Wunderlich Act, when the administrative board acts within the scope of its authority, any fact-finding must be received, if valid, in the same manner as those of the independent administrative agencies. Therefore, as Judge Davis urges, where the issue in dispute is one of fact under the contract and the board has acted within the scope of its authority, it is submitted that the proper role of the courts is strictly one of review, *i.e.*, limited to the administrative record unless there is specific evidence of one of the defects enumerated in the Wunderlich Act.

JOHN H. HINES, JR.

Labor Law—Labor Management Relations Act—Section 8(a)(5)—Refusal of Employer to Bargain in Good Faith.—***General Elec. Co. & International Union of Elec. Workers, AFL-CIO.***[1]—After an unsuccessful three-week strike against GE following the 1960 national contract negotiations, the IUE filed a complaint with the NLRB that GE had refused to bargain in good faith during the negotiations and had otherwise acted in derogation of the IUE's status as bargaining representative. The facts found by the trial examiner were as follows.

On June 13, 1960, the union presented its offer to the company. Although formal contract negotiations were not to begin until July 19, the parties had agreed that the early meetings would be negotiating and not merely review meetings, and would deal with employment-security proposals.

Prior to June 13, in its communications program to employees, GE had, in effect, committed itself to reject the IUE's employment-security proposals, and at the meetings merely repeated positions already publicly taken. During the four weeks of early negotiations, while the union formally presented and argued its contract demands, GE gave no indication to the union of the employment-security program it was eventually to include in its offer. The IUE was thus denied the opportunity to consider and propose alternatives to the company's program.

As the negotiations proceeded concerning the union's general demands (other than employment-security proposals), GE continued to maintain that it was primarily interested in "fact-finding": that is, in listening to the union's demands and considering them as facts in formulating its own demands. As demonstrated here and throughout the negotiations, GE's position consistently followed the pattern of Boulwareism,[2] its own particular approach to collective bargaining.

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[1] 150 N.L.R.B. No. 36, 2 Lab. Rel. Rep. (57 L.R.R.M.) 1491 (1964).

[2] Boulwareism, named after its creator, Lemuel R. Boulware, a GE vice-president, was the result of a reassessment of company-employee relations policies in the aftermath of strikes in 1946. It was an answer to the concern among GE management that the power of the unions had been too greatly enhanced during the war.

In practice, GE first seeks through extensive research to determine what is "right" for its employees in the light of business conditions, competition, economic trends and employee desires. At the early bargaining sessions, the company listens to the union's demands and carefully evaluates them in view of its own facts. On the basis of this evaluation, GE formulates what is "right" and makes an offer to the union. The offer

On August 30, GE formally presented its offer. Its provisions and even its contract language were entirely different from those requested by the union. The IUE declared the offer unacceptable and asked GE to continue negotiations for three days without the pressures of publicity. GE rejected the request and publicized its offer the following day, disregarding the union's objection that such publicity would prematurely "freeze" GE's position.

Between August 30 and October 19, the day on which the impasse was declared, the parties held twenty-five meetings. GE agreed to five changes in its offer but considered only two worthy of mention in its employee communications. Of these two changes, the IUE had not requested the first and had expressly opposed the other.

When, on September 8, the negotiations halted for the IUE convention, there was admittedly no impasse, and meetings were scheduled to resume on September 20. However, GE announced to its employees before September 20, and before it informed the union, that its full offer was now on the table. When negotiations resumed on September 20, GE announced to the IUE that its offer was "final".

Before, during, and after the IUE convention, GE flooded the employees with a constant stream of communications emphasizing the merits of the company's position. These stressed (1) the finality of the offer and futility of further negotiations, (2) its firm policy not to change the offer because of a strike threat, (3) the asserted "selfish" and "irresponsible" motives of the IUE leadership, and (4) the danger to employee jobs that would result from an enlargement of its offer or from a strike.

On September 20, GE also announced for nonrepresented employees, retroactive to September 12, the wage increases provided for in GE's basic offer to the unions; and, on September 22, it announced pension changes for nonrepresented employees, although these were not to be operative until the end of the year.[3]

In its complaint to the NLRB, the IUE further alleged that GE had refused to furnish it with relevant and necessary information.[4] The union had first requested information on August 24. GE admittedly made no effort at any time to obtain the data called for in the first two items of the

is intended to include everything which GE deems warranted, holding back nothing for later compromising. When first presented, GE maintains a willingness to make prompt adjustments in its offer whenever new information from any source or a significant economic change indicates that the initial offer is not "right". GE declares repeatedly that it will not make any change it believes to be incorrect merely because of a strike or strike threat. Its position is then marketed directly to the employees through an elaborate employee communications system, using newspapers, bulletins and digests, letters to homes, radio and television broadcasts, and personal contacts. Through this system GE hopes to build active employee support for management's goals and objectives, and to thereby influence union acceptance. See Northrup, The Case for Boulwareism, 41 Harv. Bus. Rev. 86 (Sept./Oct. 1963).

[3] An essential part of Boulwareism at GE is a uniformity policy which insures that the members of all the unions represented at GE and all of the unrepresented employees receive equal benefits. Supra note 1, at 1493-94.

[4] The data requested related to the cost of various insurance and pension proposals, the number and categories of laid-off and recalled employees in certain units, and the cost of a fourth week of vacation for certain employees. Supra note 1, at 1496.

union's written request and took no active steps to collect that requested in the other three items until after the strike had ended. The request had stated that the information was necessary to allow the union to appraise the cost of GE's proposals and, in general, to bargain intelligently.

The union alleged, in addition, that the employer, while engaged in national negotiations, had tried to deal separately with locals on matters properly the subject of national negotiations, and solicited two locals to abandon the strike. On September 30, GE made an offer to its Schenectady and Pittsfield employees to keep the old contract in effect beyond October 1 at their plants, provided they did not strike. GE offered to make a separate agreement, more favorable than those previously offered in national negotiations, with the locals' business agents. The locals rejected the offer but GE continued to make it on a separate local-by-local basis through direct contact with local officers. The IUE strike began on October 2 and ended unsuccessfully on October 22. At this point the union filed its complaint with the Board.

HELD: By a 4-1 vote the Board found that GE had refused to bargain in good faith as evidenced by its specific conduct and its overall approach to bargaining.

The majority interpreted Section 8(a)(5)[5] of the Labor Management Relations Act as imposing two major requirements on the employer. It first requires GE to do more than merely go through the motions of negotiating; it must have, and demonstrate, a serious intent to adjust differences and to reach an acceptable common ground.[6] It secondly imposes on GE the duty to recognize the union and the union's right to an active role in collective bargaining.[7] In applying the standard to the facts, the majority adopted the finding of the trial examiner that GE did not bargain in good faith, as evidenced by (1) its failure to furnish certain information requested by the IUE, (2) its attempts to deal separately with locals on matters under discussion in the national negotiations and its solicitation of locals to abandon the strike, (3) its presentation of the personal accident insurance proposal to the union on a take-it-or-leave-it basis, and (4) its overall approach to and conduct of bargaining, especially its communications program to employees and its conduct aimed at disparaging the union as bargaining representative. The majority criticized GE's "approach" to bargaining, stating that it "devitalizes negotiations and collective bargaining and robs them of their commonly accepted meaning."[8]

One member of the majority, Jenkins, concurred in the finding of bad faith in GE's overall conduct but refused to adopt certain language used by

[5] Labor Management Relations Act (Taft-Hartley Act) § 8(a)(5), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958):

> It shall be an unfair labor practice for an employer—
>
> (5) to refuse to bargain collectively with the representatives of his employees. . . .

[6] General Elec. Co. & International Union of Elec. Workers, AFL-CIO, supra note 1, at 1499.

[7] Ibid.

[8] Id. at 1500.

the majority. He emphasized the dangerous implications arising from a condemnation of an employer's "approach" to bargaining. Use of the word "approach" might be taken to imply a condemnation of GE's method of formulating its proposals and its hard bargaining attitude, both of which Jenkins believes GE can rightfully maintain. Jenkins would restrict the meaning of "approach" to "conduct . . . designed to destroy the bargaining relationship or to undermine the status of a bargaining representative."[9]

Member Leedom, although agreeing with the majority regarding the specific examples of bad faith by GE found by the majority, dissented from the finding of bad faith with respect to GE's *overall* bargaining conduct. He stressed the importance, to the parties and the public, of not discouraging new techniques in collective bargaining, and stated that by closely scrutinizing the particular acts and words of the parties at the bargaining table the Board will inevitably direct bargaining into specific, time-honored channels and thereby control the substantive terms of the agreement. Once the parties are brought together at the bargaining table, he believed that they should be able to use such tactics as they feel are necessary with freedom from government intervention.

The meaning of "good faith" bargaining is necessarily vague; in its flexibility lies its strength, for it was meant to apply to all employers who merely met the "externals" of bargaining.[10] The scope of the phrase today can be seen as the resulting balance struck between Section 8(a)(5)[11] and 8(d)[12] of the LMRA. The duty which section 8(a)(5) places on the employer was stated in *NLRB v. Reed & Prince Mfg. Co.* by Chief Justice Magruder:

> The question is whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union.[13]

And yet, section 8(d) expressly provides that an employer cannot be compelled to make a concession or to agree. In the words of *NLRB v. American Nat'l Ins. Co.*: "And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[14] If we look at other words in *Reed & Prince* we can appreciate the delicate balance struck

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[9] Id. at 1502.

[10] Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1413 (1958).

[11] 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958), quoted supra note 5.

[12] Labor Management Relations Act (Taft-Hartley Act) § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958): "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

[13] NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953).

[14] NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).

between the employer's duties under section 8(a)(5) and its rights under section 8(d):

> While the Board cannot force an employer to make a "concession" on any specific issue or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if section 8(a)(5) is to be read as imposing any substantial obligation at all.[15]

A recent case, *NLRB v. Fitzgerald Mills Corp.*, has examined the effect which sections 8(a)(5) and 8(d) exert on each other, and has concluded:

> The statute was not intended to require agreement by the parties or to permit the Board or the courts to impose on the parties their concept of an appropriate agreement under the circumstances. . . . What is required is that the parties meet to disclose their proposals, that such proposals be the subject of discussion so that each party be aware of the other's views and so that compromise between them be made more likely, and that neither party place insurmountable obstacles in the path of agreeable reconciliation of opposing demands.[16]

This case reaffirms the *Reed & Prince* test and implies, as does *Reed & Prince*, that the duty to bargain in good faith requires the employer to act so as to *increase* the prospects for a negotiated agreement acceptable to both parties.

Once we have determined the standard of "good faith" bargaining, the application of the standard to a particular case poses fewer problems. The *Reed & Prince* test allows the tribunal to infer the employer's state of mind from its conduct. The Board or the courts must rely on the total effect of various incidents, usually many of which are minor in themselves, to determine whether the employer's mind was closed to agreement with the union. *Universal Camera Corp. v. NLRB* held that the employer's conduct on the record as a whole was to be considered by the Board on questions of fact such as good faith.[17]

One type of collective bargaining case which seems to test the width of the line between good faith and bad faith is the "hard bargaining" case, in which an impasse develops because the employer would not change its final offer or concede to the union's demands. Typically, at an early stage of the bargaining the employer will frankly present its final offer to the union and stubbornly adhere to the offer until an impasse results or the union concedes. Although the union insists that the employer must make *some* effort to reach a common ground, the employer counters with his right not to have to concede. The principal case involved hard bargaining by GE—after hearing the union's demands, GE presented its final offer to the IUE at an early point in the negotiations and emphasized repeatedly its intent to adhere to the offer, even if a strike should result.

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[15] Supra note 13, at 134-35.

[16] NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 270 (2d Cir. 1963).

[17] Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951).

The Board and the courts have held that hard bargaining by the employer is not per se bad faith. Speaking for the majority of the Supreme Court in the *American Ins.* case, Mr. Chief Justice Vinson stated: "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position."[18] The court of appeals in the *Herman Sausage* case added:

> The employer may have either good or bad reasons, or no reason at all, for insistence on the inclusion or exclusion of a proposed contract term. If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate.[19]

Three recent "hard bargaining" cases have conclusively upheld the employer's right to refuse to concede.[20] One of the three, *Philip Carey Mfg. Co. & Local 689, UAW*, is especially relevant. There, despite the finding of the trial examiner that the employer had generally bargained in bad faith, and in particular had used "a form of Boulwareism" as its technique, and had adhered to its final offer for the seven meetings prior to the strike, the Board found no bad faith and reasserted the employer's right to formulate a proposal, present it frankly and stick to it through the bargaining.[21]

At first glance, the principal case seems to conflict with the recent precedent upholding the right of hard bargaining. However, although GE did maintain a hard bargaining position and was found guilty of bad faith bargaining, it would appear that the Board relied strongly on another factor in the case in finding overall bad faith bargaining. The Board stressed an element which distinguishes *General Elec. Co.* from *Philip Carey* and the other hard bargaining cases—the treatment of the IUE in disparagement of its position as the employees' bargaining representative. It could be argued that the majority opinion, in condemning GE's "approach to and

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[18] Supra note 14, at 404.

[19] NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960).

[20] In the first case, Philip Carey Mfg. Co. & Local 689, UAW, 140 N.L.R.B. 1103 (1963), although the trial examiner found bad faith based on the employer's "frozen" position and "deaf" attitude regarding the union's arguments, the Board, in disagreeing, stressed the number of meetings which preceded the final offer, the employer's earlier willingness to listen to the union's proposals and suggest counterproposals, and its inclusion of a wage increase in the final offer.

The second case, NLRB v. American Aggregate Co., 335 F.2d 253 (5th Cir. 1964), concerned an employer who bargained through thirty-two conferences without agreeing to the union's terms. The court found no bad faith, stressing that the employer discussed all the disputed matters and that the negotiations foundered on one issue, a maximum hour schedule, and the employer could refuse the union's proposal just as the union had refused the employer's proposal.

The third case, Dierks Forest Inc. & Local 3089, Lumber and Sawmill Workers, 148 N.L.R.B. No. 92, 2 Lab. Rel. Rep. (57 L.R.R.M.) 1086 (1964), involved an employer who negotiated through thirteen sessions without agreeing. The trial examiner found bad faith; but the Board did not, stressing that the employer appeared whenever the union requested, discussed the union's proposals and made counterproposals, and explained the reasons for its bargaining position to the union.

[21] Philip Carey Mfg. Co. & Local 689, UAW, supra note 20.

conduct of bargaining," did not disturb the right to indulge in hard bargaining, but focused on GE's hard bargaining and its treatment of the IUE as the two key components of the "totality" of GE's conduct aimed at minimizing the function of the union.

Two recent cases demonstrate similar concern by the courts over the role which the employer accorded the union in bargaining. In the *Herman Sausage* case, the court found bad faith in the employer's implied disparagement of the union and its attempts to act as the protector of the employees' interests.[22] Another court of appeals, in *Fitzgerald Mills*, likewise saw in certain acts of the employer an attempt to deal individually with employees and to weaken the union in its bargaining efforts. The court found bad faith in the attempts to undermine union prestige.[23]

Any dormant concern which the Board might feel for the union's status as bargaining representative would surely be heightened in the principal case because of the inherent weakness of the unions in the GE corporate framework. As Professor Herbert Northrup points out:

> General Electric is one of the giants of U.S. business, with more than 250,000 employees, 165 plants, and sales in excess of $4.5 billion. It is also one of the most diversified companies in the world, involved in manufacturing almost every conceivable type of electrical product. . . .[24]

Only a bare majority (135,000 of 260,000) of GE's employees are represented.[25] As of 1963 there were ten principal unions, each representing from 800 to 65,000 employees,[26] a total of over 100 unions being represented in all.[27] This structure itself presents a strong obstacle to a successful strike against GE—the diversification tends to make each plant and its employees an independent unit, and even within each unit the number of unions makes a simultaneous strike very difficult; furthermore, the large number of non-represented employees, all of whom enjoy benefits equal to those received by represented employees, provide indirect pressure on the unions to accept the company's proposals rather than risk a strike which will most likely end in failure. Thus, even without Boulwareism, the IUE and all other unions bargain from a weak position with GE.

As the facts in the principal case clearly show, Boulwareism is aimed at further weakening the union. The three specific instances of union disparagement,[28] which the Board unanimously agreed demonstrated bad faith, deserve little discussion—they demonstrate a refusal even to recognize

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[22] Supra note 19.

[23] Supra note 16.

[24] Northrup, supra note 2, at 86.

[25] N.Y. Times, Dec. 17, 1964, p. 46, col. 2 (city ed.).

[26] Northrup, supra note 2, at 87. The IUE represents the highest number of employees at GE.

[27] General Elec. Co. & International Union of Elec. Workers, AFL-CIO, supra note 1, at 1494.

[28] (1) The failure to supply requested information to the IUE, (2) the presentation of the accident insurance proposal on a take-it-or-leave-it basis, and (3) the solicitation of locals to abandon the strike and deal with GE separately.

that the union is a participant in the bargaining and must be treated accordingly. In addition to these major examples, however, there were numerous minor instances which combined with the three specifics to constitute the "totality" of bad faith conduct. From the beginning of the negotiations, when GE refused to offer its employment-security proposals for discussion, to the end of the strike, when it refused to sign a "strike settlement" labeled as such and insisted on a *unilateral* "letter of intent," the record abounds with indications of GE's disparagement of the IUE as the bargaining representative of the employees. For example, GE's proposed contract did not even respond to the contract language which the union sought. GE refused to make any substantial change in twenty-five meetings; it announced its "final" offer to the employees directly without likewise informing the union; it ignored union requests not to prematurely "freeze" its position by publicity; it announced, contemporaneously with its final offer to the union, pension and wage increases for nonrepresented employees;[29] and it utilized its communications system to question the union leadership's motives and to emphasize the finality of the offer and the futility of a strike. GE asked the employees to place their faith in its policy to "do right voluntarily." In effect, GE sought acceptance as the protector of the employees' interests.[30]

Moreover, GE rather than the union determines what is "right" for the employees and sells its position to them, while at the same time questioning the motives of the IUE in rejecting the offer and stressing the pointlessness of a strike. GE applies further pressure on the union by stressing the benefits which the nonrepresented employees are enjoying as a shining example of GE's desire to "do right voluntarily." If the IUE accepts the offer, which has largely been determined unilaterally, it strengthens GE's image and shrinks to the role of an advisor between the employer and employees. If it rejects the offer, it faces an almost certainly unsuccessful strike and a loss of member support not only because of the strike defeat but because the nonrepresented employees appear to have fared better than the union members solely by trusting in the company. The only possible result for the union is an erosion of support and a further weighing of the bargaining balance in GE's favor.

In light of the foregoing, we can conclude that the phrase "overall approach to and conduct of bargaining" was probably intended to refer to those elements of Boulwareism which are meant to weaken the already feeble bargaining position of the IUE, primarily by emphasizing to the member–employees the relative weakness of the union. GE's "firm, fair proposal" and hard bargaining are meant to prevent the union from appearing to force additional benefits from GE; and the communications program emphasizes that the dynamics of bargaining come from the employer and not the union. The effects of hard bargaining in this unique context, rather

[29] The court in *Fitzgerald Mills*, supra note 16, gave considerable emphasis to such timing as a deliberate attempt to deal individually with the employees.

[30] The court in *Herman Sausage*, supra note 19, relied heavily on the president-employer's attempts to have the employees trust in the Bible and him, instead of the union, as their protector.

than hard bargaining itself, seem to lead the Board to the finding of overall bad faith.

It can be seriously doubted that the *General Electric* decision will have any far-reaching significance. The case does not condemn "hard bargaining" or an employer's communications program per se. It probably does not attack Boulwareism per se either—at least not the bare elements, for the *Philip Carey* decision upheld a form of Boulwareism. The case does represent a close look at the role which GE accorded the IUE in its national negotiations in 1960—an examination of the effect of Boulwareism in its most effective company setting as practiced on the strongest of many weak unions represented in the company. In extremely few, if any, negotiations could the Board find such a combination of a weak union and a proven plan by a giant company to further diminish the union's strength through the collective bargaining process.

If the Board's decision is sustained, as it probably will be, it can also be doubted whether GE's bargaining approach will be radically changed. Boulwareism has been successful for GE, and it will not be altered in light of a decision as vague as this. As a first step, GE probably will recognize that the union must be patronized—at least to the point of supplying information to it and using contract language which the union requests. It seems that GE could pay lip-service to the IUE and thus avoid Board disapproval without any great effort or loss of effectiveness in its bargaining. In the long run, even if the IUE support were to grow appreciably, there is little danger to GE of a successful strike. A token bow to the union in its conduct and communications program might be enough to appease the Board and allow GE to practice a milder Boulwareism as a form of "hard bargaining."

ANDREW F. SHEA

Labor Law—Labor Management Relations Act—Section 301(a)—Removal of Cause—Injunction Action—Breach of No-Strike Clause.—***American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs***[1]— A collective bargaining agreement exists between the plaintiff corporation and the defendant union which contains clauses that prohibit strikes and work stoppages. The union commenced a work stoppage which caused a cessation of the corporate business. The corporation thereupon filed a complaint in the state court to enjoin the union from violating the no-strike provisions of the agreement and for other appropriate relief. The state court issued a temporary restraining order prohibiting the union from violating the agreement. Thereafter, the union removed the action to the federal district court pursuant to Section 1441 of the Removal Statute.[2] The corporation amended its com-

[1] 338 F.2d 837 (3d Cir. 1964), cert. denied, 33 U.S.L. Week 3296 (U.S. March 8, 1965).

[2] 28 U.S.C. § 1441 (1958):

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have