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Labor Law--Mandatory Requirement of Bargaining

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Such an arbitrary definition of "affecting commerce," however, would destroy the distinction between interstate commerce and commerce affecting the internal affairs of a state. "That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." *NLRB v. Jones & Laughlin Steel Corp., supra.* Numerous decisions indicate that the courts would not accept the criteria of volume of sales alone as adequate evidence that a business activity affected commerce. *NLRB v. Fainblatt, supra; NLRB v. Drummond,* 21 F.2d 828 (6th Cir. 1954). The proper criterion for determining jurisdiction is the impact of local action on interstate commerce which must be determined as a matter of fact on a case-by-case basis. *NLRB v. Benevento,* 297 F.2d 873 (1st Cir. 1961).

The decisions in the instant case and in *NLRB v. Benevento, supra,* make it clear that the Board must present strong evidence of the affect of local business activity on interstate commerce to support a finding of fact that it has jurisdiction over a local business, or its rulings will not be enforced by the Federal Courts.

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Labor Law—Mandatory Requirements of Bargaining

Union submitted to employer a contract including a proposal that the employer execute a performance bond. Employer assented to all terms except the performance bond and an impasse was reached on this issue. The union struck, and the employer charged the union with an unfair labor practice in proceedings before the NLRB. The NLRB found that the union's insistence upon a performance bond amounted to a refusal to bargain in good faith, National Labor Relations Act § 8(b) (3), 29 U.S.C. § 158(b) (3) (1952), and ordered the union to cease and desist. *Held:* enforcement granted. A performance bond is not within the scope of mandatory bargaining under the National Labor Relations Act § 8(b) (3), 29 U.S.C. § 158(b) (3) (1952). Refusal to come to an agreement over a condition which is not within the scope of mandatory bargaining is a refusal to bargain collectively in good faith which is an unfair labor practice. *Local 164, Brotherhood of Painters v. NLRB,* 293 F.2d 133 (D.C. Cir. 1961).

The Wagner Act of 1935 placed requirements on employers to recognize the certified bargaining agents of the employees, and to bargain collectively with them about wages, hours, and other terms and conditions of employment. National Labor Relations Act §§ 8(a) (5), 9(a), 29 U.S.C. §§ 158(a) (5), 159(a) (1952). The Taft-Hartley Act of 1947 added similar provisions with respect to unions, and added a provision requiring both the union and employer to bargain in good faith. National Labor Relations Act §§ 8(b) (3), 8(d), 29 U.S.C. §§ 158(b) (3), 158(d) (1952).

The principal case and many others have construed the words "wages, hours, and other terms and conditions of employment" to mean that these are subjects of mandatory bargaining. If a subject is mandatory, then an employer or union must bargain collectively about that subject or it is an unfair labor practice. Subjects neither mandatory nor expressly prohibited by the Act are permissive bargaining subjects. An employer or union may, on request, bargain over these subjects, but it is not an unfair labor practice to refuse to bargain about permissive subjects. If a subject is mandatory, it is not unlawful to bargain in good faith to the point of impasse. However, if a subject is permissive, then it is unlawful to bargain to the point of impasse over such a subject. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958); *Allis-Chalmers Co. v. NLRB*, 213 F.2d 374 (7th Cir. 1954).

In *NLRB v. Borg-Warner Corp., supra,* the Court held that it was an unfair labor practice for the employer to insist, to the point of impasse, upon provisions calling for a pre-strike vote by the employees and a "recognition" clause which excluded a union certified by the NLRB. The Court defined mandatory bargaining subjects as "wages, hours, and other terms and conditions of employment," and held it to be an unfair labor practice to insist to the point of impasse upon subjects not included within that definition. The clauses in question were lawful and were proper subjects of negotiation, but neither could be insisted upon as a condition to entering a collective bargaining agreement.

These decisions have the effect of placing the NLRB in the position of deciding which provisions of a labor contract are mandatory and which are permissive. One of the primary objectives of the National Labor Relations Act is to create stability in industrial relationships and to promote industrial peace. *Brooks v. NLRB,* 348 U.S. 96 (1954). By eliminating certain subjects

from those which can lawfully be demanded to the point of impasse, the courts are furthering this objective. Such a policy tends to reduce the number of strikes and also tends to limit labor disputes to certain basic areas.

The danger of such a policy is that it has the effect of placing the NLRB at the bargaining table along with representatives of labor and management. The NLRB is then in a position of having to take sides with either labor or management when one or the other insists on a provision which is in the gray area between mandatory and permissive bargaining. Cox, *The Duty to Bargain in Good Faith,* 71 HARV. L. REV. 1401 (1955). It is not the purpose of the National Labor Relations Act to determine what matters are or are not included in the collective bargaining agreement, but Congress intended that the parties have a wide latitude in their negotiations within the framework of the Act. *NLRB v. Insurance Agents,* 361 U.S. 477 (1960).

The National Labor Relations Act was passed so that the employer and the employees would be put on an equal basis so that they would be enabled to bargain collectively over matters of mutual interest. The NLRB was set up to insure that the rights and protections guaranteed by the Act would be observed by both sides. The Act was the framework in which labor and management could bargain collectively, to determine the best contract that their respective bargaining positions could attain. When section 8(a) of the Wagner Act was being debated in Congress, Senator Walsh, Chairman of the Senate Committee on Education and Labor, said:

> "When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is escort them to the door of the employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 CONG. REC. 7660 (1935).

As the law now stands, the NLRB is placed in the position of having to decide whether disputes over clauses in labor contracts are mandatory bargaining subjects instead of the parties determining what should be embodied in their own collective agreement.

Mr. Justice Harlan, in his dissent in the *Borg-Warner* case, pointed out that the result of the majority opinion was to leave certain subjects which may be bargained over, but which may not

be insisted upon. As a practical matter such subjects will be eliminated from labor contracts because neither party can be forced to accept them. He expressed the view that it was not the intention of Congress in setting out "wages, hours, and other terms and conditions of employment" to limit collective bargaining to those things. Rather, these were merely guides to help the NLRB to determine when the parties were acting in good faith.

The decision in the principal case is in accord with the current interpretation given to the National Labor Relations Act § 8(b) (3), 29 U.S.C. 158(b) (3) (1952), assuming that the court was correct in deciding that a performance bond is not within the scope of mandatory bargaining. However, in following this policy the courts are consciously or unconsciously allowing the government to enter substantive labor negotiations, by allowing the NLRB to decide what are subjects of bargaining in labor agreements.

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Labor Law—Statute of Limitations Under Taft-Hartley Act § 303

D contended that *P's* action to recover damages under the Labor Management Relations Act (Taft-Hartley Act) § 303, 61 Stat. 158 (1947), 29 U.S.C. § 187 (1958), should be barred by the state statute of limitations. *P* contended that no statute of limitations applied, or that if one did apply, it should be an analogous federal statute of limitations. *Held:* Where no limitation is laid down by Congress, the court will not adopt either a state or a federal statute of limitations, the only time requirement on the bringing of the action being the equitable doctrine of laches. *Fischbach & Moore, Inc. v. International Union of Operating Eng'rs,* 198 F. Supp. 911 (S.D. Cal. 1961).

Labor law involves a large portion of federally created law. Fitting this new law into the established law often causes problems. The principal case presents one of the problems which arose under such a federally created right of action. Under this particular statute the question whether any statute of limitations should be applied had never before been raised. As the court pointed out in its opinion, a similar question arose under this section of the statute in *UMW v. Meadow Creek Coal Co.,* 263 F.2d 52 (6th Cir. 1959); but the court in that case only decided which of two possible