

1966

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Recommended Citation

David G. Epstein, Comment, *Impasse in Collective Bargaining*, 44 Tex. L. Rev. 769 (1966).

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IMPASSE IN COLLECTIVE BARGAINING

DAVID G. EPSTEIN

The word "impasse" is an important part of the working vocabulary of all practitioners and students of labor relations. Although numerous trial examiner reports, board orders, court decisions and commentators have used the term impasse, the concept has never been discussed at length.¹ In *NLRB v. Tex-Tan, Inc.*,² the Fifth Circuit described "impasse" as "a state of facts in which the parties, despite the best of faith, are simply deadlocked."³ The *Tex-Tan* definition, while accurate, is of limited practical significance. It adds little to the definition of impasse that might be found in almost any standard desk dictionary.⁴ The only difference, one of major importance, is that an impasse in bargaining, unlike an impasse in any other situation, requires the "best of faith."⁵ Unless the deadlock in negotiations has been reached in good faith, the legal ramifications of an impasse are not applicable.⁶ Yet the *Tex-Tan* definition leaves a number of important questions unanswered. This Comment explores two of these questions: the significance of the finding of an impasse, and more important, the factors considered in determining whether an impasse exists.

I. SIGNIFICANCE OF AN IMPASSE

In most situations, a union is affected only indirectly by the presence of an impasse. Thus, a union does not have to wait until an impasse has been reached before it may strike. On the other hand, the scope of action of an employer is affected by the existence of an impasse in three major respects.

A. Defense to a Refusal To Bargain Charge

The term "impasse" was first used to characterize a labor dispute in *Lengel-Fencil*.⁷ There the employer and the union, although they met on numerous occasions and made both proposals and concessions, were unable to

¹ A number of legal writings briefly discuss some aspect of the impasse doctrine. See, e.g., Bowman, *An Employer's Unilateral Action—An Unfair Practice?*, 9 VAND. L. REV. 487, 500 (1956); Koretz, *Legality of the Lockout*, 4 SYRACUSE L. REV. 251, 255 (1953).

² 318 F.2d 472 (5th Cir. 1963).

³ *Id.* at 482.

⁴ Webster defines impasse as a "predicament affording no obvious escape . . . deadlock." WEBSTER'S NEW COLLEGIATE DICTIONARY 418 (7th ed. 1963).

⁵ See *NLRB v. Andrew Jergens Co.*, 175 F.2d 130, 136 (9th Cir.), *cert. denied*, 338 U.S. 827 (1949).

⁶ An examination of Board decisions in which the claim of impasse has been rejected clearly reveals that the most common reason for rejection is the failure of the parties to bargain in good faith.

⁷ 8 N.L.R.B. 988 (1938).

agree about wages. After bargaining collectively for over a month and a half, the employer conducted a vote by mail to determine whether the workers would be willing to return at the pre-strike wage scale. The union claimed that this constituted an unfair labor practice, a refusal to bargain. The Board, however, held that the employer's action should not be isolated from its context. Here, at the time the straw vote was taken, a definite impasse in the negotiations had been reached. Having bargained to an impasse, the parties were not legally obligated to meet and bargain further. This is now an established concept in labor law. Without exception, the courts have recognized an impasse as a defense to a charge of refusal to bargain.⁸

Although the Labor Management Relations Act makes no mention of impasse, statutory justification for this defense can be found. While the duty to bargain was established by the National Labor Relations Act of 1935,⁹ the term "bargaining" was not statutorily defined until the Labor Management Relations Act of 1947. Section 8(d),¹⁰ which defines bargaining, provides that it does not include the obligation to agree to a proposal or make concessions. Since neither party is required to yield, stalemates can and do result. Therefore the language of the statute compels recognition of a concept such as impasse as a defense to a refusal to bargain charge.

This defense, however, is subject to several limitations inherent in the impasse concept. An impasse in bargaining is a temporary state of affairs;¹¹ when the situation changes, the duty to bargain is revived. The Board will use almost any occurrence indicating that further negotiations will be fruitful to signify an end to the impasse.¹² It is well settled that a strike effects a change of circumstances sufficient to break an impasse.¹³ Its economic impact may cause one of the parties to yield from a previous bargaining position. Moreover, a strike often introduces new issues, such as replacement of the strikers, which must be bargained about. Other, less conspicuous changes, such as improve-

⁸ See, e.g., *NLRB v. Intracoastal Terminal, Inc.*, 286 F.2d 954 (5th Cir. 1961); *Shell Oil Co.*, 77 N.L.R.B. 1306 (1948).

⁹ 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (1964).

¹⁰ For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Labor Management Relations Act (Taft-Hartley Act) § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

¹¹ See Comment, 37 N.Y.U.L. REV. 666, 674 (1962).

¹² *Taplitz, Refusal to Bargain*, N.Y.U. 7TH ANNUAL CONF. ON LABOR 171, 229 (1954).

¹³ E.g., *NLRB v. United States Cold Storage Corp.*, 203 F.2d 924 (5th Cir.), cert. denied, 346 U.S. 818 (1953); *American Laundry Mach. Co.*, 76 N.L.R.B. 981 (1948), enforced, 174 F.2d 124 (6th Cir. 1949).

ment in the employer's business,¹⁴ alteration of a bargaining position,¹⁵ and even a mere passage of time,¹⁶ have also been found to break an impasse.

A second limitation is that a party cannot bargain to an impasse over nonstatutory terms; if the deadlock does not involve "wages, hours, and other terms and conditions of employment," then there is no impasse. This principle first appeared in a series of Board decisions holding that an employer violated section 8(a)(5) by insisting upon nonstatutory subjects of bargaining.¹⁷ Appellate review of the first two of these cases left the status of this principle in doubt.¹⁸ In *Allis-Chalmers Mfg. Co.*,¹⁹ enforcement of the Board order was denied on the ground that the subject was statutory; in *Darlington Veneer Co.*,²⁰ the order was enforced but the court did not rely on the ground that nonstatutory subjects cannot be bargained to an impasse. Appellate review of the third Board decision, however, removed any doubt as to the propriety of the Board's use of this doctrine. In *Borg-Warner*,²¹ the company submitted counterproposals calling for a ballot clause²² and a recognition clause.²³ From the outset, the union made clear that these provisions were wholly unacceptable to it, and when the employer refused to omit them, the union filed unfair labor practice charges. The Court held that the bargaining parties may not "lawfully insist upon . . . [nonstatutory subjects of bargaining] as a condition to any agreement."²⁴

The theory underlying the *Borg-Warner* decision is sound; there should be some subjects of bargaining that cannot lawfully be insisted upon as a condition to an agreement.²⁵ For example, an employer should not be permitted

¹⁴ Kit Mfg. Co., 138 N.L.R.B. 1290 (1962).

¹⁵ Baker Mfg. Co., 75 N.L.R.B. 1012 (1948).

¹⁶ Jeffrey De Witt Insulator Co. v. NLRB, 91 F.2d 134 (4th Cir.), cert. denied, 302 U.S. 731 (1937).

¹⁷ See Comment, 71 HARV. L. REV. 502, 510 (1958).

¹⁸ *Ibid.*

¹⁹ 106 N.L.R.B. 939 (1953), enforcement denied, 213 F.2d 374 (7th Cir. 1954).

²⁰ 113 N.L.R.B. 1101 (1955), enforced, 236 F.2d 85 (4th Cir. 1956). The court apparently reasoned that the employer's proposal was against the policy of the act. In addition, there was independent evidence of bad faith on the part of the employer.

²¹ 113 N.L.R.B. 1288 (1955), modified, 236 F.2d 898 (6th Cir. 1956), 356 U.S. 342 (1958). The *Borg-Warner* decision has been greatly criticized by legal commentators. See Cox, *Labor Decisions of the Supreme Court at the October Term 1957*, 44 VA. L. REV. 1057, 1074 (1958); Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 273 (1964); Fanning, *The Duty to Bargain in 1962*, 14 LAB. L.J. 18, 21 (1963); Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807, 826 (1959); Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988, 993 (1961). *Contra*, Sigal, *The Evolving Duty to Bargain*, 52 GEO. L.J. 379 (1964).

²² This clause provided for a pre-strike vote of all employees on the employer's last offer before the union could call a strike.

²³ The recognition clause excluded the certified international union and substituted the local. This is clearly not a statutory matter.

²⁴ 356 U.S. at 349.

²⁵ Even the dissenting opinion in *Borg-Warner* seems to accept some limitation. Justice Harlan states: "I do not deny that . . . unyielding insistence on a particular item

to insist on bargaining about the method of selecting union officers nor should a union be allowed to demand a voice in selecting a corporation's board of directors, since these are matters that are within the prerogative of only one of the parties. But the holding of *Borg-Warner* on the factual issue involved is questionable. Although the recognition clause is clearly not within the statutory language, the court did not properly analyze the ballot clause. This clause directly affects the employer-employee relationship since it, in effect, determines whether or not a strike will occur by requiring the union to ascertain the employees' sentiment before it can call a strike.²⁶ By limiting the union's right to strike, the ballot clause closely resembles a no-strike clause on which the parties can bargain to an impasse.²⁷

The literal terminology of section 8(d) should not be determinative of the matters that can be insisted upon to an impasse. This holding in *Borg-Warner* seriously impairs bargaining on nonstatutory subjects.²⁸ In the first place, a party can only mention a nonstatutory or permissive matter; if the other party does not agree to discuss it, then the proponent must drop the matter. If he insists on it, he may be found to have bargained in bad faith. Second, this rule is unduly rigid.²⁹ Management and union prerogatives vary from industry to industry, and a mandatory subject of bargaining in one industry may be highly inappropriate in another.³⁰ The custom in the industry, the history of the bargaining between the parties, and technological changes are among the factors that must be considered in determining whether the employer and the union should be required to bargain on a particular matter.³¹ These factors may not be considered under *Borg-Warner*, which subjects everyone to the same rule. Finally, the one advantage of a rigid rule—certainty of result—is lacking here since no one knows exactly what constitutes a mandatory subject of bargaining. No comprehensive general rules have been formulated, and the courts' position is in a state of flux.

Since it is unlikely that *Borg-Warner* will be overruled,³² it is necessary to find some way to limit the detrimental effects that its holding will have on

may be a relevant consideration in the over-all picture in determining 'good faith,' for the demands of a party might . . . be so extreme as to constitute some evidence of an unwillingness to bargain." 356 U.S. at 359.

²⁶ 356 U.S. 342, 353 (1958) (dissenting opinion).

²⁷ See *Shell Oil Co.*, 77 N.L.R.B. 1306 (1948).

²⁸ See Comment, 43 MINN. L. REV. 1225, 1241 (1959).

²⁹ See Cox, *supra* note 21, at 1083.

³⁰ *Ibid.* There are also variations within a particular industry. For example, suppose a financier with a reputation for acquiring companies and then "milking" them buys a plant. It would be only reasonable for the union representing the plant's employees to want some assurance that the new owner will not "milk" the company. Under *Borg-Warner*, however, the union could not insist that the new owner bargain over a clause requiring adherence to past practices of executive compensation.

³¹ *Ibid.*

³² See Duvin, *supra* note 21, at 273; Fleming, *supra* note 21, at 1005.

the collective bargaining process. There are two practical alternatives: first, liberalize the interpretation of the phrase "other terms and conditions of employment" to include every proposal that is not contrary to a federal statute or a declared public policy. This, to some extent, is what is being done today;³³ second, find that bargaining to an impasse on nonstatutory issues is not per se a violation of either the employer's or the union's statutory duty to bargain. The nature of the controverted issue would be a factor, but not a controlling factor, in finding bad faith.

The second alternative, not presently in use, would not destroy all distinctions between statutory and nonstatutory terms, but would merely return the classification to its pre-*Borg-Warner* status. Prior to *Borg-Warner*, the only immediate importance of the classification was that, if the subject was statutory, either party could compel discussion.³⁴ On the other hand, whether the matter would be included in the collective bargaining agreement depended on the economic power of the parties. *Borg-Warner* added a second importance: The classification determines not only which subjects must be discussed, but also which subjects either party can exclude from the agreement regardless of bargaining power. If the alternative is adopted, however, the Board will still require bargaining over nonstatutory subjects, but it will not, by automatically disallowing any impasse, prevent the parties from bargaining over nonstatutory subjects.

B. Unilateral Action

Since one of the purposes of labor-management legislation is the fostering of collective bargaining, courts have looked with disfavor at wage increases and other benefits conferred by the employer to the employees without consulting the union.³⁵ Collective bargaining developed as a means of counteracting the employers' almost complete control of working conditions. Unilateral action by employers concerning wages, hours, or working conditions undermines union prestige³⁶ and tends to discourage membership, since management rather than the union gets the credit for the benefit to the employees.³⁷ The employer's duty to bargain, however, is not absolute.³⁸ Except for two major limitations,

³³ Recent cases have significantly expanded the scope of the statutory language of § 8(d). See, e.g., *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

³⁴ See Cox, *supra* note 21, at 1082.

³⁵ See Bowman, *supra* note 1.

³⁶ See TELLER, *MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING* (1947); Lang, *Unilateral Changes By Management as a Violation of the Duty to Bargain Collectively*, 9 Sw. L.J. 276, 280 (1955).

³⁷ CHAMBERLAIN, *COLLECTIVE BARGAINING PROCEDURES* 122 (1944).

³⁸ Originally the Board planned no limitations on its bar of unilateral action. If a party was under an obligation to bargain about a subject, it could take no unilateral

the employer has the right to make unilateral changes after an impasse has been reached in collective bargaining.³⁹ The first limitation is on the extent of change; when a bargaining impasse has been reached, an employer may institute changes only to the extent previously offered to the union.⁴⁰ *NLRB v. Crompton-Highland Mills*⁴¹ presents one of the most aggravated cases of improper unilateral action. While negotiations were at an impasse regarding wages, the company granted its employees a wage increase that was not only substantially larger than that previously offered to the union but was also larger than the wage increase that the union had demanded. The Court held this to be an unfair labor practice. Offering employees more than was offered to the employees' bargaining agent clearly indicates bad faith. An employer bargaining in good faith should be as willing to make concessions through collective bargaining as through his own unilateral action. Furthermore, had the employer offered the union as much as he unilaterally gave the employees, the impasse might have been avoided.

The second limitation on an employer's power to act unilaterally is less definite: the manner in which the employer acts must not disparage the bargaining agent or undermine its prestige.⁴² This limitation is best illustrated by *Central Metallic Casket Co.*,⁴³ where the employer, after bargaining to an impasse over a bonus plan, unilaterally instituted the plan. Before acting, however, he held individual bargaining conferences with several employees. During these conferences he refused their requests that the union agent be included in the discussions and threatened dismissal if they did not state in writing their support of the plan. The Board held:

The existence of a bargaining impasse does not destroy either the authority of the representative to act within the sphere of its representation nor the right of the employees to seek by collective action . . . to persuade the employer . . . [A] bargaining impasse does not relieve an employer from the continuing duty to take no action which the employees may interpret as a "disparagement of the collective bargaining process" or which amounts in fact to a withdrawal of recognition of the union's representative status or to an undermining of its authority.⁴⁴

action in regard to it. See Humphrey, *The Duty to Bargain*, 16 OHIO ST. L.J. 403, 421 (1955).

³⁹ This exception was first recognized in *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 225 (1949). For a complete discussion of unilateral action, see Bowman, *supra* note 1; Humphrey, *supra* note 38, at 421; Schatzki, *The Employer's Unilateral Act—A Per Se Violation Sometimes*, 44 TEXAS L. REV. 470 (1966); Comment, 37 N.Y.U.L. REV. 666 (1962).

⁴⁰ *E.g.*, Bowman, *supra* note 1, at 500; Comment, 37 N.Y.U.L. REV. 666, 674 (1962).
⁴¹ 337 U.S. 217 (1949).

⁴² See Taplitz, *supra* note 12, at 228; Comment, 37 N.Y.U.L. REV. 666, 674 (1962).

⁴³ 91 N.L.R.B. 572 (1950).

⁴⁴ *Id.* at 573-74.

In explaining how the employer's unilateral action disparaged the union's role as a bargaining agent, the Board did not rely on the change but on the manner in which the change was effected.⁴⁵ Thus, although the employer is free to act unilaterally after an impasse has been reached, he is not free to act unilaterally in any manner he chooses. The existence of an impasse does not relieve an employer of all statutory obligations.⁴⁶

C. Lockout

Until recently, the impasse concept was utilized only as a defense to a refusal to bargain charge or as a justification for unilateral action. In *American Ship Bldg. v. NLRB*,⁴⁷ the Court greatly expanded the importance of an impasse when it stated: "[A]n employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position."⁴⁸

Although a number of earlier lockout cases mentioned impasse, it had never before been argued as a justification for a lockout.⁴⁹ Neither the advocates nor the critics of the bargaining lockout discuss impasse as a relevant factor primarily because, in the past, "lockout" cases have involved different statutory provisions from "impasse" cases. As the excerpt indicates, a lockout involves questions under sections 8(a)(1) and 8(a)(3),⁵⁰ whereas, prior to

⁴⁵ The Board in its opinion mentioned four factors which established that the employer "sought to subvert the collective bargaining process and to undermine the authority of the statutory representative . . ." All four would clearly be violations of § 8(a)(5) in any situation. *Id.* at 574.

⁴⁶ For example, even if an impasse had been reached, an employer in unilaterally granting a wage increase cannot say: "If it had not been for the union, you would have received this long ago. Get rid of the union and your wages will rise." The existence of an impasse temporarily relieves an employer of his duties arising under § 8(a)(5); impasse does not, however, affect obligations arising under other sections of the Act.

⁴⁷ 380 U.S. 300 (1965).

⁴⁸ *Id.* at 318. Section 8(a)(1) prohibits employers from interfering with the rights guaranteed to employees in § 7, namely the right to engage in concerted activities such as strikes; § 8(a)(3) prohibits employer discrimination for the purpose of discouraging unionism.

⁴⁹ As early as 1943 the Board found an impasse in a case in which a lockout was at issue. See *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943). The lockout in *Duluth* was sustained on the ground that the employers were reasonable in believing that they would be struck and that a strike would result in a spoilage of materials. This type of lockout is generally referred to as an "economic lockout." Existence of an impasse is in no way determinative of the legality of such a lockout; the essential issue is whether a sudden unanticipated strike would result in undue hardship to the company. See, e.g., *Duvin*, *The Bargaining Lockout: An Impatient Warrior*, 40 NOTRE DAME LAW. 137, 142 (1964); Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. CHI. L. REV. 614, 616 (1961). Impasse had also been mentioned in "defensive multi-employer lockouts"—lockouts by members of a multi-employer bargaining unit in response to a whipsaw strike by the union. See *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950). Here again the existence of an impasse was not determinative.

⁵⁰ Six of the circuit courts considered the problem of the bargaining lockout prior to *American Ship Bldg.* Although they were in disagreement concerning the validity of

American Ship Bldg., impasse was relevant only to section 8(a)(5) refusals to bargain.⁵¹

When a lockout is challenged on section 8(a)(1) or section 8(a)(3) grounds, it would seem that the presence of an impasse should be of no importance. One circuit court has taken this position saying: "While in *American Ship Building* there was an impasse in the negotiations between the employer and the union, we do not think the teaching of that case merely adds another exception to the Board's category of permissible lockouts."⁵² *American Ship Bldg.* offers no reason to the contrary.⁵³ This does not mean, however, that the existence of an impasse is of no importance in determining the legality of a lockout. In a lockout situation, a court should still consider the impasse in light of section 8(a)(5). In other words, the court should use the impasse as a guide in determining whether or not the bargaining lockout constituted a refusal to bargain in good faith.

II. FACTORS CONSIDERED IN FINDING AN IMPASSE

The *American Ship Bldg.* litigation offers only a limited insight into the factors courts consider in establishing the existence of an impasse. The trial examiner, in his Intermediate Report and Recommended Order, found that an impasse in the bargaining had been reached. He expressly mentioned only two bases for finding an impasse: (1) the parties met and bargained collectively on twelve separate occasions, and (2) the parties called in the Federal Mediation Service.⁵⁴ It is obvious, however, that the trial examiner did not limit his consideration to these factors because he added that "the existence of an impasse judged with hindsight is as difficult to determine as the reasonableness

such a lockout, they were uniform in their approach. All examined the lockout in the light of §§ 8(a)(1) and 8(a)(3). See *Local 374, Int'l Bhd. of Boilermakers v. NLRB*, 331 F.2d 839 (D.C. Cir. 1964), *rev'd sub nom. American Ship Bldg. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886 (5th Cir. 1962); *Utah Plumbing & Heating Contractor's Ass'n v. NLRB*, 294 F.2d 165 (10th Cir. 1961); *Quaker State Oil Ref. Corp. v. NLRB*, 270 F.2d 40 (3d Cir.), *cert. denied*, 361 U.S. 917 (1959); *Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953); *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576 (7th Cir. 1951), *cert. denied*, 346 U.S. 909 (1953).

⁵¹ *Cf. Aetna Plywood & Veneer Co.*, 130 N.L.R.B. 329 (1961), *enforced sub nom. Local 743, Warehousemen & Mail Order Employees v. NLRB*, 302 F.2d 865 (D.C. Cir. 1962); *W. W. Cross & Co.*, 77 N.L.R.B. 1162 (1948), *enforced*, 174 F.2d 875 (1st Cir. 1949).

⁵² *Detroit Newspaper Publishers Ass'n v. NLRB*, 346 F.2d 527, 530 (6th Cir. 1965). The Board decision in *Detroit Newspaper* preceded the Court's decision in *American Ship Bldg.*

⁵³ The decision merely states that a violation of § 8(a)(3) requires an intention to discourage union membership or otherwise discriminate against the union, and that a lockout in support of a legitimate bargaining position is not inconsistent with § 8(a)(1).

⁵⁴ *American Ship Bldg. Co.*, 142 N.L.R.B. 1362, 1380 (1963).

of Respondent's belief that a strike would occur. . . . Impasse cannot be determined by completely objective criteria. Subjective considerations, if held in good faith even if ignorantly, cannot be disregarded."⁵⁵

The trial examiner's report was adopted by the Board only to the extent consistent with its own order. The decision of the Board made no mention of impasse.⁵⁶ The Board discussed only whether the lockout was an economic lockout, one designed to avoid extraordinary losses threatened by an eminent strike.⁵⁷ Relying on union assurance that it had no intention of striking, the Board held that the lockout was not an economic lockout and thus violated sections 8(a)(1) and 8(a)(3). The circuit court opinion, summarily affirming the Board's decision, sheds no further light on impasse.⁵⁸ The Supreme Court, although limiting its holding to a situation where an impasse has occurred,⁵⁹ does not elaborate on why there was an impasse.

American Ship Bldg.'s failure to enumerate what factors are relevant in finding an impasse is not unusual. Very often the Board and courts merely find that negotiations have reached an impasse without giving any reasons to support their conclusion.⁶⁰ The significance of an impasse, however, makes it important to know the factors that constitute this bargaining situation. As the *Tex-Tan* definition revealed, there are two basic requirements: (1) a deadlock in negotiations, and (2) good faith bargaining. In most cases where the existence of an impasse has been at issue, the Board had been primarily concerned with whether the parties had bargained in good faith rather than whether the parties were truly deadlocked. Similarly, while numerous scholarly works have considered the problem of what is good faith bargaining,⁶¹ little consideration has been given to what is a deadlock. Therefore this Comment will deal only with those factors that should be considered in making the latter determination.⁶²

⁵⁵ *Ibid.* Read literally, this statement has tremendous implications. For example, if there are no objective criteria for impasse, then *Borg-Warner* surely could not restrict impasse to mandatory subjects of bargaining. Also, if subjective criteria are to be considered in determining the existence of an impasse, it would seem that the parties could never be certain as to when an impasse had been reached.

⁵⁶ 142 N.L.R.B. at 1382.

⁵⁷ For a comprehensive treatment of economic lockout, see Duvin, *supra* note 49, at 142; Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 73-77 (1956).

⁵⁸ *Local 374, Int'l Bhd. of Boilermakers v. NLRB*, 331 F.2d 839 (D.C. Cir. 1964).

⁵⁹ 380 U.S. at 318.

⁶⁰ See, e.g., *Jordan Bus Co.*, 107 N.L.R.B. 717 (1954); *West Fork Cut Glass Co.*, 90 N.L.R.B. 944 (1950).

⁶¹ See, e.g., Cox, *supra* note 21; Fleming, *The Obligation to Bargain in Good Faith*, 16 Sw. L.J. 43 (1962); Sigal, *supra* note 21; Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941).

⁶² Actually discussion of the two requirements cannot be completely separated. Several of the factors relevant to deadlock are also relevant to the question of good faith.

A. Number and Duration of Bargaining Sessions

Every collective bargaining situation is unique. In some instances the respective positions are clear, and it becomes obvious after only a few meetings that further negotiations would be futile. In other instances there may be a number of fruitful bargaining sessions before a deadlock is finally reached. Therefore, it has never been held that a fixed number of bargaining conferences without agreement will automatically result in impasse. No magic number exists. The number of meetings, however, is a factor often mentioned in determining an impasse. In some instances, the decision states the number of bargaining conferences held,⁶³ in others, there are references to the "frequent meetings,"⁶⁴ "numerous conferences,"⁶⁵ or "series of meetings."⁶⁶ One should not place too much reliance on the number of bargaining sessions since this has never been the sole factor considered by the Board in determining the existence of an impasse.⁶⁷ Thus, while in some cases the parties met on numerous occasions with the Board finding no impasse,⁶⁸ in others, an impasse was found even though there were only a few bargaining sessions.⁶⁹

Closely related to the number of bargaining sessions is the duration of negotiations. The parties are not required to continue negotiations indefinitely.⁷⁰ Once again, there is no magic number, no specific minimum requirement. Various periods, ranging from one and a half months⁷¹ to fourteen months,⁷² have been found sufficient. The Supreme Court indicated that the duration of negotiations will not be a controlling factor in determining whether an impasse has been reached.⁷³

⁶³ *Fetzer Television v. NLRB*, 317 F.2d 420 (6th Cir. 1963) (eight meetings); *NLRB v. Intracoastal Terminal Inc.*, 286 F.2d 954 (5th Cir. 1961) (eight meetings); *U.S. Cold Storage Corp.*, 96 N.L.R.B. 1108 (1951), *enforced*, 203 F.2d 924 (5th Cir.), *cert. denied*, 346 U.S. 818 (1953) (sixteen meetings); *Celanese Corp.*, 95 N.L.R.B. 664 (1951) (twenty-four meetings).

⁶⁴ *Exposition Cotton Mills Co.*, 76 N.L.R.B. 1289 (1948).

⁶⁵ *American Laundry Mach. Co.*, 76 N.L.R.B. 981 (1948), *enforced*, 174 F.2d 124 (6th Cir. 1949).

⁶⁶ *Shell Oil Co.*, 77 N.L.R.B. 1308 (1948).

⁶⁷ See Comment, 37 N.Y.U.L. Rev. 666, 674 (1962).

⁶⁸ See *Tex-Tan, Inc.*, 134 N.L.R.B. 253 (1961), *enforcement denied in part*, 318 F.2d 472 (5th Cir. 1963) (twenty-one meetings); *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850 (1951), *enforcement granted*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953) (thirteen meetings). Although the opinions were not entirely clear, in both cases the Board seemed to rely on bad faith bargaining on the part of the employer in finding that there was no impasse.

⁶⁹ See, e.g., *Dalton Brick & Tile Co.*, 126 N.L.R.B. 473 (1960), *enforcement denied on other grounds*, 301 F.2d 886 (5th Cir. 1962) (two meetings); *Wells Dairies Co-op.*, 111 N.L.R.B. 1192 (1955) (three meetings).

⁷⁰ "[T]he Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of positions." *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

⁷¹ *Loengel-Fencil*, 8 N.L.R.B. 988 (1938).

⁷² *Boeing Airplane Co.*, 80 N.L.R.B. 447 (1948).

⁷³ *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

B. Changes in Bargaining Positions

Although the number and duration of bargaining sessions give some indication of the state of the negotiations, they do not afford conclusive proof of a deadlock. It is possible for an employer and a union to meet on numerous occasions for many months without deadlocking. There is another factor that better indicates whether the parties have deadlocked. The Board and the courts should direct their attention to the period of time the positions of both the parties have remained substantially unchanged. If both the employer and the union have consistently refused to alter materially their positions, then it would seem that the parties have deadlocked.

In almost every Board decision in which the existence of an impasse is at issue, the trial examiner's report contains a section entitled "negotiations." A careful reading of this section usually indicates that the trial examiner has considered the number of collective bargaining sessions that have transpired since a party significantly altered its position. Often, however, the Board seems concerned only with changes in the bargaining positions at the last meeting. If at this meeting both parties express an unwillingness to alter positions, the Board finds an impasse. Thus, the trial examiner's Intermediate Report and Recommended Order in *American Ship Bldg.* indicates that, at the twelfth and final meeting, the parties submitted and rejected various proposals and counterproposals. Neither party was willing to deviate from its stand. This was stressed by the trial examiner in finding an impasse.⁷⁴

While it is quite probable that the parties were in fact deadlocked in *American Ship Bldg.*, the Board should consider more than just the last meeting. It should carefully examine the bargaining positions of both parties at the last few meetings preceding the breakdown in negotiations. If there has been no substantial change in the position of either party during that period, a finding that the parties have deadlocked seems warranted. Undoubtedly the Board is already utilizing this method, but its opinions fail to make this clear. In *American Ship Bldg.*, for example, the number of bargaining sessions is mentioned on several occasions, yet there is no mention of the number of meetings before the cessation of negotiations in which neither party materially altered its position. The Board's reticence in this regard is dangerous, since a practitioner who is not extremely careful may be misled concerning which factors the Board deems most important.⁷⁵

⁷⁴ 142 N.L.R.B. at 1373. See text accompanying note 59 *supra*.

⁷⁵ See Bowman, *An Employer's Unilateral Action—An Unfair Practice?*, 9 VAND. L. REV. 487, 501 (1956).

C. *Desire to Continue Negotiations*

The desire of one party to continue negotiations is commonly cited as the reason that a particular collective bargaining situation has not reached an impasse. An examination of the cases reveals that the Board has been reluctant to find that an impasse existed unless the attitudes of the negotiators had hardened to the extent that further talks would have been unavailing. Thus if either side indicates a willingness to alter its positions, an impasse has not developed.

In *C. C. Lang & Son, Inc.*,⁷⁶ the union receded from its demands for a wage increase and suggested that the employer draw up a contract embodying the tentative agreements that had been reached. The employer refused not only to draw up a contract but also to hold further meetings on the ground that an impasse had been reached. The Board was not persuaded by his impasse argument and held that the employer, by refusing to bargain, had violated section 8(a) (5).

In *C. C. Lang & Son*, further good faith negotiations probably would have been fruitful. The union was willing not only to continue bargaining but also to alter its bargaining position. Here, there is no reason why the negotiations should be halted. A case in which the union expresses a willingness to continue negotiations but does not offer to change its bargaining position presents a much harder problem, since the success of further negotiations is more uncertain. In this situation, the motives and interests of both parties must be considered in deciding whether the employer and the union should be required to continue negotiations.

The union should not be allowed to use either prolonged negotiations, which are time consuming and expensive, as a tool of harassment, or its willingness to continue bargaining as a means for controlling the timing of a work stoppage. The Court in *American Ship Bldg.* recognized that the right to strike does not include the exclusive right to determine when work stoppages should occur.⁷⁷ Yet, if there could be no impasse as long as the union wished to continue negotiations, this would be the practical result, since under the *American Ship Bldg.* holding the employer could not lock out until an impasse in bargaining had been reached.⁷⁸ On the other hand, the Board must attach some importance to the union's desire to continue negotiations. The national labor policy favoring the settlement of disputes by collective bargaining demands this,

⁷⁶ 102 N.L.R.B. 1667 (1953), *enforced*, 212 F.2d 436 (6th Cir. 1954).

⁷⁷ 380 U.S. 300, 310 (1965).

⁷⁸ It is important to remember that the absence of an impasse does not affect the union's power to strike. Thus even if there is no impasse, the union can strike to improve its bargaining position, but the employer cannot lock out.

for if the union is willing to change its position, perhaps the conflicts can be settled and an impasse avoided.

D. Mediator

A fourth factor that has been mentioned in many "impasse" cases is the presence of a mediator at one or more of the bargaining sessions. Several inferences have been drawn from the utilization of a third party.⁷⁹ The mere calling in of a mediator indicated to the Board that the bargaining had reached an impasse.⁸⁰ The Sixth Circuit, in *NLRB v. Cambria Clay Prods. Co.*,⁸¹ placed less emphasis on the presence of a federal mediator alone. Instead, relying on a provision of the Federal Mediation and Conciliation Act, which makes it the duty of the service to use its best efforts to bring the parties to an agreement,⁸² the court held that since the mediator did not arrange any further meetings there were no prospects of reaching an agreement.

Most cases do not expressly attach either of the above interpretations to the utilization of a neutral third party, but merely mention his presence.⁸³ This makes it difficult to ascertain the significance of this factor in determining whether a deadlock in the collective bargaining has been reached. Obviously, there is not a deadlock in every case in which a mediator appears. The large number of cases in which the parties have called in mediators and yet the courts found no impasse clearly bears this out.⁸⁴

While the presence of a mediator should not be considered as a condition precedent to an impasse,⁸⁵ it should be a significant factor in determining whether the negotiations have deadlocked. Because of traditional political distrust of governmental intervention,⁸⁶ unwillingness to give up what is felt to be superior bargaining power, and fear that mediators are prejudiced in

⁷⁹ See, e.g., *Utah County Tractor Sales*, 103 N.L.R.B. 1711 (1953); *Anchor Rome Mills, Inc.*, 86 N.L.R.B. 1120 (1949).

⁸⁰ *Mission Mfg. Co.*, 128 N.L.R.B. 275, 287 (1960).

⁸¹ 215 F.2d 48 (6th Cir. 1954).

⁸² 61 Stat. 153 (1947), 29 U.S.C. § 173(b) (1964).

⁸³ See, e.g., *American Ship Bldg.*, 142 N.L.R.B. 1362 (1962); *W. W. Cross & Co.*, 77 N.L.R.B. 1162 (1948).

⁸⁴ See *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Quaker State Oil Ref. Corp.*, 270 F.2d 40 (3d Cir. 1959); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953); *Body & Tank Corp.*, 144 N.L.R.B. 1414 (1963), enforced, 339 F.2d 76 (2d Cir. 1964). In these cases, however, the finding of no impasse seemed based on the lack of good faith by the employer, rather than the absence of a deadlock.

⁸⁵ Such a rule would be neither popular nor practical. The cost of making government mediation a prerequisite for finding an impasse would be exorbitant. Active mediation is now required in only 7% of all contracts negotiated. See Simkin, *The Third Seat at the Bargaining Table—A Government Point of View*, 14 LAB. L.J. 5 (1963).

⁸⁶ See Douglas, *What Can Research Tell Us About Mediation?*, 6 LAB. L.J. 545, 549 (1955). Dr. Douglas's study is especially interesting since she examines the psychological basis of the distrust of mediators.

favor of the other side,⁸⁷ both the employer and the union are hesitant to allow a third party to take part in collective bargaining negotiations.⁸⁸ Thus a mediator is rarely called in unless the parties feel that the negotiations are at a deadlock.⁸⁹ If the mediator is unable to bring about a settlement, then, in most cases, the Board should find that a deadlock exists.⁹⁰

III. NECESSITY TO DEADLOCK ON ALL ISSUES

In most cases, the employer and the union are bargaining collectively on more than one issue.⁹¹ Often the parties will bargain on one issue at a time and will not consider a new issue until they have resolved the prior one. Thus, in *Pool Mfg. Co.*,⁹² the parties were deadlocked on the issue of wages but not on the issue of union security. The union wished to bargain on twelve separate mandatory subjects of bargaining. From the first session on, the parties were deadlocked on the initial matter discussed, wages. The union suggested that they bargain on one of the other problem areas, but the employer refused, stating that there was no need to discuss the terms of a contract until an agreement had been reached on wages. The Board found that a deadlock had been reached as to wages, but that this deadlock did not constitute a defense to a refusal to bargain over the other matters that the union requested be considered.

Pool Mfg. Co. does not conclusively settle the question of whether all issues must be deadlocked before an impasse exists. There are limiting factors indicating that the application of the holding in *Pool* should be restricted to the fact situation involved in the case: (1) the parties never considered some of the mandatory bargaining issues proposed for discussion, and (2) the employer refused to bargain on mandatory subjects other than wages even before an impasse was reached regarding wages. Therefore, *Pool* should not be determinative of cases where all mandatory subjects are discussed before the parties deadlock on one subject.

Although there is no express language on this point, a number of holdings indicate that a deadlock on all issues is not necessary to a finding of impasse.⁹³

⁸⁷ Strangely enough this feeling is held by both employers and the union. See Fallon, *Trends In the Use of Mediation in Private Industry*, 9 LAB. L.J. 753 (1958).

⁸⁸ See *Ibid.* Macraz, *General Role of Mediation in Collective Bargaining*, 11 LAB. L.J. 453, 454 (1960); Murphy, *Current Trends in Labor Arbitration*, N.Y.U. 11TH ANNUAL CONF. ON LABOR 231, 235 (1958).

⁸⁹ See Turnbull & Kanun, *Conciliation and Mediation in Minnesota*, 3 LAB. L.J. 677, 681 (1952).

⁹⁰ Mediation would be no guarantee of an impasse. The question of good faith would still remain.

⁹¹ See CHAMBERLAIN, *COLLECTIVE BARGAINING PROCEDURES* 77 (1944).

⁹² 70 N.L.R.B. 540 (1946).

⁹³ See, e.g., *Jordan Bus Co.*, 107 N.L.R.B. 717 (1954); *Kentucky-Tennessee Clay Co.*, 49 N.L.R.B. 252 (1943); *Essex Wire Co.*, 19 N.L.R.B. 51 (1940).

*Sharon Hats Inc.*⁹⁴ is a good example. There the parties bargained primarily about wages, but also discussed other matters such as vacations, checkoff, and a no-strike clause. After bargaining for over two months without reaching an agreement, the parties decided to discontinue negotiations. Although the only issue deadlocked was wages, the Board found that an impasse in bargaining had been reached.

There are cases where, although the parties are deadlocked on one issue, the Board has recognized a duty to bargain on the other issues. Some are similar to *Pool* where mandatory subjects of bargaining were not even discussed.⁹⁵ In others, the parties had bargained about all mandatory subjects, but had bargained in good faith only on the deadlocked issue.⁹⁶ Thus if the parties in good faith consider all mandatory subjects of bargaining before a deadlock on one subject is reached, it would seem that an impasse exists.

Policy considerations both support and oppose the present law. Allowing the parties to end negotiations after they have become deadlocked on less than all of the issues takes into account situations where both the employer and the union are concerned with only one main issue. Until this issue is resolved, no progress can be made on the less important differences. The present law is also consistent with the position of those who view collective bargaining as a meaningless ritual.⁹⁷ Their theory is that, for all practical purposes, the parties agree on the major issues before negotiations even start, and collective bargaining is merely a "process by which the main terms of the agreement . . . are made acceptable . . . to those who will have to live with its results."⁹⁸ If this view is correct, compelling the parties to bargain to an impasse on all issues is not realistic.⁹⁹

It is submitted that stronger policy considerations support a contrary position. Even in cases where a particular matter is of primary importance to the parties, resolution of this issue generally will not result in complete accord between the parties since there will usually be other subjects to be considered. The parties will have to bargain over these matters eventually so it is not

⁹⁴ 127 N.L.R.B. 947 (1960), *enforced*, 289 F.2d 628 (5th Cir. 1961).

⁹⁵ See *Barrett Co.*, 41 N.L.R.B. 1327 (1942), *enforced*, 135 F.2d 959 (7th Cir. 1943); *Louisville Ref. Co.*, 4 N.L.R.B. 844 (1938), *modified and enforced*, 102 F.2d 678 (6th Cir.), *cert. denied*, 308 U.S. 568 (1939).

⁹⁶ See *NLRB v. H.G. Hill Stores*, 140 F.2d 924 (5th Cir. 1944); *Metal Hose & Tubing Co.*, 23 N.L.R.B. 1121 (1940). In *Metal Hose & Tubing*, the collective bargaining centered on wages and union security. Although the Board found that the parties had deadlocked on the union security question, it held that the negotiations were not at an impasse. The Board looked to the parties' bargaining method rather than the necessity of deadlocking on all issues. The employer had rejected union wage demands *in toto* and had refused to make any proposals, indicating to the Board his lack of good faith.

⁹⁷ See Blum, *Collective Bargaining: Ritual or Reality?*, Harv. Bus. Rev., Nov.-Dec. 1961, p. 63; Comment, 37 N.Y.U.L. Rev. 666, 691 (1962).

⁹⁸ Blum, *supra* note 97, at 64-65.

⁹⁹ If this view is correct, perhaps the entire concept of impasse is unrealistic.

unreasonable to require them to do so before finding an impasse. Further, even if agreement on the primary issue would effectuate accord concerning other matters, complete bargaining on them might have avoided the deadlock on the primary issue; either the employer or the union might have retreated from its inflexible position because of concessions during the negotiations on other items.

IV. CONCLUSION

American Ship Bldg. has greatly increased the scope of the impasse concept, yet the practical significance of impasse is limited by the difficulty of ascertaining when the concept is applicable. The problem is not that the Board is considering improper factors in determining whether the parties have deadlocked, rather, it is the difficulty—if not the impossibility—of ascertaining what factors the Board is considering.¹⁰⁰ Although it would be neither practical nor advisable for the Board to promulgate a series of inflexible rules concerning impasse, the Board should at least enunciate general guidelines on which the parties may rely.

¹⁰⁰ One commentator has suggested that vagueness in this area is a virtue, not a vice: "To prevent unions and management from directing their bargaining toward Washington rather than toward each other, the procedures to be followed should be kept vague so that both sides will be kept guessing." Blum, *supra* note 97, at 69.