierks Forests, Inc., 148 N.L.R.B. 923 (1964).

20. 255 F.2d 564, 566 (5th Cir. 1958).

21. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 408-09 (1952).

22. 255 F.2d at 569.

23. *Id.*

bargaining. He felt that the NLRB must take cognizance of the reasonableness of positions taken by the employer.

If the state courts follow the philosophy of the Fifth Circuit, it is apparent that good faith bargaining does not infringe upon school board legislative authority. This is so even if the courts acknowledge that *White* is right when it recognizes that there may be "possible circumstances" which would induce a board or court to find bad faith after looking at the content of proposals. If those "possible circumstances" are confined to the extreme situations where the demands can be said to be insulting, there surely could be no realistic claim of infringement upon school board authority. Of course, if a decision as to bad faith was made on the basis of the philosophy of the dissenter in *White*, it appears clear that there would be an infringement upon the legislative power of the school board.

The basic test to determine if the techniques required by the dictate of good faith negotiating constitute an infringement upon the legislative authority of the school board is whether the board is required to capitulate or make concessions to demands. It cannot be denied that the ultimate responsibility for a decision must be solely that of the school board. It seems unrealistic, however, to conclude, as suggested by the Supreme Court of Wisconsin,[24] that if good faith bargaining is decreed by statute[25] in the conventional sense in which that term is used in industrial relations, then there is a certain restraint or persuasion, and therefore, an invasion of the board's legislative authority.

It is submitted that if the "rules" of bargaining in good faith do not force the school board to give up its ultimate responsibility for making a decision, there is no infringement on legislative authority just because good faith bargaining dictates that a certain technique of procedure is to be used. It cannot be gainsaid that such rules of procedure do put a certain type of compulsion upon the board which does not exist if the board can "meet and confer" as it pleases. It does, however, seem unrealistic to contend that the imposition of such rules of procedure infringes upon legislative authority, unless the rules cause the school board to capitulate to demands.

This article has already cautioned about the danger of infringement upon the legislative authority of the school board if a

24. Joint School Dist. No. 8 v. Wisconsin Employment Relations Bd., 37 Wis. 2d 483, 494, 155 N.W.2d 78, 83 (1967).

25. Instead of the "conferences and negotiations" requirement of § 111.70 of the Wisconsin statute.

state labor relations board or state court should arrive at erroneous conclusions as to the necessity of making concessions, offering counterproposals or looking into the reasonableness of negotiated terms. It is now necessary to set forth other negotiating techniques which the NLRB and the federal courts have stated are dictated by the concept of good faith bargaining so that it might be determined whether these techniques require the school board to surrender its ultimate decision-making power and thus infringe upon the board's legislative authority.

An employer cannot come to the bargaining table and assume the position that he will listen attentively to all proposals, and if he hears anything to which he can agree, he will so indicate.[26] Furthermore, a party cannot enter negotiations with the announcement: "We don't want to waste time, so we will tell you in advance that we will never sign *any* contract which does not contain the terms which we will now name."[27] For instance, if this rule were applied to a school board bargaining technique, the board could not open negotiations with a proposal that the contract must contain a clause giving sole control over class load and size of the board. The technique is not good faith bargaining, since it constitutes a "take it or leave it" approach.[28] It indicates to the other party that it cannot have any agreement unless it consents to the inclusion of a significant term in the contract about which the proposer *will not bargain*. The United States Supreme Court has pointed out that parties must evidence a willingness to agree.[29] The "take it or leave it" approach does not harmonize with such philosophy.

On the other hand, if an employee representative demanded a binding arbitration clause and the school board responded that "we will tell you now that we will reserve sole control over class load and size," such a response would not seem to constitute a violation of the concept of good faith negotiations. Firmness on one or more issues when the whole record reveals no intent to dodge the obligation to bargain in good faith is no violation of the requirement.[30]

It is possible that employment relations boards or courts could

26. NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943).

27. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

28. In the early case of Highland Mfg. Co., 12 N.L.R.B. 1238 (1939), *enforced*, 110 F.2d 632 (4th Cir. 1940), collective bargaining was interpreted to include an obligation to enter into discussion or negotiations with an open and fair mind and with a sincere purpose to find a basis for agreement concerning issues raised.

29. NLRB v. Insurance Agents Union, 361 U.S. 477 (1960).

30. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

apply the prohibition against a "take it or leave it" technique to a situation in such a way as to suggest that some counterproposal in the form of a concession is necessary. The philosophy of the *General Electric*[31] case, decided by the NLRB, may illustrate such an application. In that case the union presented its demands. The company asked for time to study them. After a reasonable time for study, the company returned to negotiations. It announced that it had a policy of continuing year-round research and always did the best it could for employees. It then stated its counterproposal and announced it would not depart from this proposal unless the union could demonstrate that the company had made an error or that there had been some intervening change in circumstances. The NLRB saw in this an approach akin to a "take it or leave it" attitude and seemed to sound a warning of violation of good faith if at an early stage in negotiations a party finalizes a wide range of counterproposals.[32]

There is no doubt whatever that an employer can in due course, after good faith bargaining, put forth a final offer and carry it through to an impasse.[33] Parties do not have to engage in fruitless marathon sessions at the expense of a frank statement and support of position.[34] The unilateral granting of a benefit before an impasse is a circumvention of the duty to bargain and is held to be as bad as a flat refusal.[35]

If an impasse does develop, certain acts have been held to violate the dictates of good faith negotiating. Unilateral action on the part of an employer may violate the concept. If an employer grants benefits that have never been discussed at the bargaining table, this constitutes a violation of the good faith requirement.[36] A number of decisions have found no violation after an impasse, however, if the employer granted something which had been discussed during negotiations and which the employer at such time had indicated he would grant.[37] The

31. 150 N.L.R.B. 192 (1964).

32. There were other things that General Electric did which would make it possible to explain the outcome on the basis of totality of conduct adding up to bad faith in negotiations. However, board member Jenkins, in a concurring opinion, stated flatly that he felt the NLRB would have condemned the counterapproach as an indication of bad faith in negotiations even if other elements had not been involved in the case. The case was appealed, but no decision has been rendered because of involvement in certain procedural difficulties.

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

34. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

35. NLRB v. Katz, 369 U.S. 736 (1962).

36. NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949).

37. NLRB v. United States Sonics Corp., 312 F.2d 610 (1st Cir. 1963); NLRB v. Intracoastal Terminal, Inc. 286 F.2d 954 (5th Cir. 1961); Pacific Gamble Robinson Co. v. NLRB, 186 F.2d 106 (6th Cir. 1950).

courts recognized that such action would not seriously discourage membership in employee organizations. Many unilateral actions are condemned as evidencing bad faith in negotiations because they tend to convey to employees that the employee organization did not play a major role in securing a benefit from the employer. If an impasse is broken by a party submitting a realistically new proposal, there is a duty to resume negotiations.

When a contract is finally negotiated, the duty to bargain on modification of terms is suspended until a reasonable time before termination or until a re-opening date if the contract contains such date.[38] A negotiated contract is likely to spell out procedure for handling grievances that arise under its terms. The last step in such procedure may call for final decision by an impartial arbitrator.

An effort may be made by one of the parties during the term of the contract to add to the agreement instead of modifying or changing terms. The concept of good faith in bargaining does not require negotiations in such a situation if the matter which the party wishes to add was discussed at the time of contract negotiations.[39] Negotiations, however, are decreed by the concept of good faith bargaining if a party wishes to add to the agreement during its life a provision which falls within the mandatory subject matter area and was never discussed at the time of negotiating the agreement.[40] It is possible for the parties to use clear language in a negotiated agreement so as to avoid any need to bargain on adding terms during the span of an existing contract. Industry refers to this kind of provision as "zipper clause." The following is an example of such a clause: the employer and the association, for the life of this agreement, each voluntarily and unqualifiedly waives the rights, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to, or covered in this agreement, or with respect to any subject or matter not specifically referred to or covered in this agreement even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed the agreement.

---

38. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1964), prescribes rules in respect to negotiations prior to efforts to modify or terminate an existing contract. A state statute could very wisely do so in the field of public employment.

39. NLRB v. Union Carbide & Carbon Corp., 100 N.L.R.B. 689 (1952).

40. NLRB v. Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952).

Good faith bargaining demands a realistic interchange of reasons, information and data. Parties are not expected to bargain in the dark.[41]

It is submitted now that none of these techniques of good faith bargaining, with one possible exception, are of the sort that infringe upon the ultimate authority of the school board. The prescribed procedures do put a certain type of compulsion upon the board, but not to the extent of infringing upon legislative authority. The one possible exception can be found in the NLRB's condemnation of the *General Electric*[42] approach as a "take it or leave it" attitude. In this respect it should be remembered that General Electric was entirely willing to give reasons for the positions it took in its proposal.

It was suggested in a previous paragraph that a negotiated contract might provide a procedure for settling grievances which culminates in binding arbitration. The issue as to whether binding arbitration for such purpose constituted an infringement upon the legislative authority of a municipality was faced directly by the Wisconsin Supreme Court.[43] The court stated emphatically that there was no infringement. It pointed out that in all its arguments the city made the mistake of assuming that arbitration to dictate the terms of a collective bargaining agreement was involved. The court stressed that a provision to arbitrate disputes that arise under the terms of a contract which the parties have *voluntarily* negotiated is something entirely different. The court took cognizance of the fact that both parties may desire to provide for arbitration rather than to be forced to litigate through the judicial system.

Attention now needs to be given to a few remaining matters. Early in this article it was indicated that discussion would center on a statute which would provide for "good faith negotiating on wages, hours and other conditions of employment." Since the term "conditions of employment" is broad, the NLRB and the federal courts have focused on the issue as to what subjects fall within the term so that it can be said that bargaining about them is mandatory. The landmark case in the area is *NLRB v. Wooster Division of Borg-Warner Corporation*,[44] decided by the United States Supreme Court.

41. For an expression of this philosophy, see Truitt Mfg. Co., 110 N.L.R.B. 856 (1954), *enforcement denied*, 224 F.2d 869 (4th Cir. 1955), *rev'd*, 351 U.S. 149 (1956).

42. 150 N.L.R.B. 192 (1964).

43. Local 1226, Rhinelander City Employees v. City of Rhinelander, 35 Wis. 2d 209, 151 N.W.2d 30 (1967).

44. 356 U.S. 342 (1958).

The Court divided the subjects into those which are illegal and cannot be bargained about, those which are voluntary and can be bargained about, and those which are mandatory and must be bargained about.

The concept that it is illegal to bargain about some subject matter is very important in the area of public employment. This idea recognizes that bargaining often collides with existing statutes and cannot disregard them. Even when this collision takes place, however, there may be considerable opportunity for intermediate negotiations. For example, a state statute may specify the reasons for dismissal of a tenure teacher. Although bargaining could not be used to change those reasons, it could be used to set up some intermediate grievance procedure if the state statute did not prohibit such bargaining.

In the industrial field the trend of court decisions has been constantly to expand the area of mandatory negotiations. It is still recognized, however, that there are some fundamental management rights which need not be negotiated. Justice Stewart in his concurring opinion in *Fibreboard Paper Products Corporation v. NLRB*,[45] in which the Supreme Court best explains why it supports the legality of collective bargaining, takes special pains to set forth some examples. One illustration is the right to determine the scope of the business enterprise. Stewart admits that decisions in this field would have some relationship to conditions of employment, but he asserts that they lie at the "core of entrepreneurial control," and therefore, the employer does not have to bargain about them.

Similar decisions will be made in the field of public employer-employee bargaining. It can be expected that many state courts will follow the trend of the federal courts in working with fact situations in the industrial field and bring more and more subjects within the area of mandatory negotiations. The struggle will be in the area of the right of teachers to bargain for a role in the hiring, promoting and transfer process. Another field for debate will be the right to bargain about choice of textbooks, curriculum and other aspects of the instructional program. Since teachers are trained professionals, it is entirely probable that administrative boards and courts can be influenced to feel that decisions relative to the instructional program should be treated as falling within a concept such as "conditions of employment." Indeed, a similar argument may succeed in respect to permitting teachers to bargain for a role in connection with hiring and promotion. Since the question of "board right" is likely to be somewhat uncertain, it is predictable that some states will specify the

45. 379 U.S. 203 (1964).

right by statute in a more specific way than the mere use of the general direction that negotiations are to be on "wages, hours and other terms and conditions of employment."

Even if the employment relations boards and the courts become very liberal in defining the mandatory subjects for bargaining, it does not seem logical to assert that this would infringe upon the legislative authority of the school board. The direction will be only to bargain, and as previously indicated, the school board will not be forced to capitulate to demands.

When statutes decree good faith bargaining in the public employment sector, they usually provide for mediation and fact-finding if an impasse is reached. They also order fact-finding if an administrative board finds a refusal to bargain in good faith. It cannot be said that provisions for mediation and fact-finding infringe upon school board authority. Neither the mediator nor the fact finder is given power to order the board to write terms into a contract. The type of fact-finding provision found in statutes calls for only an advisory opinion.

CONCLUSION

The assumption has been that state employment relations boards and courts will not require any more by way of good faith professional negotiation on wages, hours and conditions of employment than have the National Labor Relations Board, the federal courts and the United States Supreme Court in interpreting the requirement for good faith bargaining under the Labor Management Relations Act. If this is so and if state agencies and courts are not misled to believe that the concept of good faith in negotiations dictates concessions, counterproposals to every demand, and a review of the reasonableness of negotiated terms, it is submitted that statutes ordering school boards to negotiate in good faith on wages, hours and conditions of employment do not infringe upon school board authority and, therefore, should withstand any constitutional test.

The trend is running in favor of giving public employees statutory protection for the right to negotiate in good faith. School boards ought to be sufficiently enlightened to see that it would be unwise to try to block the progress of legislation by asserting an invasion of their authority. A statute couched in the terms indicated will not take away from school boards the ultimate power to make decisions. The boards can well afford to remember the philosophy of the United States Supreme Court relative to the merit of collective bargaining: although it is not possible to say whether a satisfactory

solution could be reached, national labor policy is founded upon congressional determination that the chances are good enough to warrant subjecting issues to the process of collective negotiations.[46]

Were school boards to understand that bargaining does not require capitulation but is calculated to bring about harmony and build morale, they would seldom reject a proposed subject on the ground that it is not within the mandatory area of bargaining.

It may be said that good faith collective negotiations require recognition by both parties, not merely formal but real, that bargaining is a shared process in which each party has a right to play an active role. Each party balances what is desired against known costs of unresolved disagreement. These costs on the one side may be such things as loss of competent employees and the fostering of a general low morale, and on the other side the loss of community support if unreasonable demands are made. There is nothing inherent in the technique of good faith collective negotiations which mitigates against producing a climate that will insure better education for children.

In conclusion, it seems appropriate to point out that if statutes require good faith collective negotiations, they also must contain realistic enforcement provisions which can be employed against a party showing bad faith. A discussion of appropriate provisions is beyond the scope of this article.

---

46. *Id.*