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It is advocated that North Carolina should place a broader interpretation on the word "accidental" so as to include any unexpected or unusual occurrence. The court's statements in regard to the "accidental" nature of the loss in the principal case may be regarded as dicta in future cases since the outcome of the case rested on other considerations. It is further believed that a preferable construction of the words "direct and accidental" to "direct *or* accidental" would broaden the coverage of the comprehensive clause so as to include losses covered by the same clause in other states.

GEORGE J. RABIL.

### Labor Law—Employer Refusals to Bargain Collectively in the Southern Textile Industry

Since 1935, national labor policy has been to encourage the practice and procedures of collective bargaining. The Taft-Hartley Act,<sup>1</sup> though otherwise curtailing union activities and the bargaining process, ostensibly added to<sup>2</sup> the Wagner Act<sup>3</sup> in respect to this stated policy. Section 8(b)(3) creates a new unfair labor practice for unions refusing to bargain collectively. Section 8(a)(5) continues to make the employer's refusal to bargain collectively with the union selected by his employees, an unfair labor practice.<sup>4</sup>

Nevertheless it is still possible for a skillful employer to evade<sup>5</sup> the duty to bargain collectively, at least, temporarily. In *Tower Hosiery Mills*, the North Carolina company

" . . . went through many of the motions of collective bargaining. It met on numerous occasions with the union, conferred at length regarding contract proposals, made concessions on minor issues, and discussed and adjusted several grievances."<sup>6</sup>

purpose of including all property damage to an automobile, other than mechanical breakdown, exclusive of collision losses. It includes all of the older coverages . . . and in addition many new losses never before contemplated by any coverage whatever. It is a simple and convenient form of insurance. . . . It is not a profitable coverage to the average insurer, as the hazards therein included bring the loss rates above the premium level, but it does possess excellent sales angles, and is simple of analysis and application." 5 APPLEMAN, INSURANCE LAW AND PRACTICE §3222 (1941).

<sup>1</sup> 61 STAT. 136, 29 U. S. C. §141 *et seq.* (Supp. 1947).

<sup>2</sup> §§171 and 174.

<sup>3</sup> 49 STAT. 449 (1935), 29 U. S. C. §151 *et seq.* (1946).

<sup>4</sup> The N.L.R.B. first determines whether the union in fact represents a majority of the employees in an appropriate bargaining unit.

<sup>5</sup> But outright refusals to bargain are not uncommon in Southern textiles. *Itasca Cotton Mfg. Co.*, 79 N.L.R.B. 1442 (1948) *enforcement granted*, 179 F. 2d 504 (5th Cir. 1950); *Postex Cotton Mills*, 80 N.L.R.B. 1187 (1948), *rev'd on other grounds*, 181 F. 2d 919 (5th Cir. 1950); *Highland Park Mfg. Co.*, 84 N.L.R.B. 744 (1949).

<sup>6</sup> 81 N.L.R.B. 658, 662 (1949), *enforcement granted*, 180 F. 2d 701 (4th Cir. 1950).

But despite these "surface indicia of bargaining" during nineteen conferences, held over a period of seven months, it was found that the company's

"... participation in discussions with the union was not intended to lead to the consummation of an agreement with the union, but merely to preserve the appearance of bargaining."<sup>7</sup>

An examination of the general criteria used in determining "good faith" bargaining may indicate how successful this evasion of the obligation to bargain collectively has been in the Southern textile industry.

#### CHARACTERISTICS OF "GOOD FAITH"

Section 8(d) spells out the obvious requirements of negotiating—meeting at reasonable times, conferring in good faith, and executing a written contract on any agreement reached—standards previously set up.<sup>8</sup> In addition, two affirmative actions are proscribed by decisional law. Unilateral action by an employer on a matter subject to collective bargaining without prior consultation with the union, is a refusal to bargain per se.<sup>9</sup> Individual bargaining with employees, thus by-passing and ignoring the union, is also banned.<sup>10</sup>

Generally decisive in determining whether an employer refused to bargain, is the question of "good faith." The phrases used by the N.L.R.B. and courts in characterizing employer attitude during negotiations, indicate how difficult of legal enforcement are the "good faith" criteria. Is the employer's "mind hermetically sealed"<sup>11</sup> against agreement; does he engage in "Fabian tactics"<sup>12</sup> or "shadow boxing";<sup>13</sup> are the conferences no more than "purposeless talk"<sup>14</sup> or "long and fruitless negotiations"?<sup>15</sup> Such generalizations have delineated "bad faith." But if the employer entered negotiations "with an open and fair mind, and a sincere purpose,"<sup>16</sup> in a "spirit of amity and cooperation,"<sup>17</sup> exhibited

<sup>7</sup> Tower Hosiery Mills, 81 N.L.R.B. 658, 662 (1949), *enforcement granted*, 180 F. 2d 701 (4th Cir. 1950).

<sup>8</sup> H. J. Heinz Co. v. N.L.R.B., 311 U. S. 514, 523-526 (1941); Singer Mfg. Co. v. N.L.R.B., 119 F. 2d 131 (7th Cir.), *cert. denied*, 313 U. S. 595 (1941); Globe Cotton Mills v. N.L.R.B., 103 F. 2d 91 (5th Cir. 1939); 13 N.L.R.B. ANN. REP. 59 (1948).

<sup>9</sup> N.L.R.B. v. Crompton-Highland Mills, 337 U. S. 217 (1949); Aluminum Ore Co. v. N.L.R.B., 131 F. 2d 485 (7th Cir. 1942).

<sup>10</sup> N.L.R.B. v. Acme Air Appliance Co., 117 F. 2d 417 (2d Cir. 1941); Note, 27 N. C. L. REV. 266 (1949).

<sup>11</sup> N.L.R.B. v. Griswold Mfg. Co., 106 F. 2d 713, 723 (3rd Cir. 1939).

<sup>12</sup> Great Southern Trucking Co. v. N.L.R.B., 127 F. 2d 180, 185 (4th Cir.), *cert. denied*, 317 U. S. 652 (1942).

<sup>13</sup> Stonewall Cotton Mills, Inc. v. N.L.R.B., 129 F. 2d 629, 631 (5th Cir.), *cert. denied*, 317 U. S. 667 (1942).

<sup>14</sup> Rapid Roller Co. v. N.L.R.B., 126 F. 2d 452, 459 (7th Cir.), *cert. denied*, 317 U. S. 650 (1942).

<sup>15</sup> N.L.R.B. v. Tower Hosiery Mills, 180 F. 2d 701, 705 (4th Cir. 1950).

<sup>16</sup> Globe Cotton Mills v. N.L.R.B., 103 F. 2d 91, 94 (5th Cir. 1939).

<sup>17</sup> N.L.R.B. v. Reed & Prince Mfg. Co., 118 F. 2d 874, 885 (1st Cir.), *cert. denied*, 313 U. S. 595 (1941).

"fair dealings" in his "approach and attitude,"<sup>18</sup> or made a "patient and painstaking effort . . . to reach agreement,"<sup>19</sup> there has probably been no refusal to bargain.

If such short-hand expressions leave a nebulous picture, the task of dissecting the decisions to isolate individual factors in employer conduct is even more uncertain. The holding in each case is based on the employer's total course of conduct.<sup>20</sup> Direct evidence of a purpose to violate the statute is rarely obtainable.<sup>21</sup> Basically, the issues are the employer's intent, motive, or state of mind.<sup>22</sup> The N.L.R.B. early noted that "the indicia of good faith are notoriously elusive."<sup>23</sup> At best, the tests for determining "good faith" cope with the extremes of conduct.<sup>24</sup>

#### COLLECTIVE BARGAINING IN SOUTHERN TEXTILES

It is said that collective bargaining is now accepted by employers as here to stay.<sup>25</sup> Unions today are supposedly so strong and powerful that they dominate the bargaining process, thereby justifying restrictive legislation.<sup>26</sup> To what extent is this true in the Southern textile industry?

The South today is the frontier of collective bargaining. The region's major industry, cotton and rayon textiles, is among the least organized of all manufacturing industries.<sup>27</sup> Although collective bargaining has been established at Erwin Mills, Marshall Field, Dan River and portions of the Cone, Textron, Goodyear, American Enka and Lowenstein chains, fully 80 per cent of Southern textile workers are unorganized,<sup>28</sup> including employees of major companies. The AFL and CIO Southern organizing campaigns, after four years, have substantially

<sup>18</sup> N.L.R.B. v. George P. Pilling & Son, Inc., 119 F. 2d 32, 37 (3rd Cir. 1941).

<sup>19</sup> N.L.R.B. v. Corsicana Cotton Mills, 179 F. 2d 234, 235 (5th Cir. 1950).

<sup>20</sup> N.L.R.B. v. Algoma Plywood Co., 121 F. 2d 602 (7th Cir. 1941); 14 NLRB ANN. REP. 75 (1949).

<sup>21</sup> Hartsell Mills Co. v. N.L.R.B., 111 F. 2d 291, 293 (4th Cir. 1940).

<sup>22</sup> N.L.R.B. v. Fulton Bag & Cotton Mills, 175 F. 2d 675 (5th Cir. 1949); Singer Mfg. Co. v. N.L.R.B., 119 F. 2d 131 (7th Cir.), cert. denied, 313 U. S. 595 (1941); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 19 (1947).

<sup>23</sup> S. L. Allen & Co., 1 N.L.R.B. 714, 727 (1936).

<sup>24</sup> See HILL AND HOOK, *MANAGEMENT AT THE BARGAINING TABLE* 239-261 (1945) (elaborate techniques used in negotiations).

<sup>25</sup> HILL AND HOOK, *MANAGEMENT AT THE BARGAINING TABLE* 15 (1945); TAYLOR, *GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS* 220 and 228 (1948).

<sup>26</sup> MILLIS AND BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 271-281 (1950); Denham, *The Taft-Hartley Act*, 20 TENN. L. REV. 168, 179 (1948); Torff, *The Taft-Hartley Act and Collective Bargaining: A Management Appraisal*, 43 ILL. L. REV. 323, 347 (1948).

<sup>27</sup> *Extent of Collective Bargaining and Union Recognition, 1946*, 64 MONTHLY LAB. REV. 765, 766 (1947).

<sup>28</sup> DEPT LABOR BULL. No. 885, *UNION AGREEMENTS IN THE COTTON TEXTILE INDUSTRY 1* (1946); DeVyver, *The Present Status of Labor Unions in the South—1948*, 16 SOUTHERN ECON. J. 1, 13 (1949); PROCEEDINGS 5TH BIENNIAL CONVENTION TWUA-CIO 73 (1948); Fortune, Nov. 1946, p. 138, col. 1.

failed to organize Southern textiles.<sup>29</sup> Unions are often unable to secure contracts years after certification.<sup>30</sup> For sometime now, non-union mills have either matched or exceeded the economic gains won through union action. This management initiative was recently dramatized by the unilateral announcement by large unorganized Southern textile employers of an 8 per cent general wage increase.<sup>31</sup>

The Winston-Salem, Atlanta and New Orleans N.L.R.B. offices, servicing the Southern textile area, are the only ones in the nation with more unfair labor practice than representation cases.<sup>32</sup> Compared to a national average of 27 per cent "no-union" ballots of all votes cast in representation elections, North Carolina records 57 per cent, Georgia and Alabama 42 per cent, and South Carolina 41 per cent.<sup>33</sup> The textile industry as a whole shows an abnormally high proportion of elections won by "no-union": 42 per cent compared with 29 per cent for all manufacturing industries.<sup>34</sup> Significantly, elections where "no-union" secures a majority vote, in Southern textiles, are often regarded as company victories.<sup>35</sup> This high "no-union" vote is not solely attributable

<sup>29</sup> EXECUTIVE COUNCIL REPORT 5TH BIENNIAL CONVENTION TWUA-CIO 39 (1948); DeVyver, *The Present Status of Labor Unions in the South—1948*, 16 SOUTHERN ECON. J. 1, 18-21 (1949); Textile Bulletin, July, 1950, p. 38, col. 1 (quoting TWUA-CIO as claiming less Southern membership than three years earlier). Compare with original objectives: Amer. Federationist, June, 1946, p. 6 (one million members in next 12 months); Textile Labor, June, 1946, p. 1 (Canon, Bibb, Calloway and Avondale Mills as immediate goals); Textile Challenger, August, 1946, p. 1.

<sup>30</sup> See *N.L.R.B. v. Mexia Textile Mills, Inc.*, 70 Sup. Ct. 826 (1950); *N.L.R.B. v. Union Mfg. Co.*, 179 F. 2d 511 (5th Cir. 1950); *Hillsboro Cotton Mills*, 80 N.L.R.B. 1107 (1948), *enforcement granted*, 179 F. 2d 504 (5th Cir. 1950); *Itasca Cotton Mfg. Co.*, 79 N.L.R.B. 1443 (1948), *enforcement granted*, 179 F. 2d 504 5th Cir. (1950). In all four cases, union was certified in 1944.

<sup>31</sup> Greensboro (N. C.) Daily News, Sept. 13, 1950, §2, p. 1, col. 4-6. Same increase set pattern for organized mills. Durham (N. C.) Morning Herald, Oct. 16, 1950, §1, p. 1, col. 1; Winston-Salem (N. C.) Journal, Oct. 6, 1950, §1, p. 2, col. 3; Raleigh (N. C.) News & Observer, Oct. 18, 1950, §1, p. 2, col. 4. Union had not demanded wage increase prior to announcement. Textile Labor, Sept. 2, 1950, p. 1, col. 3; TWUA Contract Reporter, Erwin Chain Council, Sept. 12, 1950, p. 4.

<sup>32</sup> 14 NLRB ANN. REP. 163 (1949). Of all N.L.R.B. orders against unfair labor practices, awaiting enforcement as of August 31, 1949, 32 per cent occurred within the Fifth Circuit's jurisdiction. N.L.R.B. petition for writ of certiorari, *N.L.R.B. v. Atlanta Metallic Casket Co.*, 173 F. 2d 758 (1949).

<sup>33</sup> 14 NLRB ANN. REP. 5 and 179 (1949).

<sup>34</sup> 14 NLRB ANN. REP. 173 (1949). North Carolina elections, involving TWUA-CIO or UTW-AFL, held from October 1946 through July, 1950, eliminating known decertifications and elections where two or more unions were involved, show "no-union" secured a majority in 18 out of 30 cases. Unions lost elections in all units of over 1,500 employees. 3,201 "no-union" ballots of 4,615 valid votes were cast in North Carolina "textile" elections during 1950, through July. From unpublished tables in preparation for M.A. thesis, by Robert Millard, Chapel Hill, N. C., based on records at Winston-Salem, N. C., N.L.R.B. office.

<sup>35</sup> Cedartown Yarn Mills, 84 N.L.R.B. 1, 8 (1949) (paid holiday and parade); Macon Textiles, Inc., 80 N.L.R.B. 1525, 1550 (1948) (street demonstration, bonfire, dancing). See DeVyver, *The Present Status of Labor Unions in the South—1948*, 16 SOUTHERN ECON. J. 1, 16 (1949); Amer. Wool & Cotton Reporter, March

to employer opposition. Other factors are: a working class with an individualistic, rural background, still adjusting to industrial life; no continuous or established trade union tradition; an almost exclusively white working force;<sup>36</sup> community and press hostility; incorrect union policies and strategy.<sup>37</sup> Lost textile strikes in the region are increasing phenomena. Although company sales of housing facilities are increasing,<sup>38</sup> the mill village remains a strongly entrenched characteristic of the industry, with all the implications of the "dominant landlord-employer position."<sup>39</sup> State anti-union legislation, except for South Carolina, blankets the South, much of it drastic,<sup>40</sup> although no Southern state has a labor relations act.

Employer opposition to unionization of Southern mills, by either AFL, CIO or independent unions, presently includes both major producers<sup>41</sup> and small companies; Northern-controlled firms<sup>42</sup> as well as Southern independents; employers with existing collective bargaining relationships in other industries<sup>43</sup> and those having established dealings

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23, 1950, p. 39, col. 1; Textile Bulletin, June, 1950, p. 32, col. 2; July, 1950, p. 38, col. 2; Sept., 1950, pp. 40 and 51, col. 2.

<sup>36</sup> 14 ANN. REP. S. C. DEP'T LABOR 67 (1949); LAHNE, THE COTTON MILL WORKER 81 (1944). TWUA-CIO has Jim Crow locals at Danville, Va., and Leaksville, N. C. KENNEDY, A HISTORY OF THE TEXTILE WORKERS UNION OF AMERICA, C.I.O. 294 (unpublished Ph.D. thesis, University of North Carolina library, 1950). Compare with Southern industries where the racial employment ratio is almost 50-50, and union organization widespread: Alabama coal, steel and iron ore, North Carolina cigarette manufacturing; or industries with largely Negro employment: cotton oil, tobacco leaf processing and fertilizer.

<sup>37</sup> Some weaknesses seem to be: a centralization of organizational structure which smothers the development of Southern local leadership; the lack of any program in regard to work-loads, the major employee grievance; almost no women officials in an industry in which women comprise some 40 per cent of the working force.

<sup>38</sup> HERRING, PASSING OF THE MILL VILLAGE (1949) *passim*.

<sup>39</sup> Bibb Mfg. Co., 82 N.L.R.B. 338, 343 (1949). See 14 ANN. REP. S. C. DEP'T LABOR 41 (1949) (State mill village population of 184,683).

<sup>40</sup> Dodd, *Trends in State Legislation Relating to Unions*, NYU FIRST ANN. CONF. ON LABOR 497, 499-502 (1948).

<sup>41</sup> See Bibb Mfg. Co., 82 N.L.R.B. 338 (1949); Burlington Mills Corp., 82 N.L.R.B. 751 (1949); Pacific Mills, 91 N.L.R.B. No. 3, 2 CCH LAB. LAW REP. ¶10, 263 (1950); The American Thread Co., Inc., 84 N.L.R.B. 593 (1949); Hart Cotton Mills, Inc., 91 N.L.R.B. No. 130, 26 LAB. REL. REP. (Ref. Man.) 1566 (1950) (Ely & Walker); Russell Mfg. Co., Inc., 82 N.L.R.B. 1081 (1949); Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949).

Although the textile industry remains competitive, a distinct trend toward corporate integration and monopoly is taking place. Markham, *Integration in the Textile Industry*, 28 HARV. BUS. REV. 74 (1950); Barkin, *The Regional Significance of the Integration Movement in the Southern Textile Industry*, 15 SOUTHERN ECON. J. 395 (1949).

<sup>42</sup> See N.L.R.B. v. Crompton-Highland Mills, 337 U. S. 217 (1949); Pacific Mills, 91 N.L.R.B. No. 3, 2 CCH LAB. LAW REP. ¶10, 263 (1950); Chicopee Mfg. Corp. of Ga., 85 N.L.R.B. 1439 (1949); Premier Worsteds Mills, 85 N.L.R.B. 985 (1949); The American Thread Co., Inc., 84 N.L.R.B. 593 (1949).

<sup>43</sup> U. S. Rubber Co., 86 N.L.R.B. 3 (1949); Aldora Mills, 79 N.L.R.B. 1, 9 (1948).

with textile unions in other mills.<sup>44</sup> The uniformity of the pattern of employer opposition to unionization of Southern textile mills may be attributable to the fact that most of the employer cases before N.L.R.B. and courts are handled by only five law firms.<sup>45</sup> Employer techniques have occasionally included: use of violence,<sup>46</sup> appeals to race prejudice,<sup>47</sup> and injunctions during strikes.<sup>48</sup>

#### THE ROLE OF FIRST CONTRACTS

Such regional manifestations must be viewed as the background for the problem of employer refusals to bargain in initial joint dealings.<sup>49</sup> The critical nature of first negotiations is well recognized. Collective bargaining then has more to do with organizational questions than substantive matter. The union, insecure and recently established, is a doubly sensitive "bride" in the "shot-gun wedding" with management. The employer is faced with making a fundamental change in thinking and procedure. From individual bargaining—which usually means employees played no role, while the employer unilaterally fixes conditions<sup>50</sup>

<sup>44</sup> Pacific Mills, 91 N.L.R.B. No. 3, 2 CCH LAB. LAW REP. ¶10, 263 (1950); Chicopee Mfg. Corp. of Ga., 85 N.L.R.B. 1439 (1949); Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949); The American Thread Co., Inc., 84 N.L.R.B. 593 (1949).

<sup>45</sup> Located in Greensboro and Charlotte, North Carolina; Atlanta and Decatur, Georgia; and Fort Worth, Texas.

<sup>46</sup> Anchor Rome Mills, Inc., 86 N.L.R.B. 1120, 1146-1153 (1949) (employer procured pistol permits, armed some 75 or 100 persons for attack upon picket line with resultant beatings and violence); Dixie Mercerizing Co., 86 N.L.R.B. 285, 294-297 (1949) (with plant whistle as signal, mob of 50 or 60 persons prevented distribution of union handbills, seized same and forced organizers to leave; employer held responsible); Russell Mfg. Co., Inc., 82 N.L.R.B. 1081 (1949) *passim* (murder threats, planned provocation and physical assaults by employer agents); Macon Textiles, Inc., 80 N.L.R.B. 1525, 1548-1549 (1948) (employer responsible for attempt to run union men down by driving car up on sidewalk, physical assault and attempted provocation).

<sup>47</sup> Bibb Mfg. Co., 82 N.L.R.B. 338, 339-341 and 355-362 (1949); Russell Mfg. Co., Inc., 82 N.L.R.B. 1081, 1107 and 1110 (1949); Macon Textiles, Inc., 80 N.L.R.B. 1525, 1547 (1948); Magnolia Cotton Mill Co., Inc., 79 N.L.R.B. 91, 113 (1948). See Textile Bulletin, June, 1950, p. 31, col. 2; Sept., 1950, p. 42, col. 2; Fortune, Nov., 1946, p. 230, col. 2.

<sup>48</sup> See Hart Cotton Mill, Inc. v. Abrams, 231 N. C. 431, 57 S. E. 2d 803 (1950); Alred v. Celanese Corp., 205 Ga. 371, 54 S. E. 2d 240 (1949), *cert. denied*, 338 U. S. 937 (1950); Safie Mfg. Co. v. Arnold, 228 N. C. 375, 45 S. E. 2d 577 (1947); Corley v. Crompton-Highland Mills, 201 Ga. 333, 39 S. E. 2d 861 (1946); EXECUTIVE COUNCIL REPORT 6TH BIENNIAL CONVENTION, TWUA-CIO 30 (1950).

<sup>49</sup> 14 NLRB ANN. REP. 159 (1949) (26 per cent of all unfair labor practice cases against employers involve refusals to bargain). During this period, fiscal 1949, 23 per cent of all cases filed involving 8(a)(5) allegations, arose in the 13 Southern states (Alabama, Georgia, North Carolina, Tennessee and Texas contributed 14 per cent of the national total). Twenty per cent of all 8(a)(5) charges filed during fiscal 1948-1950 were Southern cases. From statistical chart prepared for writer by N.L.R.B., October 20, 1950. See MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 121, 127, 293 and 448 (1950); Textile Labor, July 22, 1950, p. 11, col. 4.

<sup>50</sup> See Holden v. Hardy, 169 U. S. 366, 397 (1898); N.L.R.B. v. Jones & Laughlin Steel Co., 301 U. S. 1, 33 (1937).

—the step is to collective bargaining,<sup>51</sup> with its majority rule principle<sup>52</sup> and the sharing of certain managerial functions with union representatives.<sup>53</sup>

The crux of the statutory protection of employee rights is in Section 8(a)(5), whereby they are enabled through collective bargaining to secure the fruits of self-organization such as grievance procedure and seniority rights.<sup>54</sup> Recognition and negotiation are not ends in themselves but the means of securing these written, industrial constitutions.<sup>55</sup> Collective bargaining is now so generally accepted elsewhere, that the present debate centers on the scope of its subject matter;<sup>56</sup> in the South, however, attention must still be focused on the initial step in the establishment of the collective bargaining process.

#### CONCLUSIONS

If national labor policy is to work out a peaceful solution<sup>57</sup> in the South, the N.L.R.B. and courts might consider four possible improvements in the approach toward employer refusals to bargain.

(1) To give body to the vague criteria of "good faith" bargaining, conduct should be examined not only in the light of the employer's total course of action,<sup>58</sup> but in the specific context of the particular industry

<sup>51</sup> Collective bargaining contracts add "dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer. [The contract becomes] the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted." Parker, J., in *N.L.R.B. v. Highland Park Mfg. Co.*, 110 F. 2d 632, 638 (4th Cir. 1940).

<sup>52</sup> Weyand, *The Majority Rule in Collective Bargaining*, 45 COL. L. REV. 556 (1945).

<sup>53</sup> TAYLOR, GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS 61 (1948); Chamberlain, *The Nature of the Bargaining Process*, 11 U. OF PITTS. L. REV. 397, 406 (1950). See Barkin, *The Technical Engineering Service of an American Trade-Union*, 61 INT'L. LAB. REV. 609 (1950).

<sup>54</sup> MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 111, 121 and 448 (1950); Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 394 (1950).

<sup>55</sup> See *H. J. Heinz Co. v. N.L.R.B.*, 311 U. S. 514, 525 (1941); *Timkin Roller Bearing Co. v. N.L.R.B.*, 161 F. 2d 949, 953 (6th Cir. 1947).

<sup>56</sup> Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950) *passim*; Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097 (1950) *passim*.

<sup>57</sup> The establishment of collective bargaining in steel, auto and rubber was not peaceful. BROOKS, AS STEEL GOES . . . , 130-152 (1940); LEVINSON, LABOR ON THE MARCH c. 7 and 201-209 (1938); ALINSKY, JOHN L. LEWIS c. 5, 6 and 7 (1949); MCKENNEY, INDUSTRIAL VALLEY 275 *et seq.* (1939). For developments in textiles, see DEP'T LABOR BULL. No. 963, WORK STOPPAGES CAUSED BY LABOR-MANAGEMENT DISPUTES IN 1948 17 (union organizational issues involved in 54 per cent of the man-days idle in the textile industry, compared with 17 per cent for all manufacturing industries); EXECUTIVE COUNCIL REPORT 5TH BIENNIAL CONVENTION TWUA-CIO 48 (1948); PROCEEDINGS 5TH BIENNIAL CONVENTION TWUA-CIO 153 (1948); EXECUTIVE COUNCIL REPORT 6TH BIENNIAL CONVENTION TWUA-CIO 37 (1950).

<sup>58</sup> See footnote 20, *supra*.



and particular area.<sup>59</sup> Prevailing collective bargaining practices therein might provide a helpful measuring rod.<sup>60</sup>

(2) In appraising the conduct of negotiations, the role of compromise, so essential to the establishment of collective bargaining,<sup>61</sup> should be given greater emphasis. The legislative history of Section 8(d) seems to indicate that it is no barrier to a continuing requirement of counter-proposals in negotiations.<sup>62</sup> In *N.L.R.B. v. Tower Hosiery Mills*, the Court of Appeals for the Fourth Circuit, in finding a refusal to bargain, compared concessions by the union and its willingness to compromise with the uncompromising attitude of the employer.<sup>63</sup> While the give-and-take of negotiations admit of no rigid yardstick, more consideration might be given to comparing and evaluating the bargaining attitudes of the two parties.

(3) The Court of Appeals for the Fifth Circuit might well emulate other circuits in cooperating with the N.L.R.B., to implement national labor policy in the South. The labor philosophy expressed in the court's dicta<sup>64</sup> shows an underestimation of the values of collective bargaining. The N.L.R.B. recently had occasion<sup>65</sup> to ask the Supreme Court to admonish the Fifth Circuit<sup>66</sup> for its refusal to enforce certain N.L.R.B. orders without giving any reason. Southern opposition to collective

<sup>59</sup> 1 NLRB ANN. REP. 86 (1936), quoting from *M. H. Birge & Sons, Inc.*, 1 N.L.R.B. 731, on the relevant factors in determining a refusal to bargain: ". . . the labor relations background of the industry and the actions of the other union manufacturers. . ." See *Russell Mfg. Co., Inc.*, 82 N.L.R.B. 1081, 1098-1101 and 1127 (1949) (use is made of the local sociological setting against which employer conduct occurred); *N.L.R.B. v. Stowe Spinning Co.*, 336 U. S. 226, 230 (1949) ("We cannot equate a company-dominated North Carolina mill town with the vast metropolitan centers. . .").

<sup>60</sup> See *N.L.R.B. v. Knoxville Pub. Co.*, 124 F. 2d 875, 880 (6th Cir. 1942) (prevailing economic conditions); *N.L.R.B. v. Tower Hosiery Mills*, 180 F. 2d 701, 704 (4th Cir. 1950) (employer's stringent proposal "was apparently previously unheard of in this area"). See MILLIS AND BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 117 (1950); Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 405 (1950).

<sup>61</sup> See Torff, *The Taft-Hartley Act and Collective Bargaining: A Management Appraisal*, 43 ILL. L. REV. 323, 326 (1948).

<sup>62</sup> See VAN ARKEL, *AN ANALYSIS OF THE LABOR-MANAGEMENT RELATIONS ACT*, 1947 47; MILLIS AND BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 448 (1950). *Contra*: *Adler Metal Products Corp.*, 79 N. L. R. B. 219 (1948); *Denham, The Taft-Hartley Act*, 20 TENN. L. REV. 168, 179 (1948). *But cf.* *Vanette Hosiery Mills*, 80 N.L.R.B. 1116, 1128 (1948), *enforcement granted*, 179 F. 2d 504 (1950).

<sup>63</sup> 180 F. 2d 701, 705 (4th Cir. 1950).

<sup>64</sup> *N.L.R.B. v. Red Arrow Freight Lines, Inc.*, 180 F. 2d 585, 586 (5th Cir. 1950); *N.L.R.B. v. Caroline Mills, Inc.*, 167 F. 2d 212 (5th Cir. 1948); *Stonewall Cotton Mills, Inc. v. N.L.R.B.*, 129 F. 2d 629 (5th Cir.), *cert. denied*, 317 U. S. 667 (1942) (opinion before re-hearing); *N.L.R.B. v. Riverside Mfg. Co.*, 119 F. 2d 302, 304 (5th Cir. 1941); *Globe Cotton Mills v. N.L.R.B.*, 103 F. 2d 91, 94 (5th Cir. 1939).

<sup>65</sup> *N.L.R.B. petition for writ of certiorari*, pp. 11-23, *N.L.R.B. v. Atlanta Metallic Casket Co.*, 173 F. 2d 758 (5th Cir. 1949).

<sup>66</sup> See *N.L.R.B. v. Mexia Textile Mills, Inc.*, 70 Sup. Ct. 826 (1950); *N.L.R.B. v. Pool Mfg. Co.*, 70 Sup. Ct. 830 (1950) (note dissenting opinion).

bargaining may have been encouraged by the willingness of the Fifth Circuit to set aside N.L.R.B. orders.<sup>67</sup> Although that court has secured compliance by using its contempt power to mediate,<sup>68</sup> it is possible that a sympathetic approach toward the statutory objectives and a stiffening of the contempt penalties might have a more constructive effect upon the willingness of Southern textile employers to bargain collectively.

(4) The discretionary injunction power of the General Counsel<sup>69</sup> might be used to secure the compliance with national policy of especially recalcitrant employers in the region. The speed of injunction could help offset the deadly effects of long delays, often destructive of collective bargaining, regardless of the final legal outcome.<sup>70</sup>

M. H. Ross.

### Pleadings—General Allegation of Negligence— Sufficiency Against Demurrer

There has been much confusion in the North Carolina courts concerning the necessary requirements of complaints<sup>1</sup> to withstand demurrer for failure to state a cause of action<sup>2</sup> in actions for negligence. In the recent case of *Davis v. Rhodes*,<sup>3</sup> an action for wrongful death, complaint alleged "that defendant unlawfully, recklessly, and negligently struck and collided" with the motor scooter on which the intestate was riding. Defendant answered, denying negligence. Thereafter, plaintiff was allowed to amend his complaint. This amendment, filed more than one year after the death of the intestate, particularized the acts of negligence relied upon. Defendant then demurred to the original complaint for failure to state a cause of action, and moved to dismiss the action as the amendment was filed more than one year after the death of the intestate.<sup>4</sup> The trial court sustained the demurrer and dismissed the action;

<sup>67</sup> N.L.R.B. petition for writ of certiorari, p. 13, N.L.R.B. v. Atlanta Metallic Casket Co., 173 F. 2d 758 (5th Cir. 1949).

<sup>68</sup> N.L.R.B. v. Corsicana Cotton Mills, 178 F. 2d 344 (5th Cir. 1949), 178 F. 2d 347 (5th Cir. 1949), 179 F. 2d 234 (5th Cir. 1950). Court allowed employer to escape contempt penalty but kept case on docket and read transcripts of negotiations, noting results of its mediation in later opinions.

<sup>69</sup> 61 STAT. 136, 29 U. S. C. §160j (Supp. 1947).

<sup>70</sup> MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 119 (1950); EXECUTIVE COUNCIL REPORT 6TH BIENNIAL CONVENTION TWUA-CIO 33 (1950) (court rulings are often "hollow victories"). See footnote 30, *supra*, for length of delays.

<sup>1</sup> A complaint must contain a plain and concise statement of the facts constituting a cause of action. N. C. GEN. STAT. §1-122 (1943).

<sup>2</sup> Defendant may demur to the complaint when it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action. N. C. GEN. STAT. §1-127 (1943).

<sup>3</sup> 231 N. C. 71, 56 S. E. 2d 43 (1949).

<sup>4</sup> N. C. GEN. STAT. §28-173 (1943) (. . . action . . . to be brought within one year after such death). Where the original complaint does not state a cause of action, an amendment, if it be good and available, would relegate the plaintiff to