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the critical question of the owner's implied permission for the actual use."⁴¹

Whether the courts interpret "lawful possession" to cover the emergency operator or whether he is found to have "permission" because of the existing emergency, it is evident that coverage must be provided under the statute if more than lip service is paid to the public policy underlying compulsory liability insurance in North Carolina. Arguably, the more desirable approach is to give "lawful possession" a meaning independent of permission, for the former appears to describe the emergency situation more accurately. Indeed, "lawful possession" can even be extended beyond the emergency situation so that anyone other than a thief becomes an insured. Such a far-reaching interpretation would still fall short of the ultimate remedial goal of providing partial redress to *every* innocent victim of a negligent driver.⁴²

JAMES LEE DAVIS

Labor Law—Duty to Bargain in Good Faith—Boulwarism Within the Totality-of-Circumstances Rule

In 1947, following a series of setbacks in negotiations with the three major unions representing its employees,¹ General Electric introduced a new approach into its technique of collective bargaining. This approach, labelled "Boulwarism" after its supposed progenitor,² was designed to instill in the employees of GE the idea that the company, without prodding by the representatives of the employees, would do what was "right" and would give each employee the benefits to which he was entitled, but no more.³ The implementation of Boulwarism was two-pronged. First, by means of extensive investigation into the various economic factors in-

⁴¹ *Bailey v. General Ins. Co. of America*, 265 N.C. 675, 678, 144 S.E.2d 898, 900 (1965).

⁴² See text preceding notes 19 & 24 *supra*.

¹ Note, *Labor Law: General Electric's "Overall Approach" to Bargaining Held a Violation of Good Faith*, 1965 DUKE L.J. 661 n.1. See Cooper, *Boulwarism and the Duty to Bargain in Good Faith*, 20 RUTGERS L. REV. 653, 662-63 & n.35 (1966).

² Lemuel R. Boulware, then vice-president of GE, designed the new technique in the late 1940's. R. SMYTH, L. MERRIFIELD, & T. ST. ANTOINE, *LABOR RELATIONS LAW* 718 (4th ed. 1968). The most detailed history of Boulwarism is contained in H. NORTHRUP, *BOULWARISM* (1964).

³ Note, *Labor Law—Collective Bargaining—General Electric's Firm Offer Approach Held Bad Faith*, 40 N.Y.U.L. REV. 798 (1965). GE developed an almost paternalistic attitude toward its employees. See Cooper, *supra* note 1, at 660.

volved, the company would arrive at what it felt to be a fair offer. This offer would be presented to the union representatives at the time for renegotiation of the employment contracts. The company would not consider changing its offer unless bargainers for the union could prove to the company that the proposal was based on a misapprehension of the relevant facts. Thus was the "firm, fair offer" conceived.⁴ Second, an extensive communications campaign would be waged to convince the employees and the public that GE had made its best offer first, that the offer was fair for all concerned, and that the offer was not subject to change.⁵

Boulwarism was so successful initially that the first year in which GE employed it, "The [union] was so dumbfounded . . . that its representatives asked for an adjournment and accepted the company's offer the next day."⁶ Abandoning altogether the "auction" method of bargaining, GE continued to use the Boulware technique unimpededly until the contract negotiations of the summer and fall of 1960.⁷ At that time, prototypic Boulwarism alone proved to be ineffective to force capitulation by the union representatives; GE was forced to engage in activities—including unilateral offers to employees⁸ and direct negotiations with locals⁹—that were outside the theory of Boulwarism.¹⁰

⁴ Comment, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 NW. U.L. REV. 40, 66 (1968). Perhaps the most important facet of the "firm, fair offer" relating to its legality is that it is not completely unalterable. See *Dierks Forests, Inc.*, 148 N.L.R.B. 923 (1964) ("hard bargaining" by an employer is not in itself unlawful).

⁵ 38 TEMP. L.Q. 353 (1965). GE was attempting to apply its successful product-marketing techniques to its relations with its employees. See Cooper, *supra* note 1, at 660.

⁶ Cooper, *supra* note 1, at 661 n.29, citing HENDERSON, CREATIVE COLLECTIVE BARGAINING 52-53 (Healy ed. 1965).

⁷ Comment, "*Boulwareism*": *Legality and Effect*, 76 HARV. L. REV. 807, 809 (1963). In the 1966 negotiations, the major union with which GE was bargaining tried another method of combating Boulwarism instead of striking—co-ordinated bargaining. Under this approach, other unions with which GE dealt were brought in for joint negotiations so that a united front might be presented. GE refused to join in joint negotiations. See R. SMITH, L. MERRIFIELD, & T. ST. ANTOINE, *supra* note 2, at 718-19; Note, *Labor Law—The Legality of Co-ordinated Bargaining*, 47 N.C.L. REV. 946 (1969).

⁸ *General Elec. Co.*, 150 N.L.R.B. 192, 214-15 (1964). GE unilaterally offered an accident and life insurance policy to all its employees. This action was held by the Labor Board to be a violation of GE's duty to bargain in good faith. *Id.* at 193. See *NLRB v. Katz*, 369 U.S. 736 (1962).

⁹ 150 N.L.R.B. at 193. The Board held GE's action in dealing with locals when the parent international union was the recognized bargaining agent to be a violation of the company's duty to bargain in good faith. *Id.* See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960).

¹⁰ The Board found one other specific violation of the duty to bargain in good

Under the contract that was operative prior to 1960, the earliest date that either party could compel the beginning of formal negotiations was August 16, 1960, forty-five days before the end of the contract.¹¹ In the latter part of 1959, the company began its publicity campaign by advising employees of the need for GE to remain competitive through low operating costs.¹² Then, after negotiations had started, the employees were bombarded with over one hundred written communications¹³ bruiting the virtues of their company's "firm, fair offer" and disparaging the representatives of the IUE (International Union of Electrical, Radio, and Machine Workers).

During the period of informal negotiations, the company informed the union that it was going to institute contributory group-life and accident-insurance plans for all employees, but that, if the union objected, the plan would be instituted only for unrepresented employees. Despite protests by the union that such a plan should be negotiated before being implemented, the company instituted it for the unrepresented employees in July, 1960.¹⁴ Once the formal bargaining began, the company consistently refused to furnish the union the information, including wage costs, used in computing its offer. When pressed for such information, GE's representatives would only state enigmatically that they bargained in terms of the "level of benefits" rather than costs.¹⁵

As the bargaining progressed, GE continually refused to make mean-

faith—GE's refusal to supply information to the union regarding the cost-basis for its "firm, fair offer." 150 N.L.R.B. at 193. The reason that such a refusal is unlawful is that it forces the representatives of the union to rebut proposals by the company without having any information on which to base their rebuttal. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963).

¹¹ *NLRB v. General Elec. Co.*, 418 F.2d 736, 741 (2d Cir. 1969).

¹² *Id.* at 741-42.

¹³ *Id.* at 759 n.14. See Comment, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 Nw. U.L. Rev. 40, 67-71 (1968) (pointing out the massive size of GE's campaign and examining effects of the campaign on GE's eventual bargaining position).

¹⁴ 418 F.2d at 742. This action was held by the court to constitute in itself a violation of section 8(a)(5) of the National Labor Relations Act. (This section is described in note 25 *infra.*) *Id.* at 746-49. See *Equitable Life Ins. Co.*, 133 N.L.R.B. 1675 (1961). See also cases cited note 8 *supra.*

¹⁵ 418 F.2d at 742-43. An employer's failure to disclose "relevant" information in support of his claimed inability to meet union demands is a violation of section 8(a)(5). *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Furthermore, there is a presumption that information relating to wages is relevant. *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963). In *General Electric*, the second circuit held that GE's failure to furnish relevant information was a violation of section 8(a)(5). 418 F.2d at 749-53.

ingful concessions to the union.¹⁶ It was not until August 29, 1960, that GE completely revealed its own proposals.¹⁷ Despite the IUE's admonitions that GE should not publicize its "firm, fair offer" until the IUE representatives had an opportunity to examine it, GE refused to delay releasing its prepared publicity beyond the time of the formal presentation of its offer on the next day.¹⁸ With only three scheduled meetings left before the end of the existing contract, it was evident that GE would not make any significant changes in its offer; for when asked about the possible institution of a local-option plan to divert proposed wage increases to supplement unemployment compensation, the company's negotiator replied that "[a]fter all our month [*sic*] of bargaining and after telling the employees before they went to vote that this is it, we would look ridiculous to change it at this late date; and secondly the answer is no."¹⁹

On September 29, 1960, with a strike imminent, GE refused the union's request to maintain the status quo under the old contract until a new one could be signed.²⁰ On the same day, GE authorized its employee-relations manager for the Schenectady plant to offer almost all of the terms of the "firm, fair offer" to the local IUE unit for local approval. The manager did so. Throughout the ensuing strike, the company continued to deal with local officials directly.²¹ The strike was unsuccessful; on October 22, the IUE was forced to capitulate. Without having seen the complete contract, the union signed a short-form memorandum of agreement.²²

In 1964, the NLRB reviewed GE's conduct in the 1960 negotiations.²³ Among other violations of the National Labor Relations Act (NLRA),²⁴

¹⁶ 418 F.2d at 742-43.

¹⁷ *Id.* at 742.

¹⁸ *Id.* at 742-43.

¹⁹ *Id.* at 745.

²⁰ *Id.*

²¹ *Id.* GE's dealings with locals were found by the court to constitute a specific violation of section 8(a)(5) of the National Labor Relations Act. *Id.* at 753-56. See cases cited note 9 *supra*. See also *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

²² 418 F.2d at 745-46.

²³ *General Elec. Co.*, 150 N.L.R.B. 192 (1964).

²⁴ In addition to the three specific violations of the duty to bargain in good faith (see notes 8-10 *supra*), the Board also found GE guilty of violations of sections 8(a)(1) [61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964) (unlawful to interfere with or restrain employees' exercise of the right to bargain collectively)] and 8(a)(3) [61 Stat. 141-42 (1947), 29 U.S.C. § 158(a)(3) (1964) (unlawful to discriminate in employment opportunities against employees exercising collective-bargaining rights)] of the National Labor Relations Act [*formerly*, Labor Management Relations Act, 61 Stat. 136-62 (1947), 29 U.S.C. §§ 141-87 (1964)]. See 150 N.L.R.B. at 193, 284.

the Board found GE guilty under section 8(a)(5) of an over-all failure to bargain in good faith²⁵ with the IUE. In *NLRB v. General Electric Co.*,²⁶ a 1969 decision, the Second Circuit Court of Appeals affirmed the Board's decision. Judge Kaufman, writing for a two-judge majority,²⁷ reaffirmed the Board's use of the "totality-of-circumstances"²⁸ approach to determining good faith: "[G]ood faith—or lack of it—must in the absence of a per se violation depend upon a factual determination based on the overall conduct of the party charged."²⁹ He made clear that the determination of subjective good faith could not be made to fit a uniform rubric, but would have to be resolved through a case-by-case examination of the facts.

In an opinion concurring and dissenting, Judge Friendly disagreed with the majority's analysis of GE's conduct.³⁰ He suggested that since the parties had "sat down together"³¹ and had not engaged in any "proscribed tactics"³² in bargaining, the majority's finding of an over-all failure to bargain in good faith contravened the language and policy of section 8(d) of the NLRA.³³ He insisted that when the Board relies on

²⁵ 150 N.L.R.B. at 196. Section 8(a)(5) [61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964)] provides that it is an unfair labor practice for an employer to refuse to "bargain collectively" with his employees' representatives. Section 8(d) [61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964)] defines "bargain collectively" as follows:

For the purposes of this section [8 of the NLRA], to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, 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 concession . . .

²⁶ 418 F.2d 736 (2d Cir. 1969).

²⁷ *Id.* Judge Kaufman was joined in his opinion by Judge Waterman. Judge Friendly dissented from the portion of the majority opinion finding GE guilty of an over-all refusal to bargain in good faith.

²⁸ *Id.* at 756. See *General Elec. Co.*, 150 N.L.R.B. 192, 196 (1964). See also *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

²⁹ 418 F.2d at 756.

³⁰ *Id.* at 764-74 (concurring and dissenting opinion).

³¹ *Id.* at 767. This reference by Judge Friendly apparently was to GE's compliance with the procedures required by section 8(d) (see note 25 *supra*). See Comment, "Boulwareism": *Legality and Effect*, 76 HARV. L. REV. 807, 810-11 (1963).

³² 418 F.2d at 767. Judge Friendly alluded to the fact that GE had not committed a per se violation of the NLRA. *But see id.* at 762; *NLRB v. Katz*, 369 U.S. 736 (1962).

³³ 418 F.2d at 765. See generally Cox, *supra* note 28, at 1403-12, tracing the

the "totality of circumstances" in finding a violation of section 8(a)(5), a more stringent test than the subjective absence of good faith should be required: ". . . I have no difficulty with the Board's making a finding of bad faith based on an entire course of conduct so long as the standard of bad faith is, in Judge Magruder's well-known phrase, a 'desire not to reach an agreement with the Union.'"³⁴ Judge Friendly came to the conclusion that GE had sought to reach *some* agreement with the union and was, therefore, not guilty of bad-faith bargaining.³⁵

The flaw in Judge Friendly's approach, the majority pointed out,³⁶ is that it is easily susceptible of reduction to the absurdity wherein a company could escape the prohibitions of section 8(a)(5) merely by demonstrating a desire to sign a contract with the terms to be supplied by the company itself. Such a result would permit bad-faith bargainers to avoid the sanctions of the NLRA merely by meeting a prescribed form of bargaining. Since "good faith," absent facts warranting a finding of per se bad faith,³⁷ necessarily involves a determination of the state of mind of the particular bargainers,³⁸ the majority was correct in concluding that a court best proceeds on a case-by-case examination of the facts surrounding the negotiations and should leave to the Board's discretion the application of the "totality-of-circumstances" doctrine.³⁹

Since the majority relied on the totality of GE's conduct in reaching

history and policies relating to section 8(d); Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807 (1959).

³⁴ 418 F.2d at 767, citing NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953). *But see* 418 F.2d at 761, in which Judge Kaufman pointed out that Judge Magruder's language was not intended to be converted into a simplistic test of good faith; *United Steelworkers v. NLRB*, 390 F.2d 846 (D.C. Cir. 1967).

³⁵ 418 F.2d at 774.

³⁶ *Id.* at 761.

³⁷ Certain actions of employers have been held to be inherently indicative of bad-faith opposition to collective bargaining. *See, e.g.*, *NLRB v. Katz*, 369 U.S. 736 (1962) (unilateral wage increases while bargaining was in process held to be a violation of section 8(a)(5)). Thus, in cases involving per se bad faith, the actual state of mind of the employer is irrelevant because his unlawful act renders a good-faith intent objectively impossible. *See generally* Cox, *supra* note 28, at 1422-28; Bowman, *An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 VAND. L. REV. 487 (1956).

³⁸ *See* Comment, "*Boulwarism*": *Legality and Effect*, 76 HARV. L. REV. 807, 810-14 (1963).

³⁹ 418 F.2d at 756. Since the only way that the state of mind of an employer can be determined is through an evaluation of the objective manifestations of his intent through the totality of his actions, it is useless to try to segment a defendant's conduct and make rules for each separate act. Indeed, it is clear that often, when a defendant's state of mind is in issue, the sum of his acts may be illegal although each individual act is not. *See, e.g.*, *Daniel Constr. Co. v. NLRB*, 341 F.2d 805, 811 (4th Cir. 1965), *cert. denied*, 382 U.S. 831 (1965). *See also* Cooper, *supra* note 1, at 672-73.

a decision, it is still unclear whether "pure" Boulwarism constitutes bad-faith bargaining.⁴⁰ However, in at least two respects, Judge Kaufman went farther than did the majority of the NLRB toward declaring prototypic Boulwarism a violation of section 8(a)(5): he indicated that GE's failure to make meaningful concessions changed the context in which the company's other conduct would be viewed,⁴¹ and he held that using evidence of GE's publicity campaign did not contravene section 8(c)⁴² of the NLRA.⁴³

The Board in its decision of the case did not directly address the issue of GE's refusal to make concessions and the effect of that refusal on the legality of GE's "firm, fair offer." However, a majority of the Board indicated a preference for an "auction" type of bargaining: "This 'bargaining' approach [Boulwarism] undoubtedly eliminates the 'ask-and-bid' or 'auction' form of bargaining, but in the process, devitalizes negotiations and collective bargaining and robs them of their commonly accepted meaning."⁴⁴ Judge Kaufman did not opt for this subtler approach to the issue of lack of concessions and the validity of various forms of bargaining.⁴⁵ Rather, he stated that "while the absence of concessions would not prove bad faith, their presence would, as GE claims, raise a

⁴⁰ See address by Frank W. McCulloch, Chairman of the NLRB, 43d Annual Conference of Tex. Indus., Oct. 28, 1965, in 60 L.R.R.M. 44 (1965):

. . . [T]he Board held in all the circumstances of that case [*General Electric*] that the company failed to meet the law's requirements of good faith bargaining.

. . . The Board simply applied accepted principles to a unique bargaining situation, which I do not know to have been duplicated in any other company. . . .

Id. at 47. But see Note, *Labor Law: General Electric's "Overall Approach" to Bargaining Held a Violation of Good Faith*, 1965 DUKE L.J. 661; Note, *Labor Law—Collective Bargaining—General Electric's Firm Offer Approach Held Bad Faith*, 40 N.Y.U.L. REV. 798 (1965); 38 TEMP. L.Q. 353 (1965) (concluding that the Board had found that Boulwarism alone was an unlawful method of bargaining).

⁴² 418 F.2d at 758-59.

⁴³ 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1964):

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

⁴⁴ 418 F.2d at 760. See discussion p. 1000 *infra*.

⁴⁵ *General Elec. Co.*, 150 N.L.R.B. 192, 195 (1964) (footnote omitted).

⁴⁶ But see remarks by Phillip D. Moore, Manager of Employee Relations Service of GE, 58 L.R.R.M. 33 (1965) (concluding that the Board in its decision specifically held that the absence of concessions is evidence of a lack of good faith).

strong inference of good faith."⁴⁶ If concessions raise an inference of good faith, then, logically, concession-making forms of bargaining will, under a given set of facts, fare better in court than bargaining in which the best offer is made first. Thus, the context in which a tribunal may view the facts surrounding employment-contract negotiations is substantially altered by Judge Kaufman's determination. Two questions thus emerge. First, has the court disregarded section 8(d)?⁴⁷ Second, does the encouragement of concessions do any more than make the parties go through a period of haggling before they tender their "real" offer?

In defining the obligation to bargain collectively, section 8(d) states that "such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."⁴⁸ In interpreting this language, the Supreme Court has held that the Board may not compel concessions either directly or *indirectly*.⁴⁹ Clearly Judge Kaufman's opinion at least indirectly would compel GE to make concessions in bargaining, and this fact was one basis for Judge Friendly's dissent.⁵⁰ Judge Friendly's view was that, instead of telling the parties *how* to bargain,⁵¹ the Board must limit its functions to escorting the parties to the bargaining table, to making sure that they meet at reasonable times and make memoranda of any agreements reached,⁵² and to assuring that there are no per se violations of the duty to bargain.⁵³ Such an approach ignores the intentions of the parties and precludes the Board from ever examining the negotiators' state of mind. But this restrictive interpretation was repudiated in the very case that Judge Friendly cited⁵⁴ as his authority—*NLRB v. Insurance Agents' International Union*.⁵⁵ Since a

⁴⁶ 418 F.2d at 758. See *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943); Marcus, *The Employer's Duty to Bargain: Counterproposal v. Concession*, 17 LAB. L.J. 541 (1966); Comment, *Collective Bargaining, Boulwarism, and the Fluctuating Duty to Concede*, 61 NW. U.L. REV. 427 (1966).

⁴⁷ For the language of section 8(d) see note 25 *supra*.

⁴⁸ 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

⁴⁹ *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

⁵⁰ See 418 F.2d at 765-66 (concurring and dissenting opinion).

⁵¹ See *id.* at 769.

⁵² Cf. *California Girl, Inc.*, 129 N.L.R.B. 209, 219 (1960) (there must be a potentiality of the parties' yielding).

⁵³ See material cited note 37 *supra*. But see Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 290-91 (1964) (concluding that Boulwarism inevitably results in the employer's total unilateral control over "distributive power").

⁵⁴ 418 F.2d at 765.

⁵⁵ 361 U.S. 477 (1960), *aff'g* 260 F.2d 736 (D.C. Cir. 1958). The Supreme Court emphasized that its holding in the case was not intended to remove the Board's power to examine the good faith of the parties through their over-all conduct. *Id.* at 498 (dictum).

factual determination of the parties' state of mind is extremely difficult to make and since concessions are indeed relevant to a state of open-mindedness in bargaining, the provision of section 8(d) relating to concessions should be limited to its precise language: no concessions shall be *required*. To deny evidence concerning concessions or the lack of them would only inhibit the Board in performing its duty to seek industrial peace through enforcing collective bargaining.⁵⁶

If evidence of concessions raises an inference of good-faith bargaining, what is to prevent GE from entering negotiations, haggling with the IUE for a few meetings, making a few planned concessions, and then resorting to its normal bargaining techniques? The prevention of this possibility was, arguably, the very purpose behind the passage of section 8(d); the Supreme Court has recognized that "it is now apparent from the statute [8(d)] that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position."⁵⁷ There appears to be an adequate check against such a superficial use of concession-making by virtue of the fact that the Board may declare mere surface bargaining to be indicative of a lack of good faith.⁵⁸ Although the Board might be unable always to ferret out those parties who lack good faith this risk is worth the "vitalizing" effect that encouragement of concessions should have on the negotiations of the parties.⁵⁹

The Board's use of evidence of GE's publicity campaign in finding bad-faith bargaining provided the issue that split the court three ways. The court was forced to make a determination of the scope of an employer's free speech under section 8(c) of the NLRA.⁶⁰ Unlike the majority of the Board, Judge Kaufman addressed himself directly to whether section 8(c)⁶¹ precluded use of the evidence. He concluded that Congress, in passing the statute, had intended to exclude only "irrelevant"

⁵⁶ See 61 Stat. 136 (1947), 29 U.S.C. § 151 (1964).

⁵⁷ NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952). Cf. Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir. 1964).

⁵⁸ See, e.g., H. K. Porter Co., 153 N.L.R.B. 1370 (1965), *enforced*, 363 F.2d 272 (D.C. Cir. 1966), *rev'd on other grounds*, 38 U.S.L.W. 4177 (U.S. Mar. 2, 1970).

⁵⁹ It does not seem unreasonable to suggest that parties will be more willing to listen to each other when each knows that there is some possibility for a change in the other's position. See California Girl, Inc., 129 N.L.R.B. 209, 219 (1960).

⁶⁰ Judge Waterman's concurring opinion, explicitly adopting Judge Kaufman's opinion, took up only the issue of GE's communications to its employees. 418 F.2d at 763-64.

⁶¹ See note 42 *supra* for the text of section 8(c).

speech from the Board's consideration: "The evil at which the section was aimed was the alleged practice of the Board in inferring the existence of an unfair labor practice from a totally unrelated speech or opinion delivered by an employer."⁶² He insisted that Congress could not have intended to bar the Board's examination of all communications that do not contain a threat or a promise of benefit; otherwise section 8(c) would destroy the Board's purview over sections of the NLRA predicated on evaluation of motive and intent.⁶³

Although Judge Kaufman's reasoning seems to contradict the express language of section 8(c), his viewpoints, arguably, have a rational basis. Congress probably passed the section to achieve a more equitable balance between the free-speech rights of employers and the rights of employees to organize and bargain than had existed under the doctrine of *NLRB v. Virginia Electric and Power Co.*⁶⁴ To permit this balance to be struck formalistically so that the rights of employees are subverted would be an unintended paradox.

Judge Waterman went the step beyond the determination that section 8(c) was intended only to balance the interests of the parties: he actually balanced the interests involved in the case.⁶⁵ He found that GE's publicity campaign had had two deleterious effects on its employees' rights: it cemented the company to its original position so that there was no effective bargaining possible,⁶⁶ and it fixed the idea in the minds of the employees that the company, rather than the union, was their proper representative.⁶⁷ As to the employer's rights to exercise freedom of speech, Judge

⁶² *Id.* at 760; *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 62 (1966) (concurring opinion).

⁶³ 418 F.2d at 761-62. In addition to section 8(a)(5), section 8(a)(1) also requires examination of an employer's intent in cases in which there appears to be a conflict with section 8(c). See *Southwire Co. v. NLRB*, 383 F.2d 235 (5th Cir. 1967); Comment, "Boulwareism": *Legality and Effect*, 76 HARV. L. REV. 807, 814-15 (1963). See generally Pokempner, *Employer Free Speech Under the National Labor Relations Act*, 25 MD. L. REV. 111 (1965).

⁶⁴ 314 U.S. 469 (1941). The Board in this case was given broad discretion to examine an employer's speech as an incident of his total course of conduct. The Board's use of this broad discretion to examine employers' speech that was unrelated to bargaining was criticized by the Senate committee that drafted section 8(c). S. REP. No. 105, 80th Cong., 1st Sess. 23-24 (1947). See, Comment, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 NW. U.L. REV. 40, 44-47 (1968).

⁶⁵ 418 F.2d at 764 (concurring opinion).

⁶⁶ *Id.* This result may, in fact, be the single feature of GE's communications program that made it illegitimate. See *Procter and Gamble Mfg. Co.*, 160 N.L.R.B. 334 (1966).

⁶⁷ 418 F.2d at 764. This argument (that GE was attempting to replace the union as the representative of the employees) can be extended even farther than

Waterman saw no value in the company's publicizing that its offer was virtually unalterable.⁶⁸ Thus, he concluded that evidence of GE's communications program was properly admitted in the action before the Board.

Judge Friendly felt that "GE's communications [fitted] snugly under the phrase 'views, argument, or opinion' in § 8(c)."⁶⁹ He argued that Judge Kaufman had misinterpreted the reasons why Congress passed the statute, that Congress had struck a constitutionally-permissible balance in favor of protecting employers' speech, and that the court was bound by that determination.⁷⁰ He concluded that since GE's "views" contained neither a threat of reprisal or force nor a promise of benefit, evidence of GE's publicity campaign could not be considered.⁷¹

The three judges' debate on the proper interpretation and application of section 8(c) points to the problem that is the heart of the issue of the legality of Boulwarism: the Board and the courts are forced to reconcile two sections of the NLRA—8(a)(5) and 8(c)—that are, under the facts of many cases, contradictory. Section 8(a)(5) must depend for its enforcement upon the ability of the Board to determine the employer's state of mind. Such a determination is not difficult when the employer completely disregards the procedures prescribed by section 8(d),⁷² when he commits an act that can be said to be inherently indicative of bad faith,⁷³ or when he adamantly refuses to bargain with a union.⁷⁴ But when an employer meets the formal procedures that are required in collective bargaining and disguises his performance in the negotiations through hard bargaining so that the Board is unable clearly to perceive his bad faith, then determination of his state of mind is very difficult. When the employer carefully follows a "legal" form of bargaining, he

Judge Waterman did not provide a basis for finding that GE violated section 8(a)(5): GE refused to recognize the IUE as the representative of its employees; therefore, since it is logically impossible for GE to bargain with a union that it fails to recognize, GE could not have been bargaining in good faith "with the representatives of [its] employees." 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964). See Cooper, *supra* note 1, at 675.

⁶⁸ 418 F.2d at 764. Judge Waterman seemed to feel that disparagement of union officials and massive communication of the benefits of the company's offer were not evidence of bad faith. Rather, it was the communication of "firmness for firmness' sake" that threw the balance against the speech. *Id.*

⁶⁹ *Id.* at 770.

⁷⁰ *Id.* at 771-73.

⁷¹ See *id.* at 771.

⁷² See, e.g., *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941).

⁷³ See, e.g., *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960).

⁷⁴ See, e.g., *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 268 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963).

may be able to avoid the sanctions of section 8(a)(5) and still communicate his bad-faith intentions to his employees if section 8(c) precludes any evidence of such communications. Thus, if he is able to persuade the courts to adhere strictly to the language of section 8(c), he has safely avoided the duty imposed by the NLRA to bargain in good faith. If he cannot persuade a court to preclude use of this evidence at the hearing of an 8(a)(5) charge, he will have to rely solely on his "hard bargaining" at the negotiations; and this alternative is less likely to bring about capitulation of the union and more likely to effectuate the policies of the NLRA. Judges Kaufman and Waterman, by consciously balancing the interests of the parties, have adopted the only feasible method for protecting the policies embodied by the Act.

KENNETH B. HIPPI

Medical Problems in the Law—Automobiles—Reporting Patients for Review of Drivers' Licenses

A person licensed to drive a motor vehicle by the State of North Carolina may lose this privilege¹ if he is adjudged incompetent, is admitted as an inpatient to an institution for the treatment of the mentally ill, or enters an institution for the treatment of alcoholism or drug addiction.²

¹ "A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute." *Underwood v. Howland*, 274 N.C. 473, 476, 164 S.E.2d 2, 5 (1968), quoting from *In re Wright*, 228 N.C. 584, 589, 46 S.E.2d 696, 699-700 (1948).

² N.C. GEN. STAT. § 20-17.1 (Supp. 1969) in pertinent part provides:

(a) The Commissioner, upon receipt of notice that any person has been legally adjudged incompetent or has been admitted as an inpatient to an institution for the treatment of the mentally ill or has entered an institution for the treatment of alcoholism or drug addiction shall forthwith make inquiry into the facts for the purpose of determining whether such person is competent to operate a motor vehicle. Unless the Commissioner is satisfied that such person is competent to operate a motor vehicle with safety to persons and property, he shall revoke such person's driving privilege. No driving privilege revoked hereunder shall be restored unless and until the Commissioner is satisfied that the person is competent to operate a motor vehicle with safety to persons and property.

(c) The person in charge of every institution of any nature for the care and treatment of the mentally ill, the care and treatment of alcoholics or habitual users of narcotic drugs shall forthwith report to the Commissioner in sufficient detail for accurate identification the admission of every person.

(e) Notwithstanding the provisions of G.S. 8-53, G.S. 8-53.2, G.S. 122-8.1