

Kenneth G. Dau-Schmidt

The Duty to Bargain in Good Faith: *NLRB v. Truitt Manufacturing Co.* and *NLRB v. Insurance Agents' International Union*

Introduction

The process of collective bargaining contains an inherent conflict between the individual interests of the parties in acting strategically to gain an advantage at the expense of the other, and their collective interest in cooperating and dividing the fruits of their joint enterprise without industrial strife. By being stubborn, lying, refusing to meet, committing to a favorable position or otherwise “bargaining hard,” each party can hope to gain an advantage over the other in the ultimate bargain that is struck, but if both sides engage in such recalcitrant behavior the negotiations are more likely to devolve into industrial warfare and a strike. By bargaining cooperatively, not only can the parties avoid the lost wages and lost profits of a strike, but they can also constructively explore new ways in which both sides might benefit through improved production or more efficient contract terms.¹

Of course, one can't solve this dilemma by simply outlawing strikes. The exercise of economic weapons is essential to any system for the private determination of disputes through collective bargaining. Without the possibility of resort to economic pressure, neither side would have an incentive to make concessions nor reach agreement. In public sector bargaining where strikes are prohibited, the parties adjudicate disputes before a neutral arbitrator in interest arbitration.² Unless we want to replace our system of private determination of terms and conditions of employment by the parties through collective bargaining with a system in which the parties appeal to a neutral arbitrator to determine employment terms, the parties need at least some reasonable prospect of resort to economic weapons. Moreover, strikes sometimes serve other purposes. They communicate employer resolve or poverty to the union and union resolve and ability to conduct a strike to the employer, and they build (or destroy) political consensus within the union.³ Because of the essential motivating role strikes play, they might be described as the “engine” that drives

¹ Kenneth G. Dau-Schmidt, *A Bargaining Theory of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 Mich. L. Rev. 419, 431-34 (1992).

² Alvin L. Goldman, *Labor and Employment Law in the United States*, para 118 (1996).

³ Sir John Richard Hicks, *The Theory of Wages* 146-47 (2d ed. 1963); Orley Ashenfelter & George E. Johnson, *Bargaining Theory, Trade Unions and Industrial Strike Activity*, 59 Am. Econ. Rev. 35, 36-37 (1969).

collective bargaining.⁴

The solution to this dilemma is to regulate the conduct of collective bargaining so as to prohibit outright acts of strategic opportunism and to formulate the problem of collective bargaining in such a way as to promote the parties' ability to act on their collective interest in cooperation, rather than their individual interest in being recalcitrant. By following this strategy, the law might be used to promote the resolution of industrial disputes by the parties themselves through collective bargaining, while minimizing the number of strikes and thus promoting "industrial peace." One objective of labor law is to produce an efficient industrial relations system that needs only a small amount of industrial strife to drive the parties' private decision-making.⁵

To help achieve this solution, Congress required in the National Labor Relations Act (NLRA) that employers and unions bargain in "good faith." Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" and §8(b)(3) places a reciprocal obligation on the union.⁶ Section 8(d) of the NLRA specifies that "to bargain collectively" is 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."⁷ But what does it mean to bargain in "good faith"? What behavior does this obligation prohibit, and what behavior does it require, in order to promote cooperation between the parties while still allowing recourse to economic weapons that may ultimately decide the dispute?

This chapter discusses two classic Supreme Court cases from the 1950's that explore the contours of the obligation to bargain in good faith. In the first, *NLRB v. Truitt Manufacturing Co.*,⁸ the Supreme Court addressed the question whether the obligation to bargain in good faith requires an employer to open its books to the union when the employer refuses a union request for a larger wage increase on the basis that such an increase will drive the employer out of business. What is the extent of the employer's obligation to provide the union with information? In the second, *NLRB v. Insurance Agents' International Union*,⁹ the Supreme Court addressed the question whether union tactics to slow down work to put pressure on the employer in negotiations, tactics which are not protected by the NLRA, were consistent with the union's obligation to bargain in good faith. Does

⁴ George W. Taylor, *Government Regulation of Industrial Relations* 18 (1948); Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1409 (1958).

⁵ Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law*, 91 Mich. L. Rev. 419, 487-88 (1992).

⁶ 29 U.S.C. §§ 158(a)(5), 158(b)(3).

⁷ 29 U.S.C. §158(d).

⁸ 351 U.S. 149 (1956).

⁹ 361 U.S. 477 (1960).

the obligation to bargain in good faith limit the parties' recourse to economic warfare? These two cases are considered together in this chapter, because their seemingly inconsistent holdings illustrate the tension in the NLRA between regulating the conduct of collective bargaining to promote the parties' ability to bargain cooperatively in industrial peace, while still allowing the recourse to economic weapons that is necessary for the process of collective bargaining. This chapter offers the stories behind these two great cases, the arguments the lawyers made on behalf of their clients, how these cases were resolved by the Board and the courts, and some of the theory behind what it means to "bargain in good faith."

Social, Economic and Political Background

Perhaps it was inevitable that the Board and courts would define the boundaries of the concept of good faith bargaining during the 1950's. The core of the NLRA, the Wagner Act, had been passed just two decades earlier in 1935, while major substantive amendments, including the union's obligation to bargain collectively and the §8(d) specification that "to bargain collectively" meant to bargain "in good faith," were added in the 1947 Taft-Hartley amendments. Although the obligation to bargain in good faith had a jurisprudential history under the pre-Wagner Act National Labor Board and the pre-Taft-Hartley amendments National Labor Relations Board, it is not surprising that seminal cases regarding the meaning of the language in these statutes would develop during the two decades immediately following their enactment.¹⁰

Moreover, in America during the 1950's, collective bargaining was generally undertaken between healthy and prosperous employers and relatively strong and powerful labor organizations. The production required to win World War II purged the last vestiges of the Great Depression from the American economy and made even marginally productive firms profitable. Moreover, the destruction wreaked on Europe and Asia by the war left the United States as one of the few industrialized nations with an intact industrial plant and infrastructure. American industry emerged from the war stronger than when it entered, and with few international competitors until the late 1960's.¹¹ The American labor movement prospered during this period of economic expansion and shelter from international trade. Fired with idealism born of the Great Depression, and armed with the new labor law, unions successfully organized an ever larger share of the American workforce throughout the 1940's and 50's, reaching their zenith in 1954 of thirty-nine percent of private non-agricultural employees organized.¹² Although initially split into two competing organizations, the older craft-oriented American Federation of Labor (AFL) and the upstart industrial-based Congress

¹⁰ I *The Developing Labor Law*, 763-70 (Patrick Hardin & John E. Higgins, Jr. eds. 4th ed. 2001).

¹¹ Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 Ind. L. J. 1, 9 (2001).

¹² U.S. Bureau of Labor Statistics, *Handbook of Labor Statistics*, Bulletin 2070 (1980), tables 72, 162 and 165. Although the percentage of workers organized in the private sector fluctuated after 1954, it did not begin its precipitous decline until the 1960's.

of Industrial Organizations (CIO), these two organizations merged in 1955 to form the AFL-CIO.¹³ Strong employers faced by strong unions made for many important contests, both in the process of collective bargaining, and before the courts.

Despite economic prosperity at home, the 1940's and 50's saw a significant change in the American political landscape. The Democrats, under the leadership of Franklin Delano Roosevelt and Harry S Truman, controlled both the presidency and Congress throughout the recovery from the Great Depression and the victory in World War II. Although tremendous diversity of political perspective existed within the Democratic Party, especially between northern and southern politicians, Democrats generally favored the interests of unions and were responsible for passage of the Wagner Act. However, with the election of a Republican-majority House and Senate in 1946, and President Eisenhower in 1952, control of the federal government became mixed, or passed back and forth between the Democrats and the Republicans, who were generally more inclined toward employer interests. Indeed, the Republicans gained control of Congress in 1946 at least in part due to public unease over a series of postwar strikes by major unions, in particular the United Mine Workers and the United Steelworkers.

The Republican Congress passed the Taft-Hartley amendments to the NLRA in 1947, over President Truman's veto, as a check on union power. The election of Republicans also meant that appointees to the NLRB and courts would more likely favor employer interests. The replacement of Democrat Paul Herzog with Republican Guy Farmer as Chair of the National Labor Relations Board in June of 1953 marked a passing of the torch from a pro-union to a pro-employer Board.¹⁴ Although Eisenhower's policies were fairly moderate, some more conservative elements of the Republican party used the Cold-War competition after World War II between the United States and the Soviet Union as an excuse to persecute communists, socialists and leftists in the United States, particularly within the motion picture industry, the academy and the labor movement. Even within the labor movement itself, alleged communists were ferreted out and the AFL-CIO expelled several allegedly communist-controlled unions and created competing labor organizations to raid their members.¹⁵ In the 1950's, unions also came under increased scrutiny for corruption. In 1958 Congress passed the Landrum-Griffin Act in response to a congressional hearing that showed some union leaders had misappropriated union funds, accepted bribes from management, failed to maintain records and interfered with members' rights within the union.¹⁶

Legal Background

¹³ Foster Rhea Dulles, *Labor in America: A History* 373 (3d ed. 1966).

¹⁴ James A. Gross, *The NLRB: An Historical Perspective*, in *A Guide to Sources of Information on the National Labor Relations Board* 14, 16 (Gordon T. Law, Jr. ed., 2002).

¹⁵ Henry Pelling, *American Labor 192-96* (1960).

¹⁶ Foster Rhea Dulles, *Labor in America: A History* 382-89 (3d ed. 1966).

The parties' legal obligation to bargain in good faith is set forth in several provisions of the National Labor Relations Act. The original Wagner Act established the employer's obligation to bargain collectively in what is now §8(a)(5):

It shall be an unfair labor practice for an employer--
to refuse to bargain collectively with the representatives of his employees¹⁷

Later, in the 1947 Taft-Hartley amendments, Congress added an obligation on the part of the union to bargain collectively in §8(b)(3),¹⁸ and a definition of what it meant to "collectively bargain" in §8(d):

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession¹⁹

Taken together, these statutory provisions have been interpreted to impose on both the employer and the union an obligation to "bargain in good faith" concerning wages, hours and other terms and conditions of employment in collective negotiations. However, none of these provisions expressly answers the questions raised in the two cases addressed in this chapter--the employer's obligation to supply information consistent with good faith bargaining raised in *Truitt*, and the question whether partial work-stoppages and other "harassing tactics" are consistent with good faith bargaining posed by *Insurance Agents*'. The precedents relevant to the *Truitt* case will be discussed here, while *Textile Workers Union of America*,²⁰ the case that most influenced *Insurance Agents*', will be discussed later in the chapter.

Several precedents influenced the actions and arguments of the parties in *Truitt*. Board and court decisions had established that an employer's obligation to bargain in good faith included the obligation to supply the union with data on the wage rates and hours worked by unit members.²¹ Such information was necessary for the union to compute the cost of its bargaining proposals and

¹⁷ 29 U.S.C. §158(a)(5).

¹⁸ 29 U.S.C. §158(b)(3).

¹⁹ 29 U.S.C. §158(d).

²⁰ 108 NLRB 743 (1954).

²¹ See, e.g., *Boston Herald Traveler Corp. v. NLRB*, 223 F.2d 58 (1st Cir. 1954); *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947 (2d Cir. 1951); *NLRB v. Whittin Machine Works*, 217 F.2d 593 (4th Cir. 1954).

intelligently to discuss those proposals with management. However, it was unclear whether good faith included an obligation to share financial data on the firm's economic health.

The Board first addressed the question of the employer's obligation to supply financial information in *Southern Saddlery*.²² In that case, the employer rejected union demands for even a nominal wage increase on the basis that the firm's financial condition would not allow one. Moreover, the employer refused to make any counterproposal on wages or provide information substantiating its repeated claims of poverty. The Board held that it was necessary for the company to provide sufficient information to enable the union to understand and intelligently discuss all the issues relating to negotiations and that, by repeatedly rejecting the union's wage demands and refusing to provide information substantiating its claims of poverty, the company had impermissibly "erected an insurmountable barrier to successful conclusion of the bargaining." No appeal was taken from the order of the Board that the employer end its refusals to provide substantiating information and bargain in good faith.

The Board affirmed *Southern Saddlery* in *The Jacobs Manufacturing Co.*²³ In *Jacobs*, the employer rejected the union's request for a wage increase, stating that a wage increase would require a product price increase and that the decrease in demand for the firm's product that would result made this "infeasible." When the union requested information to substantiate the company's claim, the company refused, stating that the decision whether to grant a wage increase was purely one of "business judgment." The Board unanimously held that under *Southern Saddlery* the company was required to provide the union with information to substantiate its claim that a wage increase would lead to substantial economic harm. The employer's refusal to provide any substantiating information whatsoever constituted bad faith bargaining. Accordingly, the Board ordered the company to bargain in good faith and supply the union with "such statistical and other information as will substantiate the Respondent's position in bargaining with the union." The Second Circuit enforced the Board's order, holding that the employer was required to produce "whatever relevant information it has to indicate whether it can or cannot afford to comply with the union's demands."²⁴ However, the employer was not required to "produce proof that he is right in his business decision as to what he can, or cannot afford to do," nor to produce any specific books and records.

Factual Background of Truitt

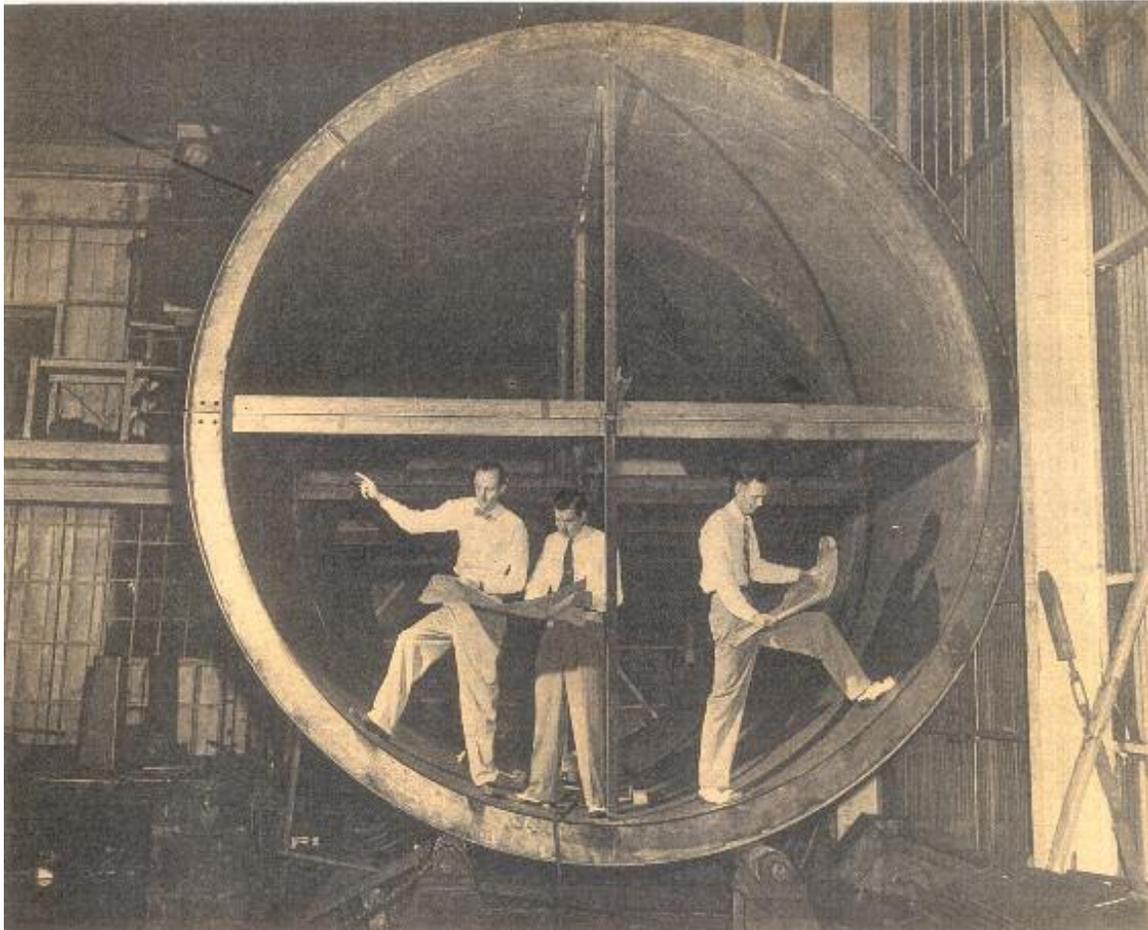
The Truitt Manufacturing Company was founded in 1941 by twin brothers William and Wallace Truitt. The twins made the down payment on a small manufacturing plant in Greensboro, North Carolina using money their father, William Brooks ("W. B.") Truitt, had saved for their college tuition, but which had been left unused due to scholarships. Soon after the founding, the twins invited W. B. to leave his job at Carolina Steel and join the Truitt Company as its President.

²² Southern Saddlery Company, 90 NLRB 1205 (1950).

²³ 94 NLRB 1214 (1951).

²⁴ 196 F.2d 680, 684 (2d Cir. 1952).

In 1942 W. B. and the twins invited the twins' younger brother, John, to join the firm's management to help with war production. The Truitts were all engineers trained at North Carolina State University. Like many professionals, the Truitts delighted more in the professional challenges of their enterprise--designing and constructing sophisticated projects in structural steel--rather than the day-to-day running of the business.²⁵



The Truitt Brothers, William, John and Wallace, inspect a supersonic wind tunnel the Truitt Co. built for the NACA, 1946. This picture first appeared in the December 1946 issue of PIC Magazine and is used with permission of John Truitt.

The Truitt Manufacturing Company produced rolled and structural steel. Projects ranged from mundane high-volume work (simple brackets and braces, metal containers on rollers for use

²⁵ Interview with John Truitt, March 15, 2004.

in other manufacturing concerns and metal stands to display quarts of oil in gas stations) to very sophisticated one-of-a-kind projects (structural steel towers used in early implosion experiments in the development of the atom bomb and a supersonic wind tunnel used by the National Advisory Commission on Aeronautics--a precursor of NASA). The timing of the firm's founding allowed the company to flourish on World War II production and the Truitts were able largely to retire the debt from the purchase and construction of the firm with war production profits. From the firm's founding in 1941 to the height of war production in 1945, the firm grew from 9,000 square feet of production space and twenty employees to 90,000 square feet of production space and 300 employees. After the war, the firm's size declined to about 150 employees, but the Truitts still had plenty of business with private and government contracts and were doing about \$1.5 million in annual sales by the mid-1950's.²⁶

The employees of Truitt Manufacturing Company began organizing in the late 1940's. The primary motive appears to have been a desire to attain wages comparable to those of union workers in the North.²⁷ Both the International Association of Bridge, Structural and Ornamental Iron Workers (AFL) (Iron Workers) and the United Steelworkers (CIO) made organizing efforts. At first the campaigns were subtle, and just "snuck-up" on management, but soon they escalated into organizational picketing and strikes.²⁸ On the first day of picketing, W. B. Truitt called Robert Dick Douglas, Jr. ("Dick Douglas"), the attorney who handled Truitt's general legal matters, and asked him to represent the company in the organizing campaign. Although Douglas professed no expertise in labor law, W. B. prevailed on him to represent the firm because W. B. trusted Douglas and Douglas was cheaper than a labor relations specialist. At the time, Douglas had no idea that acceptance of this assignment would lead to an appearance in the United States Supreme Court and a thirty-year career in labor law.²⁹ The organizing campaign continued for several years and included two union electoral defeats (one by only two votes) and a "long-planned" peremptory raise in base pay from sixty-five to eighty cents an hour.³⁰ Finally, on October 27, 1950, the Iron Workers Local 729 won an election and the right to represent all production and maintenance employees at Truitt. Shortly after that, the union successfully negotiated a two-year contract.³¹

²⁶ Interview with John Truitt, March 15, 2004; The Greensboro Record, Aug. 16, 1957, at 1; Truitt Manufacturing Co., 110 NLRB 856, 859 (1954).

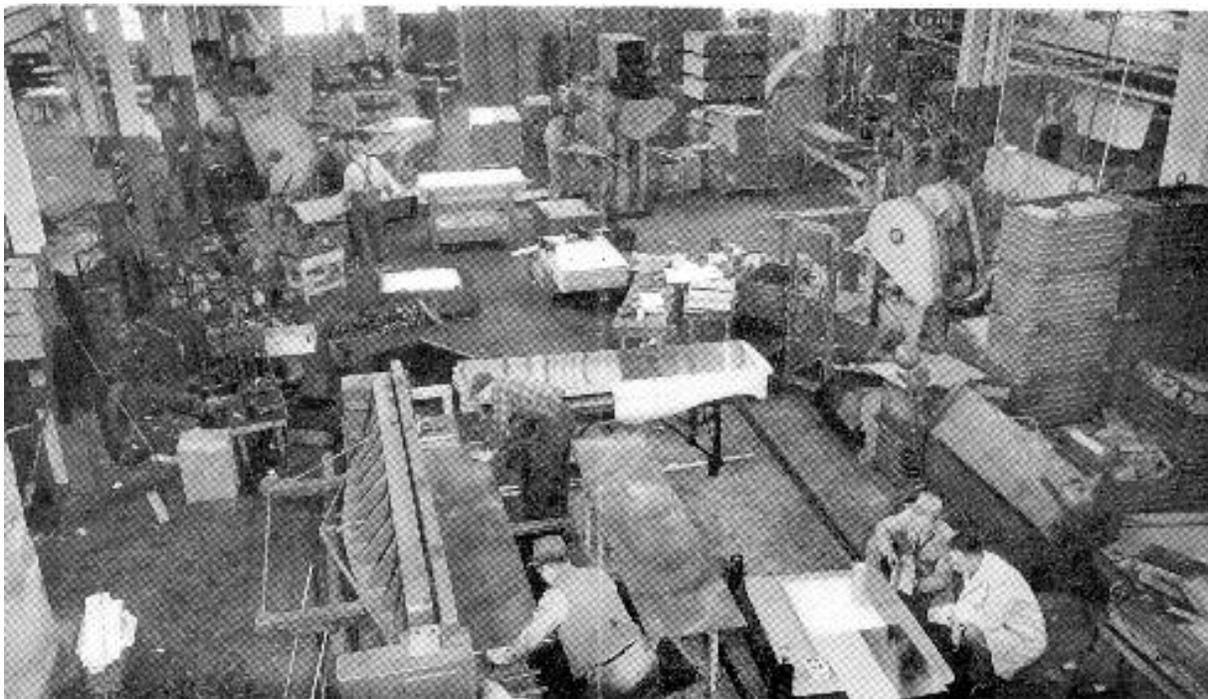
²⁷ Some management practices may have also been at issue. John Truitt said: "They say that good management doesn't get organized, there may be some truth to that in our case." Interview with John Truitt, March 15, 2004.

²⁸ Interview with John Truitt, March 15, 2004.

²⁹ Robert Dick Douglas, Jr., *The Best 90 Years of My Life* 219-36 (2003); Interview with Robert Dick Douglas, Jr., March 15, 2004.

³⁰ Interview with Robert Dick Douglas, Jr., March 15, 2004, Jr.; The Greensboro Record, Feb. 25, 1953, at 1.

³¹ Truitt Manufacturing Co., 110 NLRB 856, 859 (1954).



Truitt Co. Employees working in the plate steel manufactory in the early 1950's. Picture from a company brochure, used with the permission of John Truitt.

In the summer of 1953, the Truitt Company and the Iron Workers undertook negotiations for a second collective bargaining agreement. In these negotiations the company was represented by Dick Douglas, W. B. Truitt and the Truitt brothers. The employees were represented by Henry D. Cole, George F. Beck, John W. Sandlin and a representative of the international union, Julian F. Head. The Iron Workers opened negotiations for a new contract on August 4, 1953, with a demand for a ten cent an hour wage increase citing prevailing rates for similar workers in the Pittsburgh area. The company responded that the average wage of Truitt workers was already higher than the average wage of its competitors in the Greensboro area and countered with an offer of a two and a half cent an hour wage increase. Because of the recent Board decision in *Southern Saddlery*, both Mr. Douglas and Mr. Head knew that the Board was looking for a “plead poverty” case to test the new doctrine. Douglas had cautioned the company bargaining committee to let him talk and not to plead poverty. However, after being worn down by the union’s repeated demands for a ten cent an hour wage increase, and perhaps short on insulin, W.B. rose to his feet, cited the “under-capitalization” of the firm asserting that they “had never paid dividends” and angrily told the union bargaining committee: “If we give you that raise, we will go broke!” Dick Douglas recalled that, after W. B.’s

outburst, the union representatives looked at each other and smiled.³²

The bargaining committees continued to meet throughout August, but made no progress on the question of a wage increase. On August 10, 1953, the employees went on strike, but returned to work five days later without moving the company on its offer of a two and a half cent an hour wage increase. Perhaps seeking to lay a firm evidentiary basis for an unfair labor practice charge based on *Southern Saddlery*, in early September, Julian Head wrote to the company stating that the union had rejected the company's offer based on its belief that the company could meet the union's demand of a ten cent an hour wage increase, and stating that the union "respectfully requests permission to have a certified public accountant examine such books, records, financial data, etc. to ascertain or substantiate the Company's position or claim of being unable to meet the Union's proposal . . . of a wage increase in excess of two and one-half cents . . . per hour."³³ Dick Douglas responded that "the Company takes the position that confidential financial information . . . of this Company is not a matter of bargaining or discussing with the Union. The Company's position throughout the recent negotiations and in previous sessions with you and the Union, has been that the question of granting a wage increase concerns our competitive bidding for jobs to keep the plant operating."³⁴ Douglas also offered to share data on the wages the employees were paid, but noted that he thought the union already had that information.

Mr. Head made one more effort to gain access to the firm's financial information through a letter, perhaps drafted by a union attorney, that specifically cited *Southern Saddlery* and used some of the language from that opinion:

The Union does not contend that financial affairs of the Company are subject to collective bargaining. It does contend, however, that the Company should submit full and complete information with respect to its financial standing and profits . . . in order that the Committee, as well as the other members of the Union . . . , can intelligently decide whether or not they should continue to press their request of ten (10) cents per hour. Such financial information is pertinent to collective bargaining. *Failure on the part of the Company to furnish such information has the effect of erecting an insurmountable barrier to a successful conclusion of the bargaining.*³⁵

³² *Id.* Interview with Robert Dick Douglas, Jr., March 15, 2004. John Truitt's recollection of his father's outburst was that it was precipitated by the union representatives' dogged commitment to their bargaining position. The explanation that his father was short on insulin was merely creative lawyering on the part of Mr. Douglas. Interview with John Truitt, March 15, 2004.

³³ Records and Briefs of Cases Decided by the Supreme Court of the United States, Volume 351, Transcript of Record, *NLRB v. Truitt Manufacturing Co.*, 1-2.

³⁴ *Id.* at 3-4.

³⁵ *Id.* at 4-6 (emphasis supplied). The language in italics is taken almost directly from the Board's opinion in *Southern Saddlery Company*, 90 NLRB 1205 (1950).

Dick Douglas responded for the company that he was aware of *Southern Saddlery* but still did not believe the union had a right to the information it had requested. The union filed an unfair labor practice charge alleging that the company had failed to bargain in good faith. In January 1954, the NLRB Regional Director issued a complaint against the Truitt Company for its refusal to supply the requested information.³⁶

Prior Proceedings in Truitt

Before the Board and the court of appeals, the parties disputed both precedent and policy. Dick Douglas labored mightily to distinguish the facts in *Truitt* from those of *Southern Saddlery*, arguing that in *Truitt* the company had not said it could not afford a wage increase, but had instead merely told the union that the requested wage increase would make the company uncompetitive. Douglas also argued that, unlike in *Jacobs*, the Truitt Company had not refused to discuss a wage increase based on inability to pay, but had instead offered a wage increase of two and a half cents an hour. Board Attorney Duane Beeson argued that Truitt had claimed inability to pay and that, under *Southern Saddlery* and *Jacobs*, Truitt was obliged to supply information to verify this claim.³⁷ Before the Fourth Circuit, Douglas also assailed the inconsistency of *Southern Saddlery* and *Jacobs* with the language and purposes of the NLRA. Douglas argued that §8(d) of the NLRA specified that the duty to bargain in good faith did not require the making of a concession--including the concession of financial information. On behalf of the NLRB, Beeson also cited the larger policies of the NLRA, arguing that disclosure of information was necessary to reasoned bargaining and the promotion of industrial peace.³⁸ As will be discussed later, this larger policy framework of promoting industrial peace within our system of private collective bargaining is ultimately the best basis for understanding the importance of the *Truitt* case and reconciling it with the Supreme Court's later decision in *Insurance Agents*'.

The Board affirmed the holding of the Trial Examiner that the company had violated its obligation to bargain in good faith by refusing to substantiate its plea of poverty. Rejecting as mere semantics Truitt's distinction between a claim of "lack of competitiveness" and "inability to pay," the Trial Examiner found that W. B. Truitt's assertions--that the company had never paid dividends, was undercapitalized and would be driven out of business by the union's wage demands--to be precisely the kind of economic conclusions that required documentation. Thus, the facts of the *Truitt* case fell squarely within the precedents of *Southern Saddlery* and *Jacobs*.³⁹ Despite recent

³⁶ Truitt Manufacturing Co., 110 NLRB 856, 859 (1954).

³⁷ *Id.* at 868-69.

³⁸ NLRB v. Truitt Manufacturing Co., 224 F. 2d 869, 870 (4th Cir. 1955).

³⁹ Truitt Manufacturing Co., 110 NLRB 856, 868-69 (1954).

Republican appointments to the Board,⁴⁰ the Board unanimously agreed that the Truitt Company had violated its duty to bargain in good faith. Citing *Jacobs*, the Board stated that “it is settled law, that when an employer seeks to justify the refusal of a wage increase upon economic basis . . . , good-faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by reasonable proof.”⁴¹ Accordingly, the Board ordered Truitt to bargain in good faith and provide the necessary documentation to the union. The company refused to comply and the Board sought enforcement in the Fourth Circuit.

The Fourth Circuit denied enforcement. The court’s opinion was written by Chief Judge John J. Parker, whose 1930 nomination to the United States Supreme Court by President Herbert Hoover had been rejected by the Senate thirty-nine to forty-one because of his racist and anti-labor views.⁴² Parker cited the language of Taft-Hartley, noting that the Act’s definition of good faith bargaining in §8(d) expressly disavowed a requirement of agreement or the making of any concessions. The panel said:

We do not think that merely because the company has objected to a proposed wage rate on the ground that it cannot afford to pay it, good faith bargaining requires it to open up its books to the union To bargain in good faith does not mean that the bargainer must substantiate by proof statements made by him in the course of bargaining. It means merely that he bargain in sincere desire to reach agreement.⁴³

Chief Judge Parker stood the application of the NLRA’s purpose of promoting industrial peace in the case on its head and stated that, if employers were required to disclose financial information, unions’ demands for such information “could be used as a club to force employers to agree to an unjustified wage rate rather than disclose their financial condition . . . which could conceivably be used to their great damage.” The court’s opinion largely ignored *Southern Saddlery* and read *Jacobs* extremely narrowly. The Board sought and the Supreme Court granted a writ of certiorari based on the division between the Second Circuit’s decision in *Jacobs* and the Fourth Circuit’s decision in *Truitt*.

The Supreme Court Decision in Truitt

⁴⁰ Republican appointees Ivar Peterson, Guy Farmer, Philip Rogers and Albert Breeson had recently been added to Abe Murdock, the only remaining Democratic appointee to the Board. James A. Gross, *The NLRB: An Historical Perspective* in A Guide to Sources of Information on the National Labor Relations Board 14-16 (Gordon T. Law, Jr. ed., 2002).

⁴¹ *Truitt Manufacturing Co.*, 110 NLRB 856 (1954).

⁴² <http://www.senate.gov/artandhistory/history/minute/Judicial_Tempest.htm>.

⁴³ *NLRB v. Truitt Manufacturing Co.*, 224 F.2d 869, 874 (4th Cir. 1955). Also on the Board’s brief were Solicitor General Simon E. Sobeloff, General Counsel Theophil Kammholz, Assistant General Counsel Dominick L. Manoli and Attorney Frederick U. Reel.

The Supreme Court argument was assigned to NLRB Associate General Counsel David P. Findling, a seasoned attorney who had already represented the Board several times before the Supreme Court.⁴⁴ The National Association of Manufacturers prevailed upon W. B. Truitt to retain the services of Whiteford S. Blakeney, a nationally known labor law expert from Charlotte, North Carolina, for the argument before the Supreme Court. Although Blakeney helped with the Supreme Court brief, Dick Douglas represented Truitt in the oral argument before the Supreme Court because it was felt that Douglas knew the case best and had been doing pretty well on his own.⁴⁵

The parties' Supreme Court briefs fleshed out the basic arguments they had made before the court of appeals. In its brief, the Board asserted that the duty to bargain in good faith had been uniformly held to embrace the duty to supply information relevant to bargaining issues. In support of this proposition, the Board cited appellate court opinions requiring employers to supply unions with wage data in bargaining, and the Supreme Court's opinion in *NLRB v. American National Insurance Co.* for the proposition that good faith bargaining required the exchange of relevant information.⁴⁶ Citing *Southern Saddlery* and *Jacobs*, the Board argued if an employer can plead financial inability and withhold relevant information upon which it relies, the employer can erect a virtually insurmountable barrier to successful conclusion of bargaining. Returning once again to the fundamental purposes of the NLRA, the Board argued that the experience of the Board and students of labor relations demonstrated that the production of such information furthers good faith negotiations and industrial peace. The Board contended that the employer's distinction between pleading "lack of competitiveness" and "inability to pay" was mere semantics and that the employer had not demonstrated any harm it would suffer as a result of sharing information with the union to demonstrate that it was undercapitalized, had never paid dividends and could not afford a ten cent an hour wage increase.

The company's brief argued that the obligation to bargain in good faith required only that the parties approach bargaining "with a fair mind and a sincere purpose to reach agreement" and that the Taft-Hartley definition of the duty to bargain expressly disavowed any requirement that an employer make a concession or reach an agreement.⁴⁷ From this the company deduced that an employer negotiating in a genuine effort to reach agreement may not be required to agree to any particular proposal or request, including a request for information. The company characterized the Board's rule as a per se violation of the duty to bargain. Moreover, asserted the company, the Board's rule could be easily evaded: employers who did not want to disclose financial information could simply

⁴⁴ Findling had represented the Board in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), *Bus Employees v. Wisconsin Board*, 340 U.S. 416 (1951), and *Brooks v. Labor Board*, 348 U.S. 96 (1954).

⁴⁵ Interview with Robert Dick Douglas, Jr., March 15, 2004.

⁴⁶ 343 U.S. 395 (1952). *Records and Briefs of Cases Decided by the Supreme Court of the United States*, Volume 351, Brief for the NLRB, *NLRB v. Truitt Manufacturing Co.*, 12.

⁴⁷ *Records and Briefs of Cases Decided by the Supreme Court of the United States*, Volume 351, Brief of the Respondent, *NLRB v. Truitt Manufacturing Co.*, 2.

avoid any plea of poverty. The disclosure obligation was also difficult to administer: Did the employer need to document all of its financial obligations and all the obligations of its competitors?

The Supreme Court heard oral argument on March 29, 1956. Associate General Counsel Findling barely finished his recitation of the facts and outline of the Board's basic argument when he was interrupted by Justice Felix Frankfurter concerning the breadth of the Board's remedy. Justice Frankfurter, an FDR appointment and expert on labor law who had been a Harvard law professor, wanted to know if the employer really had to open its books in order to bargain in good faith. "I don't see how you can say that failure to open the books is a failure to bargain in good faith," exclaimed Frankfurter.⁴⁸ Findling responded that the Board's rule did not require the employer to make all books available, but merely to offer "reasonable proof" of an asserted inability to pay. "The Board held that the employer failed its good faith obligation in this case when it refused to supply *any* supporting information Otherwise the union is just bargaining in the dark"⁴⁹ To allow an employer to "merely sit back and say 'I can't afford to pay,' without proof," would "stagnate bargaining," Findling maintained.⁵⁰ Justice Sherman Minton, a Truman appointee and former Senator from Indiana, wanted to know who was to determine what was "reasonable proof" and how. Findling responded that the Board would decide on the basis of the negotiations in each case. "No unreasonable burden is required The employer must disclose merely the information that is the basis for his assertions of inability to pay." Findling also argued that the appellate court's finding that the union could use a demand for information as a "club" was unfounded. "The company has never asserted that disclosure would do it harm, only that this information was none of the union's business If harm to the business from disclosure can be shown, that is a different case than the one before you."⁵¹ If the Board's arguments had any friends among the six Democrats and three Republicans sitting on the bench that day, it was not apparent in the questioning of Findling.⁵²

The Court's treatment of Dick Douglas was much more cordial. In a homily some observers described as a "fireside chat," Douglas tried to persuade and charm the Justices by mixing his attack on the Board's arguments with a discussion of North Carolina basketball. Douglas began by taking exception to Findling's assertion that the Board order did not require Truitt to open its books. In

⁴⁸ Greensboro Daily News, March 29, 1956, at 1, 4.

⁴⁹ Tape of Supreme Court Oral Argument in the Truitt Case, on File with the U.S. Supreme Court.

⁵⁰ Greensboro Daily News, March 29, 1956, at 1, 4.

⁵¹ Tape of Supreme Court Oral Argument in the Truitt Case, on File with the U.S. Supreme Court.

⁵² Actually, the politics of the Supreme Court at this time were a little complicated. Justices Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Harold Burton, Tom Clark and Sherman Minton were Democratic appointees, but Burton had been a Republican Senator from Ohio. Chief Justice Earl Warren and Justice John Marshall Harlan were Eisenhower appointees, but Warren was of such political stature that he had been both the Republican and the Democratic candidate for Governor of California in 1946. Peter Irons, *A People's History of the Supreme Court* 327-94 (1999).

support of this position, Douglas cited the letters from the union requesting information including a broad breakdown of costs and sales. Chief Justice Warren asked if such an extensive disclosure was required by the Board's order, to which Douglas replied "No sir. But I contend that these things—costs, price structure and other full and complete information . . . is what they are going to point us to if you send us back to the NLRB." The Chief Justice then asked Dick Douglas to read the language of the order which required the company to "furnish such statistical and financial information as to substantiate their stand." Justice Frankfurter asked attorney Douglas whether a basic picture of company conditions could be given to the union without opening the books and without harming the company. Douglas conceded that an employer needed to give the union some information necessary to conduct labor negotiations, "But I don't think the Government should order us to give them our books." In outlining the potential costs that the Board's order would require the company to justify, Douglas mentioned Truitt's sponsorship of radio broadcasts of basketball games. This led to an informal exchange on various aspects of North Carolina basketball including a description of what was a "free-throw." In the end, the Justices were charmed enough by Douglas' down-home style that they granted him an additional four minutes to finish his argument.⁵³

The Supreme Court overturned the Fourth Circuit, and upheld the Board's decision in the case, by a six to three vote. On May 7, 1956, in an opinion that covered a mere five pages, Justice Hugo Black, joined by Chief Justice Warren and Justices Reed, Douglas, Clark and Minton, decided that "in determining whether the obligation of good-faith bargaining has been met the Board has a right to consider an employer's refusal to give information about its financial status. . . ."⁵⁴ To support this finding, the Court noted the relevance of the employer's financial status on the facts of the case and the importance of accurate information to collective bargaining.

In their effort to reach agreement here both the union and the company treated the company's ability to pay increased wages as highly relevant. . . . Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . . If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.

The Court's reasoning about the importance of accuracy in collective bargaining drew on the Board's argument that exchanges of information served the NLRA's fundamental purpose of promoting industrial peace. Just as exchanges of accurate information promote trust and cooperation in bargaining, substantial inaccuracies or deceptions in negotiations produce industrial strife.⁵⁵ The Court strengthened its rationale with the idea from *Southern Saddlery* that unsubstantiated claims can pose an obstacle to bargaining.

⁵³ Greensboro Daily News, March 29, 1956, at 1, 4; Tape of Supreme Court Oral Argument in the Truitt Case, on File with the U.S. Supreme Court; Robert Dick Douglas, Jr., *The Best 90 Years of My Life* 223-24 (2003).

⁵⁴ NLRB v. Truitt Manufacturing Co., 351 U.S. 149, 152-53 (1956).

⁵⁵ Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law*, 91 Mich. L. Rev. 419, 485 (1992).

And it would certainly not be far fetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim. . . .⁵⁶

The Court then concluded “that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.”⁵⁷

The Court gave only modest direction about the breadth and application of the new rule. As to the extent of the burden an employer must bear in providing financial information, the Court noted that Truitt had not complained that disclosure would be burdensome or injurious, but instead merely “that the requested information was irrelevant to the bargaining process and related to matters exclusively within the province of management.” Accordingly the Court did not define the level of burden that would relieve an employer of the obligation to provide information, but noted that it was the Board’s position that it required only “reasonable proof” “made available in a manner not so burdensome or time-consuming as to impede the process of bargaining.” As to the application of its holding in future cases, the Court stated: “Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.”

Justice Frankfurter wrote a minority opinion, joined by Justices Clark and Harlan, concurring in part and dissenting in part. In Frankfurter’s opinion, the Board was not necessarily wrong in its determination that Truitt had failed to bargain in good faith, but it had applied the wrong standard by focusing merely on the question of whether the employer had failed to substantiate its claim of poverty rather than on examining the employer’s conduct as a whole: “The totality of the conduct of the negotiation was apparently deemed irrelevant to the question; one fact alone disposed of the case. . . . This is to make a rule of law out of one item--even if a weighty item--of the evidence. There is no warrant for this.”⁵⁸ Frankfurter would have remanded the case to the Board to apply the appropriate legal standard, examining the company’s conduct as a whole.

The Immediate Impact of Truitt

The immediate impact of the Supreme Court’s decision on the parties was slight. Truitt and the Iron Workers had already agreed to a contract including an immediate two and a half cent an hour wage increase, followed by another two and a half cent increase a year later. As a result, the issue of the company’s ability to pay was moot and the company never actually had to open the books.⁵⁹ As to what they would have found if they had gotten a look at the books, John Truitt maintains that,

⁵⁶ NLRB v. Truitt Manufacturing Co., 351 U.S. 149, 152-3 (1956).

⁵⁷ *Id.*

⁵⁸ *Id.* at 155 (opinion of Justice Frankfurter).

⁵⁹ Interview with Robert Dick Douglas, Jr., March 15, 2004

although the company was not then at risk of bankruptcy, his father's representations were largely correct.⁶⁰

Although Dick Douglas had lost in the Supreme Court, he had acquitted himself well and the publicity the case brought led to many more years representing the interests of employers in labor relations. In future negotiations on behalf of Truitt and other employers, Douglas was very careful that the company would not characterize its position as an inability to pay so as to avoid the constraints of the Supreme Court ruling. Although Douglas lost the battle of the *Truitt* case, his side ultimately won the war. In the 1980's the demand for employer representation in contests with unions declined so that Douglas adopted a more general practice with an emphasis on employment law. At the age of 92, in 2004, Dick Douglas was still practicing in Greensboro, North Carolina, largely in the area of trusts and estates.⁶¹

The Truitt Manufacturing Company continued in operation for a little more than a year after the Supreme Court decision and was sold to Robert Edmonds on August 16, 1957, with 115 employees, 90,000 square feet of manufacturing space and annual sales of \$2 million.⁶² W. B. Truitt remained Chairman of the Board of Directors while the Truitt brothers also stayed on in various managerial positions. Explaining the reason for the sale, John Truitt later said "people don't sell profitable businesses." Nevertheless, he attributed the sale more to the Truitts' interest in engineering over running a business rather than to the influence of the union.⁶³

At the time, the members of the bar and the academy recognized *Truitt* as an important decision, however, they did not yet know whether its theory would be broadly applied by the Board and courts or whether it would prove a narrow precedent limited largely to its facts. The *Washington Post* and *New York Times* ran stories implicitly recognizing the extraordinary nature of the remedy of ordering union access to company books within the context of American labor relations. Both stories pointed out, however, that the opinion stated that the existence or extent of the duty to disclose would depend on the facts of each case.⁶⁴

Among lawyers, there was initially some discussion of how to use or avoid the doctrine, and whether the Court's action in the case was consistent with its words. Much was made of the apparent ease with which employers could avoid disclosure by merely avoiding any claims that

⁶⁰ Interview with John Truitt, March 15, 2004.

⁶¹ Interview with Robert Dick Douglas, Jr., March 15, 2004

⁶² Greensboro Record, August 16, 1957, at 1.

⁶³ Interview with John Truitt, March 15, 2004.

⁶⁴ Wash. Post & Times Herald, May 8, 1956, at 30; N.Y. Times, May 8, 1956, at 42.

smacked of inability to pay.⁶⁵ Whether the opinion had broader implications, or was limited merely to cases in which the employer used the “magic words” of inability to pay, remained to be seen. Archibald Cox ventured the opinion that the doctrine would have little effect on employer practices because “employers accustomed to labor negotiations seldom balk at giving the modicum of financial information required by the NLRB.”⁶⁶ Others suggested that unions would not ask for information that would damage their firm, since they also had an interest in the firm’s success.⁶⁷

Even though most experts saw the substance of the holding as innocuous, they sometimes worried about its impact on the procedure of collective bargaining. Cox and others worried that *Truitt* would result in the damaging insinuation of courts into the process of collective bargaining.⁶⁸ One negative result might be posturing by the parties, in anticipation of unfair labor practice charges, that would detract from or have a negative impact on collective negotiations.⁶⁹ A lot of ink was spilled over the question whether the Supreme Court’s apparent application of the doctrine as a per se rule was consistent with the opinion’s closing admonition that good faith had to be determined on a case-by-case basis. The consensus was that the Court’s failure to remand for a factual determination meant that it had in effect announced a per se rule against employers pleading poverty without documentation.⁷⁰ There was no discussion of the implications of the larger themes of *Truitt* on the importance of truthfulness and exchanges of information to the success of collective bargaining.

Factual Background of Insurance Agents’

The Prudential Insurance Company of America was founded by insurance agent John F. Dryden in Newark, New Jersey in 1875 as the “Prudential Friendly Society.” It was one of the first companies to make insurance available to people of modest means, selling “Industrial Insurance” that provided funeral and burial expenses for weekly premiums as low as three cents. The company’s sales quickly grew as its area of operations expanded to New York and Philadelphia and, by 1885, company assets had reached \$1 million. Shortly afterward, the company adopted the Rock

⁶⁵ *Union Requests for Information in the Collective Bargaining Process*, 105 U. Pa. L. Rev. 90 (1956); Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958).

⁶⁶ Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. at 1437.

⁶⁷ *Union Requests for Information in the Collective Bargaining Process*, 105 U. Pa. L. Rev. 90, 102-103 (1956).

⁶⁸ Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1437 (1958). *See also The Supreme Court Term, 1955 Term*, 70 Harv. L. Rev. 95, 177-179 (1956); Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 390 (1950).

⁶⁹ Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1437 (1958).

⁷⁰ Brent Robbins, *Rethinking Financial Information Disclosure Under the National Labor Relations Act*, 47 Vand. L. Rev. 1905, 1914 (1994).

of Gibraltar as its symbol, one of the most identifiable corporate logos in American business. Despite bank failures and mortgage delinquencies during the Great Depression, Prudential sales continued to grow.⁷¹

Prudential enjoyed a self-proclaimed “Golden Period” during the 1940’s and 50’s providing insurance to employees and employers of the prospering American economy. Monetary assets grew sixfold during the 1940’s, and the company’s prosperity continued into the 1950’s. For 1955, the year before the insurance agents’ job actions, Prudential reported record life insurance sales of \$6.4 billion, record life insurance in force of \$51.5 billion and record assets of \$12.5 billion. The company expanded its sales area in North America, opening regional offices in Los Angeles, Chicago, Minneapolis, Jacksonville, Houston, Boston, northern New Jersey and Toronto.⁷²

Prudential’s methods of motivating and organizing its sales force had much to do with both Prudential’s success and its agents’ motivations for organizing. Prudential’s methods, along with the nature of the insurance industry itself, also determined the means by which the agents would take collective action. First, to motivate sales, the company paid insurance agents on a strict commission basis dependent on the premiums for new or existing business attributable to the agent. In addition to commissions, agents received only a small fixed payment amounting to roughly \$4.50 per week to cover expenses. Second, the company assigned each of its insurance agents to a district office run by a district manager. The district manager received a share of all sales commissions earned in the office. To increase sales, the district manager might require motivational sales meetings, sponsor sales contests or set sales quotas. District managers rewarded agents who succeeded and chastised or fired agents who did not meet sales objectives. These mercenary working conditions, combined with the constant pressure of commission sales, fed agents’ desire to organize.⁷³ Finally, Prudential believed that success in selling insurance depended on the development of a personal relationship between agents and the insured. Accordingly, each agent was assigned a sales territory or “debit” in which he had sole responsibility to make sales, process paperwork and collect premiums. For agents, the size of their debit represented income and potential income, and the reassignment of areas from one salesman to another, either because of retirement or because the company was not satisfied with an agent’s performance, was a hotly contested issue in contract negotiations. Government regulations designed to ensure that those who purchased insurance actually received it required that agents report all sales and payments and turn in all premiums in a timely fashion. Agents who failed to comply with these regulations would lose their license and ability to sell insurance. As a result, agents could not lawfully participate in a full work stoppage in which they failed to report on or turn in premiums for existing business, and their alternative was to fail to cooperate with the hated district

⁷¹ William H. A. Carr, *From Three Cents a Week: The Story of the Prudential Insurance Company of America* (1975).

⁷² *Id.*; N.Y. Times, March 14, 1956, at 51.

⁷³ My grandfather, Carl Algot Bloom, sold insurance all of his life and deeply impressed upon me the need to avoid being in the situation where feeding my family depended on getting a commission.

sales policies and cease soliciting new business.⁷⁴

Prudential agents in New York, Pennsylvania, and Wisconsin began to organize in 1937. The organizing campaigns were contests between the Insurance Agents' International Union (AFL) and the United Office and Professional Workers of America (CIO). Prudential fought tooth and nail against organization, arguing first that its agents were independent contractors exempt from the Act, and then contesting the appropriate bargaining unit.⁷⁵ The first union contract, which covered Prudential agents in New York, was signed in 1942. By 1949, the Insurance Agents' International Union had won out and represented agents across thirty-five states and the District of Columbia. Early experiences under the new contracts led to friction between the company and the union. On January 5, 1951, as one disagreement came to a head, Prudential found it "necessary" to suspend a group of union agents in Pittsburgh. Within a week, 2,300 agents had called in sick and 1,600 agents had staged a wildcat demonstration outside the Corporate Home Office in Newark to protest the suspensions. Normalcy returned to the company when the union helped calm the wildcat action. However, the next winter contract negotiations led to a union sanctioned eighty-one day "strike" from December 1, 1951 to February 20, 1952. The Labor Department reported that the strike was then the longest in American history by white collar workers. Of course, one reason the strike may have lasted so long was that the agents had to continue servicing existing customers during the work stoppage.⁷⁶

The Supreme Court case arose out of the negotiations that began January 16, 1956, to replace the collective agreement that would expire March 18, 1956. Prudential's President was Carrol M. Shanks, a man who had supported New Deal legislation, but who was also confrontational enough to have his chauffeur drop him off a block or two from the company's front door so that he could walk past picketing agents. Within the company, Shanks was known as a take-charge man who accomplished objectives by shaking up entrenched bureaucracy and cutting through red tape.⁷⁷ Shank's Vice President in charge of district agencies, the vice president with primary responsibility for labor relations, was Paul B. Palmer. The company's legal counsel throughout the dispute were Nahum A. Bernstein and Donald R. Seawell of the New York firm of Silver & Bernstein. The President of the International Insurance Agents' Union was George L. Russ, the man who had led the union's successful organization of Prudential and who eventually negotiated the merger of his union with the competing Insurance Workers of America union in 1959. Russ began his work life as an insurance agent in Virginia where he began organizing for the union. However, his ability as a motivator and his devotion to the interests of the insurance agents soon propelled him to the union

⁷⁴ Telephone Interview with Isaac N. Groner, June 22, 2004.

⁷⁵ *Id.*

⁷⁶ William H. A. Carr, *From Three Cents a Week: The Story of Prudential Insurance Company of America*, 191-192 (1975).

⁷⁷ *Id.* at 192-93.

presidency.⁷⁸ The union’s legal counsel was Isaac N. Groner, a Yale law graduate, former law clerk to United States Chief Justice Vinson, and solo practitioner from Washington, D.C.⁷⁹

As the March 18 expiration date for the existing collective bargaining agreement neared, the union negotiating committee became dissatisfied with the progress of negotiations. On February 28, 1956, the union President George Russ sent a letter to all local presidents advising them that there had been “some progress” toward a “satisfactory contract” but that the “attitude of the Company” necessitated that they be prepared to “take action” after the expiration of the existing agreement.⁸⁰ The primary issues in dispute were the company’s insistence on contract language guaranteeing it the power to determine the size of an agent’s “debits” or sales territory, differences about the appropriate grievance procedure, and a disagreement over the appropriate contract length, with the union favoring two years and the company favoring five.⁸¹ On March 13, 1956, the President of Prudential, Carrol Shanks, announced that Prudential had enjoyed record insurance sales of \$6.4 billion for 1955.⁸² The same day, union President Russ wrote another letter to the local presidents directing them to take a “strike vote” and to carry out a “work without a contract program” beginning March 19 if no satisfactory contract had been reached by then. The “work without a contract program” involved abstaining from writing new business and demonstrating and distributing leaflets in front of district offices on March 21 and 23. The same letter said: “During this period the union shall continue its negotiations with the Company and make every effort to reach a satisfactory agreement . . . Your participation is necessary to the success of this effort.”⁸³ Some days later, union members voted by a margin of three to one in favor of a job action.⁸⁴

On March 19, 1956, the old collective bargaining agreement expired without agreement on a new contract. As planned, on March 21 and 23 the agents undertook the “work without a contract program” and picketed their district and home offices. An estimated three thousand insurance agents demonstrated in front of Prudential’s headquarters in Newark.⁸⁵ Still dissatisfied with the progress of negotiations, union President George Russ and the union bargaining committee determined to

⁷⁸ Telephone Interview with Isaac N. Groner, June 22, 2004.

⁷⁹ *Id.*

⁸⁰ Records and Briefs of Cases Decided by the Supreme Court of the United States, Volume 361, Transcript of Record, *NLRB v. Insurance Agents’ Int’l Union*, 66-67.

⁸¹ Newark Star-Ledger, March 24, 1956, at 3; *Id.*, March 28, 1956, at 4; *Id.*, March 30, 1956, at 7.

⁸² N.Y. Times, March 14, 1956, at 53.

⁸³ Records and Briefs of Cases Decided by the Supreme Court of the United States, Volume 361, Transcript of Record, *NLRB v. Insurance Agents’ Int’l Union*, 66-67.

⁸⁴ N.Y. Times, March 24, 1956, at 41.

⁸⁵ Newark Evening News, March 23, 1956, at 1; Newark Star-Ledger, March 24, 1956, at 3.

continue the “work without a contract program.” George Russ orchestrated the offensive through a series of letters directing the agents to engage in further acts of defiance. Between March 23 and about June 26, 1956, the insurance agents intermittently refused to write new insurance, reported late for work, engaged in “sit-in mornings” by staying in the office “doing what comes naturally” rather than going out to pursue sales, and refused to work after 4:30 p.m. They also picketed and demonstrated in front of company offices, leafleted policyholders and solicited their signatures on petitions supporting the insurance agents, boycotted company sales meetings and sales campaigns, and refused to file company paperwork.⁸⁶ Of course, all of these activities were designed to impose financial losses on the company and pressure it into making concessions at the bargaining table. The General Counsel later computed that the union’s activities cost Prudential approximately \$62 million in new sales over the course of the seven weeks most affected by the “work without a contract program.”⁸⁷

Prudential Vice President Paul Palmer condemned the union’s tactics of “harassment” in a March 29 letter to agents.⁸⁸ Palmer told the agents that these tactics were not in their, or the company’s, best interests and were self-destructive. Palmer’s choice of the word “harassment” was well advised. The Board had previously held in *Textile Workers Union of America*⁸⁹ that partial work stoppages were unlawful “harassment” in contravention of the union’s obligation to bargain in good faith under §8(b)(3) of the NLRA. Palmer’s use of the term “harassment” was undoubtedly an attempt to set the stage for an unfair labor practice charge against the Insurance Agents’ to prohibit the “work without a contract program.” The *Textile Workers* precedent was weak, however, since the D. C. Circuit had refused enforcement of the Board’s order there, reasoning that if the union could lawfully call a complete strike consistent with its obligation to bargain in good faith it could also call lesser partial work stoppages.⁹⁰ Nevertheless, on April 9, 1956, Prudential filed a charge with the NLRB alleging that the union’s “work without a contract program” amounted to a failure to bargain in good faith. After investigation, the New York Regional Director of the NLRB, Charles T. Douds, filed a complaint on June 5, 1956. At the request of the union, the Board proceeding against it was recessed for a brief period so that a new collective bargaining agreement

⁸⁶ Records and Briefs of Cases Decided by the Supreme Court of the United States, Volume 361, Transcript of Record, NLRB v. Insurance Agents’ Int’l Union, 63-104; Insurance Agents’ Int’l Union, 119 NLRB 768, 769-70 (1957).

⁸⁷ Records and Briefs of Cases Decided by the Supreme Court of the United States, Volume 361, Transcript of Record, NLRB v. Insurance Agents’ Int’l Union, 136.

⁸⁸ Newark Star-Ledger, March 30, 1956, at 7.

⁸⁹ 108 NLRB 743 (1954). The *Textile Workers* case is also sometimes referred to as the *Personal Products* case, a reference to the company involved in the dispute, in an effort to distinguish this case from other Board decisions involving the Textile Workers Union.

⁹⁰ NLRB v. Textile Workers Union, 227 F.2d 409, 410 (D.C. Cir. 1955).

between the company and the union could be reached on July 17, 1956.⁹¹



From left, Insurance Agents' Sec.-Treas. Max Shine, Vice-Pres. Charles G. Heisel and President George L. Russ picket the Prudential Newark Headquarters, 1956. Picture used with the permission of the George Meany Memorial Archives.

⁹¹ Insurance Agents' Int'l Union, 119 NLRB 768, 777 (1957).



Insurance Agents' Vice President Charles G. Heisel leads picketing Prudential insurance agents in Newark, 1956. Picture used with the permission of the George Meany Memorial Archives.

Prior Proceedings in Insurance Agents'

Counsel for the Board and the Insurance Agents' union honed their arguments in the initial proceedings before the Board and the court of appeals. The Board was represented by Regional Attorney Samuel K. Kaynard and Associate General Counsel Frederick U. Reel, both long-time Board attorneys. Kaynard and Reel argued that the union's partial work stoppages were inconsistent with the reasoned deliberations necessary for good faith bargaining and were unprotected by the National Labor Relations Act as a form "harassing tactics" that the Board had already determined were an unfair labor practice in *Textile Workers*.⁹²

⁹² *Id.* at 780-84.

The union was represented throughout the dispute by Isaac N. Groner, a solo practitioner from Washington, D.C. Groner served as the union's General Counsel from 1952 until the union's merger with the United Food and Commercial Workers in 1983. Even after the merger, Groner served as union Special Counsel handling Insurance Agents' legal matters until he retired in 2000.⁹³ Groner argued that the plain language of §13 of the NLRA and §501 (2) of the Labor Management Relations Act (LMRA) prohibited the Board from diminishing the right to strike. Moreover, within the unique circumstances of the insurance industry, with its lack of a set workplace and hours and the regulation of existing business, such tactics were the only realistic recourse for insurance agents in collective bargaining. For the Board to determine which economic weapons the parties could, and could not, use would entangle the Board too deeply in the process of collective bargaining. He also argued that the union could strike without violating the requirements of good faith bargaining, and therefore they could undertake lesser economic actions while still bargaining in good faith. Groner argued that the Board's decision in *Textile Workers* was not of much significance since the Court of Appeals for the D.C. Circuit had refused to enforce the Board's order in that case.⁹⁴

The Board, in a three-member panel consisting of Boyd Leedom, Abe Murdock and Joseph Alton Jenkins,⁹⁵ overturned the ruling of the Trial Examiner, and found that the union had failed to bargain in good faith. The Trial Examiner had found that, although the union's "slowdown" was "unprotected" activity, it was not "unlawful."⁹⁶ The Trial Examiner noted that §13 of the NLRA expressly stated that the NLRA should not be construed to diminish the right to strike which was defined to include "slowdowns" in §501 of the LMRA.⁹⁷ The Board, however, concluded that the Insurance Agents' "harassing" activities were inconsistent with the Act's requirement of "reasoned discussions . . . upon which good-faith bargaining must rest."⁹⁸ The Board analogized the union's slowdown at Prudential to employer unilateral action and other unfair labor practices. Ignoring the union's arguments about the unique attributes of the insurance industry that impeded full work stoppages, the Board concluded that the facts of this case were governed by its prior decision in *Textile Workers* and constituted a failure to bargain in good faith.⁹⁹ With affected members in thirty-

⁹³ Telephone Interview with Isaac N. Groner, June 22, 2004.

⁹⁴ Insurance Agents' Int'l Union, 119 NLRB 768, 771, 780-84 (1957).

⁹⁵ All three of these members had been appointed or reappointed by Eisenhower, although Murdock was a Democrat who had originally been appointed by Truman and Jenkins was also a Democrat. James A. Gross, *The NLRB: An Historical Perspective in A Guide to Sources of Information on the National Labor Relations Board* (Gordon T. Law, Jr., ed. 2002), 14-16.

⁹⁶ Well-settled Board doctrine established that, unlike a full strike, slow-downs are not protected concerted activity under §7 of the NLRA. Insurance Agents' Int'l Union, 119 NLRB 768, 779 (1957); Phelps Dodge Copper Products Corp., 101 NLRB 360, 368 (1952).

⁹⁷ Insurance Agents' Int'l Union, 119 NLRB 768, 779-82 (1957).

⁹⁸ Insurance Agents' Int'l Union, 119 NLRB 768, 772 (1957).

⁹⁹ *Id.* at 772

five states and the District of Columbia, Mr. Groner chose to take the union's appeal to the D.C. Circuit, where the Board had already lost the *Textile Workers* case.

The Court of Appeals for the D.C. Circuit rewarded Mr. Groner's choice of venue. On October 23, 1958, in a one-paragraph, per curiam opinion, Judges Elijah Prettyman, Wilbur Miller and George Washington, all Truman appointees, denied enforcement of the Board's order. The panel stated:

This case involves the same question of law presented in *Textile Workers* . . . we find no critical difference between the two cases. On the authority of that case, the order of the Board here under review must be set aside. One panel of this court will not attempt to overrule a recent precedent set by another panel, even though one or more of its members may disagree with the ruling.¹⁰⁰

The Board petitioned the United States Supreme Court for a writ of certiorari. The writ was granted on January 26, 1959.

The Supreme Court Decision in Insurance Agents'

The Board was represented in the Supreme Court by Dominick ("Dom") L. Manoli. Manoli was born in Lentini, Italy, raised in Omaha, Nebraska, and educated at Harvard Law School. He began his career in private practice, but became a Board Attorney in 1941. Manoli rose rapidly through the ranks at the Board, becoming Supervisory Attorney in 1945, Assistant General Counsel in Charge of Supreme Court Litigation in 1953 and Associate General Counsel in Charge of the Litigation Division in 1960. His work for the Board included work on several important Supreme Court cases including *Truitt*, *Borg-Warner* and *Mastro Plastics*.¹⁰¹

In its brief before the Supreme Court, the Board recognized the importance of economic sanctions to the process of collective bargaining, but argued that good faith bargaining included resort only to the "traditional" strike weapon. The Board argued that slowdowns were repugnant to the statute's purposes of promoting equity in bargaining power and industrial peace, and so could

¹⁰⁰ *Insurance Agents' Int'l Union v. NLRB*, 260 F.2d 736 (D.C. Cir. 1958).

¹⁰¹ NLRB Bulletin, Division of Information, Washington, D.C., July 25, 1980. *Borg-Warner v. NLRB*, 356 U.S. 342 (1958) (determining the scope of mandatory collective bargaining under the Act); *Mastro Plastics v. NLRB*, 350 U.S. 270 (1956) (determining the applicability of a "cooling-off period" to unfair labor practice strikes). Other significant Supreme Court cases Mr. Manoli participated in were *Truck Drivers Local 449 v. NLRB*, 353 U.S. 87 (1957) (testing the legality of employer lock-outs in response to union "whip-sawing" tactics); and *Local 1976, Carpenters v. NLRB* 357 U.S. 93 (1958) (determining the legality of "hot-cargo" agreements as a defense to secondary boycott charges). Manoli's surprising representations to the Supreme Court in his oral argument in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), are discussed in the chapter on that case in *Labor Law Stories*.

properly be found to be a failure to bargain in good faith.¹⁰² The Board described on-the-job pressure such as slowdowns or intermittent strikes as “foul blows” and “diseases of collective bargaining” which “cost one party little or nothing in relation to the disadvantage imposed on the other.” “With the economic pressure largely one-sided,” the Board argued, “these tactics take on more the character of coercion than collective bargaining.”¹⁰³ According to the Board, the one-sidedness of the harm imposed by slowdowns justified their being both unprotected by the Act and evidence of a party’s failure to bargain in good faith. In the Board’s view, “a reading of the Statute which leaves the employer . . . with only the choice of dismissing those employees who engage in improper tactics would fail to give full effect to Section 8(b)(3), which seeks to preserve and enhance the stability of the bargaining relationship.”¹⁰⁴ The Board argued that slow-downs were included in the definition of strikes in §501(2) of the LMRA, not to bring them within the protections of §13 of the NLRA, but instead to bring them within the penalties and prohibitions of §§8(b)(4) and 8(d) of the NLRA and §§303 and 305 of the LMRA.¹⁰⁵

The union, represented by its stalwart lawyer, Isaac Groner, argued in its brief that private resolution of bargaining disputes was essential to the system of bargaining under the NLRA. Mr. Groner argued that to allow the Board to regulate bargaining power would be to allow the Board to determine the resolution of collective bargaining issues--a proposition expressly disallowed by the definition of good faith bargaining in §8(d) of the NLRA.¹⁰⁶ Citing legislative history from the Wagner Act, Groner argued that the obligation to bargain in good faith allowed the Board to regulate merely the “process” of negotiations, not the parties’ substantive bargaining “powers.” He contended that the Board’s pronouncements that the union’s activities were “foul blows” or “diseases of collective bargaining” had no basis in the statute and were too general to produce a workable standard. “If the Board can take action on the basis of such judgments, it literally can do anything in the field of collective bargaining.”¹⁰⁷ The union also emphasized the plain words of the statute defining the right to strike and the obligation to bargain in good faith. Section 13 of the NLRA safeguards “the right to strike” from Board interference or diminution “except as specifically provided for herein.” Section 501(2) of the LMRA expressly defines the term “strike” to include

¹⁰² Records and Briefs of Cases Decided by the Supreme Court of the United States, Volume 361, Brief for the NLRB, *NLRB v. Insurance Agents’ Int’l Union*, 10-11.

¹⁰³ Records and Briefs of Cases Decided by the Supreme Court of the United States, Volume 361, Brief for the NLRB, *NLRB v. Insurance Agents’ Int’l Union*, 13 (quoting *NLRB v. Electrical Workers*, 346 U.S. 464, 477 (1954)).

¹⁰⁴ Records and Briefs of Cases Decided by the Supreme Court of the United States, Volume 361, Brief for the NLRB, *NLRB v. Insurance Agents’ Int’l Union*, 14.

¹⁰⁵ *Id.* at 35.

¹⁰⁶ *Id.* at 23-25.

¹⁰⁷ *Id.* at 21.

“any concerted slowdown or other concerted interruption of operations by employees.”¹⁰⁸ In the union’s view, the Board’s decision made illegal what §13 protected. Finally, Mr. Groner cited the unique characteristics of the insurance industry and their influence on the agents’ ability to undertake a full work-stoppage, but did not make this a central theme of the brief.

Insurance Agents’ was argued before the Supreme Court on December 7 and 8, 1959. For the Board, Assistant General Counsel Manoli began with a recitation of the relevant statutory provisions, facts and history of the case. Manoli then expounded upon the view articulated in the Board’s brief that good faith bargaining, under the NLRA, was a system of reasoned discussion, subject to resort to economic sanctions that were consistent with the purposes of the Act. He asserted that good faith bargaining required more than simply a desire to reach agreement and that the language of the Act established several substantive requirements such as those to meet and to reduce agreements to writing. Traditional strikes were a necessary cost of collective bargaining and were consistent with the purposes of the NLRA. Such work stoppages imposed costs on both sides, encouraging them to negotiate in good faith and avoid costly breaches of industrial peace. On the other hand, slowdowns and harassing tactics imposed costs disproportionately on only one side and amounted to coercion which the perpetrator had no reason to avoid. Accordingly the Board’s determination that such “foul blows” amounted to a failure to bargain in good faith was consistent with the basic purposes of the Act of promoting good faith bargaining and industrial peace. About three-fourths of the way through Manoli’s presentation, Justices Black and Douglas in turn pressed him on the consistency of his position with the protection of the right to strike in §13 of the NLRA and the express inclusion of slowdowns in the definition of strike in §501(2) of the LMRA. Although Mr. Manoli twice walked the Justices through his argument that the definition of a strike in the LMRA was relevant only to that statute and the prohibitions and penalties against secondary boycotts under the NLRA, they seemed to remain unconvinced at the end of his presentation.¹⁰⁹

Mr. Groner’s argument on behalf of the union commenced at the end of the day, and had to be completed the next day. Groner, as a former clerk for Chief Justice Vinson, knew most of the Justices and what to expect in their questioning even though it was his first Supreme Court argument. Groner would appear before the Supreme Court many more times, including an appearance on behalf of the Amalgamated Transit Workers and several appointments by the Court itself on behalf of individual litigants.¹¹⁰ Groner began with his basic argument that the Board had no authority for its ruling. According to Groner, at the expiration of the contract on March 18, the union had the choice of either capitulating on the issue of the company’s control of the assignment of debits--an issue touching the fundamental economic security of its members--or to take economic action. The unique characteristics of the insurance industry made a traditional strike impossible. Accordingly, the agents determined that the only way they could exert effective pressure on their

¹⁰⁸ Records and Briefs of Cases Decided by the Supreme Court of the United States, Volume 361, Brief for Insurance Agents’ International Union, *NLRB v. Insurance Agents’ Int’l Union*, 22.

¹⁰⁹ Tape of Supreme Court Oral Argument in the Insurance Agents’ Case, on file with the U.S. Supreme Court.

¹¹⁰ Telephone Interview with Isaac N. Groner, June 22, 2004.

employer over this matter of vital concern was to undertake the “no new business” and picketing exercises in which they engaged. Both the agents and the company suffered from the refusal to take new business, Groner pointed out, and the picketing activities were protected by §8(c) of the NLRA. Moreover, the union had been willing to meet with the company, engaged in “give-and-take” negotiations and was ultimately successful in reaching an agreement. How could this be bargaining in bad faith? Groner also insisted that the Board did not have the authority to consider the exercise of economic power in determining whether there had been a failure to bargain in good faith because to enable the Board to create a balance of power between the parties would enable the Board effectively to determine the terms and conditions of employment. Mr. Groner closed by arguing that if the Court sustained the Board’s position, the Board could intrude into collective bargaining based on nothing more than the Board’s characterization of an activity as “harassing.”¹¹¹

Groner expected some tough questioning by the Court--especially Justice Frankfurter. He knew that Justice Frankfurter was one of the most active questioners on the Court, and was particularly tenacious in his questioning of former clerks. He was not disappointed. When Groner described the union’s activities as merely picketing, Frankfurter asked whether it wasn’t the combination of the union’s activities to which the Board objected. Groner responded that under the Board’s decision all of the union’s individual activities were harassment and bargaining in bad faith, but that in fact many of those activities were expressly protected by §8(c). After more discussion of §8(c), Justice Frankfurter quipped “But why did the Board bring this case? Why did we take it on certiorari? If your characterization of the dispute is correct, there would seem to be nothing to this case.” In an effort to head off more grilling, Mr. Groner responded “There *is* nothing to the case. *I am* right. There is no authority or basis for the Board’s decision. . . . Don’t assume that just because the Board brings a dispute before you that they have a case!” In a backhanded slap at the Board (and perhaps the former clerk) that smoothed over the situation, Justice Frankfurter responded “I can only speak for myself, but I wouldn’t think that *anyone* would make such a rash assumption.”¹¹²

In an opinion by Justice William J. Brennan announced on February 23, 1960, the Supreme Court upheld the decision of the court of appeals and rejected the position of the Board. Joining Justice Brennan’s opinion were Chief Justice Earl Warren and Justices Black, Douglas, Clark and Stewart. Justice Frankfurter, joined by Justices Harlan and Whittaker, wrote a separate opinion preferring that the case be remanded to the Board to apply the correct legal standard. Justice Brennan’s opinion is remarkable for the sophistication and clarity with which it treats a very complex question. Justice Brennan, the son of Irish immigrants, showed obvious potential in his studies at the University of Pennsylvania and Harvard. Although his father was a labor leader, Brennan represented employer interests during his years in private practice. Despite the fact that Brennan was a Democrat, President Eisenhower appointed him to the Supreme Court to fill the “Catholic seat” and to demonstrate that his appointments were above political partisanship. Brennan’s personal

¹¹¹ Tape of Supreme Court Oral Argument in the Insurance Agents’ Case, on file with the U.S. Supreme Court.

¹¹² *Id.*; Telephone Interview with Isaac N. Groner, June 22, 2004.

warmth and brilliance combined to make him one of the most successful facilitators and consensus builders in the history of the Court.¹¹³ Working among some of the most independent and egotistical legal minds in the country, Brennan articulated clear and soundly reasoned public policy, on complicated questions, consistent with the legislative pronouncements of elected representatives. Brennan's opinion in *Insurance Agents'* outlines much of our modern theory of the obligation to bargain in good faith under the NLRA.

Justice Brennan's opinion first recounted the relevant language and legislative history of the NLRA. The NLRA's duty to bargain collectively, the opinion observed, was first imposed upon employers in §8(5) of the original Wagner Act. This obligation was narrowly conceived. Senator Walsh, Chair of the Senate Labor Committee, described the obligation imposed by the Act as follows:

When the employees have chosen their . . . representatives, all the bill proposes to do is to escort them to the door of their employer and say 'Here they are, the legal representatives of your employee.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.¹¹⁴

However, as Brennan explained, this narrow formulation carries a broader and essential purpose of the obligation to bargain in good faith. "That purpose is the making effective of the duty of management to extend recognition to the union; the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union." Although, as Walsh's quote makes clear, in passing the NLRA Congress was generally not concerned with the substantive terms of collective bargaining agreements, and believed such matters should be left up to the parties, realization of the fundamental purpose of the obligation to bargain in good faith "necessarily led beyond the door . . . , and into the conference room." "For example, an employer's unilateral wage increase during the bargaining process tends to subvert the union's position as the representative of the employees . . . , and hence is violative of [the obligation to bargain in good faith]."

Justice Brennan noted that "[o]bviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." In the Board's efforts in the 1940's to address this tension, Congress became concerned that the Board had strayed too far into the approval of various substantive terms in its determination of what constituted employers' good faith bargaining. Accordingly, the 1947 Taft-Hartley amendments to the NLRA defined the obligation to bargain collectively in §8(d). Moreover, Congress had become more concerned with abuses of union power. As a result, said the Court, Congress enacted §8(b)(3) to impose the obligation to bargain in good faith on unions. As Brennan

¹¹³ Eisenhower is said to have expressed regret about appointing Brennan and Chief Justice Earl Warren to the Supreme Court. Peter Irons, *A People's History of the Supreme Court* 402-403 (1999); <<http://www.michaelariens.com/ConLaw/justices/brennan.htm>>.

¹¹⁴ *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. at 484 (citing Senator Walsh at 79 Cong. Rec. 7660).

asserted: “It is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design [of the Act] of achieving industrial peace.”

Addressing the case at hand, Justice Brennan described the Board’s position as based on “an erroneous view of collective bargaining.”

It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth--or even with what might be thought to be an ideal one. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . [T]he truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors--necessity of good faith bargaining between the parties, and the availability of economic pressure devices . . . to make the other party incline to agree to one’s terms--exist side by side.

The Board’s approach--evaluating the economic weapons employed by the parties as indicia of good faith bargaining--involved an intrusion into the substance of collective bargaining that was not authorized by Congress in the NLRA.

[I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties’ own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our policy is not presently erected on a foundation of government control of the results of negotiations.

As a result, the Supreme Court found that the Board had exceeded its authority in holding that the union had failed to bargain in good faith, and upheld the decision of the D.C. Circuit Court of Appeals.

The Immediate Impact of Insurance Agents’

Isaac Groner was thrilled with the Court’s decision. He recalled that the union experienced the exhilaration that can only be felt when one is shot at but missed. Because of the peculiar characteristics of the insurance industry and the legal requirements to maintain service to existing customers, had the Board won the case and the union’s partial work stoppage strategies been held unlawful, the employees’ bargaining power in the insurance industry would have been severely undermined. As the case turned out, the insurance agents were able to resort to similar slowdown and picketing strategies in later negotiations, and maintained their bargaining relationship with the Prudential Insurance Company into the twenty-first century. However, this strategy is not quite so

effective or cost free for the workers as the Board's argument in the case might suggest. Participating agents forego commissions they could have earned on unsolicited business and of course Prudential could fire agents who participated in slowdowns or failed to follow company rules.¹¹⁵

The bar and the academy recognized *Insurance Agents'* as an important case with potentially far ranging implications for interpretation of the NLRA. No one anticipated any major change in strategy by the labor movement on the basis of the Court's limited endorsement of the slowdown in *Insurance Agents'*, and none occurred.¹¹⁶ However, there was a general recognition that the analysis of the case would have a significant impact on the way future bargaining cases were decided. *The New York Times* described the Court's ruling as "important" and having "far reaching implications."¹¹⁷ Academic authors identified larger themes in the case concerning the obligation to bargain in good faith. The Court's analysis in *Insurance Agents'* was seen as a step back from the per se analysis that had seemed implicit in recent good faith cases, including *Truitt*, and a return to an analysis that considered the facts of the case as a whole.¹¹⁸ Furthermore, the opinion was seen as an important check on the encroachment of the Board into the process of collective bargaining.¹¹⁹ Although some authors rejoiced in this, others wondered what the implications of the ruling would be for employer actions against unions. The Court's gloves-off "freedom of contract" philosophy in *Insurance Agents'* and other cases would benefit the stronger party in collective bargaining, and some realized that the stronger party would often be the employer. Just four years after it was decided, Harry H. Wellington cited *Insurance Agents'* as "perhaps the high watermark for freedom of contract in modern labor-management relations."¹²⁰

The Continuing Importance of Truitt and Insurance Agents' Today

The *Truitt* and *Insurance Agents'* cases stand today as landmarks resolving important questions and establishing important principles in the interpretation of the NLRA's obligation to "bargain in good faith." Over the years, the specific holding of the *Truitt* case has been narrowed at the hands of the Board and the courts. Despite the fact that similar arguments were ably made by Dick Douglas in the original case, and either ignored or rejected by the Court, several Board and

¹¹⁵ Telephone Interview with Isaac N. Groner, June 22, 2004.

¹¹⁶ *Id.*

¹¹⁷ N.Y. Times, February 24, 1960, at 22; Wash. Post Times Herald, February 24, 1960, at B3; Newark Evening News, February 23, 1960, at 1.

¹¹⁸ *NLRB May Not Equate Partial Strike to Harass Employer with Failure to Bargain in Good Faith*, 109 U. Pa. L. Rev. 134, 139 (1960).

¹¹⁹ *The Supreme Court, 1959 Term*, 74 Harv. L. Rev. 97 (1960).

¹²⁰ Harry H. Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. Pa. L. Rev. 467, 477 (1964).

court opinions have distinguished employer claims of inability to pay from those of competitive disadvantage and applied the financial disclosure requirements of *Truitt* only to the former and not the later.¹²¹ Thus, although it seems doubtful that this is the best interpretation of the Supreme Court’s opinion, most commentators acknowledge that, in practice, *Truitt* has been narrowed and the employer’s claim of “inability to pay” has taken on the aura of the “magic words” necessary to trigger the employers obligation to share financial data on the firm.¹²² This narrowing of *Truitt* is undoubtedly a product of shifts of the judiciary and the Board under successive Republican administrations.

Despite this narrowing in interpretation, *Truitt* still stands for the important propositions that good faith bargaining requires truthful representations and that the union has the right to relevant information. These principles reaffirmed the basis for the doctrine of good faith bargaining requiring employers to provide the union with sufficient information or “wage data” to enable its representatives to understand and intelligently discuss the issues raised in bargaining.¹²³ Moreover, the Supreme Court has extended the principles applied to collective bargaining in *Truitt* to information that is relevant to the enforcement of the collective agreement. In *NLRB v. Acme Industrial Co.*,¹²⁴ the Supreme Court used *Truitt* to establish a right to discovery in our system of industrial jurisprudence, allowing unions to gain the information they need to evaluate the merit of grievances, prepare for arbitration and enforce any award. *Truitt* and its progeny establish that the union and employer both have a right to all information that is relevant to performing their responsibilities in negotiating and enforcing collective bargaining agreements.¹²⁵ It is recognized that the sharing of relevant information in negotiations and contract enforcement helps to achieve the NLRA’s purposes of promoting productive collective bargaining and industrial peace.¹²⁶

¹²¹ See, e.g., *Nielson Lithographing Co.*, 305 NLRB 697 (1991), *enforced sub nom.* *Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992); *NLRB v. Harvstone Manufacturing Corp.*, 785 F.2d 570 (7th Cir. 1986); *AMF Trucking and Warehousing, Inc.*, 342 NLRB 116, 2004 WL 2138194 (2004) (no *Truitt* obligation where the company merely claims that it is “in distress”).

¹²² See, e.g., Brent Robbins, *Rethinking Financial Disclosure Under the National Labor Relations Act*, 47 Vand. L. Rev. 1905 (1994); Amy Gladstone, *It’s All in the Phrasing: When Does A Demand for Concessions Require the Provision of Information to the Union?* 470 PLI/Lit 31 (1993); Christopher T. Hexler, *Duty to Supply Information Nielson Lithographing Co. Revisited: The Board’s Retreat from Collective Bargaining as a Rational Process Leading to Agreement*, 8 Lab. Law 831 (1992).

¹²³ See, e.g., *Boston Herald Traveler Corp. v. NLRB*, 223 F.2d 58 (1st Cir. 1954); *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947 (2d Cir. 1951); *NLRB v. Whitin Machine Works*, 217 F.2d 593 (4th Cir. 1954); *Industrial Welding Co.*, 175 NLRB 477 (1969).

¹²⁴ 385 U.S. 432 (1967).

¹²⁵ Julius G. Getman, Bertrand B. Pogrebin & David L. Gregory, *Labor Management Relations and the Law* 150-54 (2d ed. 1999).

¹²⁶ Neil W. Chamberlain & James W. Kuhn, *Collective Bargaining* 78 (2d ed. 1965); Lavania Hall, *Negotiation: Strategies for Mutual Gain* (1993).

Unlike the holding of *Truitt*, the “hands-off” approach of *Insurance Agents*’ has fared well in the current conservative judicial environment. Although the *Insurance Agents*’ case itself was a union victory, the hands-off approach to the use of economic weapons has probably benefitted employers much more than unions. Since the 1980’s, American employers have become more aggressive about exercising economic weapons in collective bargaining. Although the use of strike replacements was fairly rare in the 1950’s, American employers have resorted to this strategy more often since President Reagan fired and replaced the striking air traffic controllers in the early 1980’s.¹²⁷ Also, since 1965 and the *American Ship Building* case,¹²⁸ the Board and courts have accepted employers’ use of the lock-out as an offensive weapon in collective bargaining.¹²⁹ Although *Insurance Agents*’ establishes that, consistent with good faith bargaining, employees may use unprotected and non-traditional economic weapons in collective bargaining, the logical corollary, of course, is that employers may do the same.

Beyond the particular holdings and principles they establish, *Truitt* and *Insurance Agents*’ are useful for understanding the concept of good faith bargaining because they illustrate a fundamental tension in the concept of good faith bargaining identified by Justice Brennan. At first the cases seem irreconcilable. *Truitt*’s requirements of honesty and the duty to divulge information are consistent with a model of “rational bargaining.” The *Truitt* Court seemed to promote exactly the vision of collective bargaining as a “collective academic search for truth” that it later expressly rejected in *Insurance Agents*’. Moreover, the Court promoted this vision in a fairly intrusive manner, requiring employers to open their books to the union under an almost per se rule based on a plea of poverty. On the other hand, *Insurance Agents*’ promotes the idea of collective bargaining as an economic contest or struggle. At least with respect to the choice of economic weapons, this struggle is to be free from interference by the Board or courts lest the government rather than the parties have the power to determine the outcome of the negotiations. The Court’s approach in *Insurance Agents*’ seemed to eschew per se rules concerning the parties’ behavior in favor of “consideration of the facts of the case as a whole.” Yet, as Justice Brennan made clear in his opinion in *Insurance Agents*’, neither of these conceptions of collective bargaining can be strictly true and both must exist within our understanding of good faith bargaining.

The problem of requiring good faith bargaining to promote industrial peace can be analyzed using a simple game theoretic model of collective bargaining.¹³⁰ In this model, we examine how the employer and the union might agree to divide \$10 in profits that will be earned over the life of the

¹²⁷ Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* 109, 112-13 (1990). The use of strike replacements is discussed in the chapter on *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), in *Labor Law Stories*.

¹²⁸ 380 U.S. 300 (1965).

¹²⁹ William B. Gould IV, *A Primer on American Labor Law* 109-11 (4th ed. 2004).

¹³⁰ This model borrows from my analysis in Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and The Search for Bargaining Equity and Industrial Peace*, 91 Mich. L. Rev. 419, 444-50 (1992).

collective bargaining agreement.¹³¹ It is assumed that the parties each adopt a strategy of either intransigence or cooperation in bargaining and that each party's success in bargaining depends on how "hard" it bargains relative to the other party. If one side is intransigent while the other is cooperative, the intransigent party will gain at the other's expense. However, if both sides are intransigent, the result is a strike in which the parties waste a portion of the \$10 they could have earned because the parties forego profits and wages during the strike.¹³² A plausible schedule for the division of the \$10 in this bargaining game is as follows: if both parties are cooperative, they each get \$5; if one side is intransigent while the other is cooperative, the intransigent party will get \$8 while the cooperative party will get \$2; and if both sides are intransigent, the result is a strike that wastes \$4, after which the parties agree to divide the remaining profits at \$3 each. These payoffs are shown in Matrix 1, with the union's payoff for each cell given below the diagonal and the employer's payoff for each cell given above the diagonal.

Matrix 1
Union and Employer Expected Payoffs for the Negotiations Game

| | | Employer | |
|-------|-------------------------|------------------------|-------------------------|
| | | Cooperative Bargaining | Intransigent Bargaining |
| Union | Cooperative Bargaining | 5 / 5 | 8 / 2 |
| | Intransigent Bargaining | 2 / 8 | 3 / 3 |

¹³¹ In game theory, the value of a contract that is subject to negotiations is referred to as the "cooperative surplus." In collective bargaining the cooperative surplus is the amount by which the profits of the firm over the life of the collective agreement exceed the amount each input to production must be paid in a competitive market. Robert Cooter & Thomas Ulen, *Law and Economics* 93-94 (1988).

¹³² In economics, the costs of intransigence in this bargaining problem are characterized as a "positional externality" in that the parties are rewarded based on their relative performance in being intransigent, and the costs of such intransigence is experienced by, or externalized on, the other party. Robert H. Frank, *Microeconomics and Behavior* 629-38 (1991).

The divergence of the parties' individual and collective interests in collective bargaining can be seen by examining Matrix 1. In the negotiations, each party has an individual incentive to be intransigent and attempt to gain at the other's expense. Examining the problem from the union's perspective, if the company decides to be cooperative, the union does better by being intransigent (\$8) than by being cooperative (\$5) and if the company decides to be intransigent, the union still does better by being intransigent (\$3) than by being cooperative (\$2). Similarly, from the company's perspective, intransigence is also individually the best strategy.¹³³ However, if both parties follow their individual interest in being intransigent, the result will be a strike that wastes a portion of the company's profit and yields a low payoff for both parties (\$3). The parties' collective interest is to cooperate so that they can avoid the strike and divide the profits with a higher payoff for both parties (\$5). In game theory, a problem that poses such a divergence between individual and collective interests is referred to as a "dilemma game" because it poses a dilemma between individual and collective interests in the parties' choice of strategies.¹³⁴

This divergence between individual and collective interests poses an opportunity for regulation to avoid industrial strife and waste of potential profits and wages. From the perspective of avoiding strikes, the simplest solution would be to direct the parties to submit the entire dispute to an arbitrator who would find that the company would earn \$10 in profits over the term of the collective agreement and that the parties should split those profits at \$5 each. Of course, there may be substantial costs from deriving and enforcing such a solution, not to mention the infringement on the parties' autonomy. Short of such an intrusive solution, what can the government do?

An alternative regulatory strategy to promote cooperative bargaining and minimize industrial strife would be for the government to prohibit and punish clear cases of intransigent behavior. If the government could identify intransigence or other opportunistic behavior in the above bargaining game, and punish it with an expected fine of \$4, the payoffs for each party would change so that it would always pay to cooperate.¹³⁵ Unfortunately, it may not always be possible to identify intransigence or other opportunistic behavior in bargaining. Is the employer bargaining hard because it's being intransigent, or because it really can't afford to pay? Taken to an extreme, this solution requires only slightly less of a herculean effort on the part of the adjudicator, and only slightly less an infringement of the parties' individual autonomy, than just arbitrating to the \$5 solution.

Fortunately, one last regulatory strategy remains for the government to promote cooperative bargaining and industrial peace. The government can try to formulate the context for collective bargaining in such a way as to increase the parties' chances of acting on their collective interest in

¹³³ In game theory a strategy that is the best regardless of what the other side does is referred to as a "dominant" strategy. Eric Rasmusen, *Games and Information: An Introduction to Game Theory* 38 (1989).

¹³⁴ Martin Shubik, *Game Theory in the Social Sciences* 240 (1989).

¹³⁵ In Matrix 1, adding a \$4 penalty for intransigence changes the \$8 payoffs to \$4, and the \$3 payoffs to -\$1. With such a payoff structure, cooperation dominates for both the union and the employer.

cooperating, rather than their individual interest in being intransigent. In experiments with dilemma games, researchers have found that people are more likely to act on their collective interests and cooperate if (a) the parties have good information so they know when they are being treated fairly; (b) there is a limited number of parties to the game so that there is no free-riding on cooperation; (c) there is a community of interests with the other people on their side of the table so that it is easy to identify the cooperative solution; and (d) there is a reasonable prospect of repeat future bargaining so that intransigence now can be punished in the future.¹³⁶

This analysis suggests that an optimal regulatory strategy for encouraging cooperative or “good faith” bargaining will be a mixed strategy. The government should adopt some per se rules to prohibit clearly intransigent or strategic behavior such as lying or refusing to bargain as bargaining in “bad faith.”¹³⁷ The government should also regulate the context of collective bargaining to promote the parties’ ability to see and act on their collective interest in cooperation by requiring exchanges of information, promoting organization among employees with similar interests in “appropriate bargaining units” and creating a “presumption of continuing majority status” so that there is a reasonable expectation of future collective negotiations between the parties.¹³⁸ Accordingly, it is consistent with the purpose of promoting industrial peace to require that the parties exchange relevant information in collective bargaining, as part of “good faith” bargaining, as a means of engendering trust and cooperation between the parties.¹³⁹ However, unless the government wants to intercede in the relationship of the parties and adjudicate the cooperative solution through arbitration, at some point the government must leave the resolution of the dispute to the parties with their skill, knowledge--and economic weapons--trusting that the best interests of the parties and the context of the negotiations the government has created will minimize industrial strife. This seems to approximate the doctrine of good faith bargaining that Congress intended by enacting the NLRA, and that the Supreme Court has developed through cases like *Truitt* and *Insurance Agents*’.

¹³⁶ Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law*, 91 Mich. L. Rev. 419, 484-86 (1992); Henry Hamburger, *Games as Models of Social Phenomena* 177-92 (1979).

¹³⁷ Although “puffing” is allowed in bargaining, outright misrepresentations are generally found to be a violation of the duty to bargain in good faith. Neil Lloyd, *Management’s Duty to Back Up Competitive Disadvantage Claims*, 61 U. Chi. L. Rev. 675, 679 (1994). The strategies of lying and refusing to bargain, along with the strategy of committing to third parties, can be analyzed graphically using a game theory model similar to the one presented in this chapter. Henry Hamburger, *Games as Models of Social Phenomena* 117-22 (1979).

¹³⁸ Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law*, 91 Mich. L. Rev. 419, 492-504 (1992).

¹³⁹ Indeed, under the presented analysis one could reasonably ask why employers aren’t *always* required to share financial information with their employees, at least where such sharing can be done without substantial burden or harm to the employer. Absent burden or harm, the only reason for the employer to keep such information silent is to trick the employees into accepting less than they otherwise would, at the risk of industrial strife. This strategy would seem at odds with both of the fundamental purposes of the NLRA--promoting equity in bargaining power and industrial peace.

Conclusion

The doctrine of good faith bargaining under the NLRA is a careful balance between regulating the conduct and context of collective bargaining to promote the parties' ability to act on their collective interest in cooperation, while still maintaining private determination of terms and conditions of employment through negotiation and possible resort to economic weapons. The *Truitt* and *Insurance Agents'* cases represent two distinct observation points in the Supreme Court's development of the contours of this doctrine. *Truitt* stands for the proposition that the Board and courts must regulate certain behavior of the parties in order to promote their ability to reach productive agreements and avoid industrial strife. The general principle announced in *Truitt* that the union has the right to information that is relevant to the performance of its duties as the exclusive representative of the employees is consistent with this proposition and the Act's purpose of promoting industrial peace. The Supreme Court's opinion in *Insurance Agents'* astutely outlines the tension implicit in the balancing of these objectives in our doctrine of good faith bargaining. The Court's holding in *Insurance Agents'*, that the Board and courts must not regulate the economic weapons of collective bargaining for fear of determining the substance of collective agreements, is consistent with the national labor policy of maintaining a system for the private determination of the terms and conditions of employment.