Boulwarism: Will Labor-Management Relations Take It or Leave It?

Morris D. Forkosch

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Has Lemuel R. Boulware's brainchild survived its baptismal decade of union and judicial immersion? If not judicially rejected, has it been significantly altered? Unfortunately no illuminating answers appear; the decisions and opinions are complicated, and the General Electric Company (GE) take-it-or-leave-it (TILI) insurance plan offer emerges from the judicial cauldron as somewhat Janus-faced and confused.

Can one treat this pre-bargaining insurance plan as distinct from the same plan found in the bargaining period, and if so, can one condemn the latter separately on a per se basis? Can one use either or both TILI offers as evidence of a general bad faith charge? Or is the specific TILI insurance plan not only to remain so termed but also to be transformed into a general appellation for an overall series of acts and conduct—Boulwarism as conceived and practiced by GE? The second face of TILI is the bugaboo


It may be added that in the Court of Appeals, Judge Friendly felt that the judiciary should on a discretionary basis “decline to enforce a Labor Board order relating to practices nearly a decade in the past when . . . any harmful effect of the alleged unfair labor practice has been dissipated. . . .” Id. at 774. Judge Friendly further objected to the “general obscurity” of the Board's order in telling GE what it “is and is not permitted to do . . . [so that] no contempt proceeding could be successfully maintained,” referring to International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967). Id. at 773. But see Judge Kaufman's reply on “specific conduct” being now proscribed, infra note 165 and accompanying text.

2. This acronym was coined by this writer in “Take It Or Leave It” as a Bargaining Technique, 3 Calif. W.L. Rev. 43 (1967).

3. These two faces of TILI, as just illustrated, are discussed in NLRB v. General
of not only the International Union of Electrical Workers, AFL-CIO (IUE) but of unionism in general; it is this general aspect which eventually becomes the focus of initial judicial condemnation and therefore must be considered separately from the specific TILI insurance plan.

The conclusion of this writer is that, as of now and sans a clarifying Supreme Court ruling, a good deal, if not all, of Boulwarism's tactics are still available, albeit to be used cautiously. In support of this conclusion I will set forth GE's overall plan, technique, and conduct in some detail and analyze them in the light of the related Trial Examiner—National Labor Relations Board (NLRB)—Second Circuit opinions.

"Boulwarism"

"Boulwarism"5 is a coined term, analogous in creation to "boycott,"6 and perhaps initially equally as vague.7 Its understanding, if not definition, requires a bit of background. For our purposes this background begins with the 1946 national contract negotiations between GE and the United Electrical Workers (UE). In that year GE's complacency about its employee relations was badly shattered when its proposed ten cent hourly increase was rejected and a lengthy strike resulted in its agreeing to an 18.5 cent raise. This debacle for GE resulted in the hiring of Lemuel R. Boulware as the GE labor relations expert. With Boulware came a new bargaining policy8 embracing a singular basic concept and a program to effectuate it.

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5. On its spelling, i.e., with or without an "e" after the "r," see Judge Kaufman's preference for the "e" in NLRB v. General Elec. Co., 418 F.2d 736, 740 n.1 (2d Cir. 1969).

6. This term is derived from Captain Charles Cunningham Boycott, an English land agent in Mayo, Ireland, whose ruthlessness in the eviction of tenants in 1880 caused his employees to refuse to cooperate with him and his family, i.e., to boycott them.

7. In Gill Engraving Co. v. Doerr, 214 F. 111, 118 (S.D.N.Y. 1914) the court said boycott was a word "of vague signification, [with] no accurate and exclusive definition" available. Since then the term has been further judicially and statutorily defined and applied. M. FORKOSCH, LABOR LAW § 250 (2d ed. 1965).

8. Professor Northrup disagrees with this writer's statement that with Mr. Boulware "came a new bargaining policy." In his book Northrup states that "Boulwarism"—the employee relations policies of the General Electric Company—thus has its roots firmly in company history which occurred long before Lemuel R. Boulware came on the scene, and has been shaped by many factors indigenous to this company and its managerial personnel. H. NORTHRUP, BOULWARISM 1 (1964). Both this book and an earlier article by Northrup, The Case for Boulwarism, 41 HARV. BUS. REV., Sept.-Oct. 1963, at 86, offer a strong defense for the Boulware methods and procedures. Northrup "was closely connected with G.E.'s program for several years as employee relations consultant." Id. at 3.
This basic concept, "marketing," has been described as "the linchpin of the 'Boulware approach.'" The 1946 strike had disclosed to GE that its side of the issues, as well as its objectives and policies, were not understood by its employees. To meet this problem, the new vice-president adapted "from the consumer marketing process" a "job marketing program," since "job marketers and product marketers deal with the same people and the same considerations." His assumed parallel required, for marketing job satisfaction to GE's employees, a "high 'single standard' of research, preparation, value, full information and courageous public forthrightness which had been so rewarding in our relations with our product customers." The "public forthrightness" and "full information" included the usual public relations approach previously followed as well as an aggressive campaign after the bargaining had been concluded so as to inform everyone of the details. This approach was to continue thereafter between bargainings, during bargainings when necessary, and especially during strike periods. 

A new ten-point approach to collective bargaining was now to be effectuated: (1) GE would engage in intensive year-round research into all "pertinent" facts relevant to its relations with its employees; (2) Through-
out the entire period between contracts, the company would inform its employees of all facts pertinent to their conditions, e.g., wages, company policies, and other efforts; (3) At the inception of bargaining, and yet still as part of its overall research pattern, GE would listen to the unions' presentations and take into account the additional facts supplied; (4) Assuming both sides had done their homework properly, then they should both desire voluntarily and willingly to cooperate in having each obtain just shares; (5) Assuming there were new and pertinent facts, GE would then evaluate the unions' demands in the light of the totality of the facts now before it; (6) This evaluation concluded, GE would next make and publicize its own determination of what it considered to be "right;" (7) This determination would embrace everything GE found to be warranted and would be presented to the unions without holding anything back for any trading or compromising (there is as yet no TILI); (8) The GE offer

the gathering of its own information as to employee needs and desires through independent employee attitude surveys, comments made by employees at informative meetings, direct discussions by supervisors with employees, and statements in union publications." 150 N.L.R.B. at 208.

17. These union "facts" must be somewhat objective and susceptible to computer-type analysis. Of course, the pertaining GE evaluations of business conditions, company objectives and policies, are essentially subjective.

18. On the alleged effect upon employers in general of the second and fourth aspects of this new policy, and because of the Board's view that GE had thereby violated the National Labor Relations Act, 150 N.L.R.B. at 197-98, see the testimony of Eugene A. Keeney, labor counsel to the U.S. Chamber of Commerce, Hearings on Investigation of the Administration of the National Labor Relations Act, as Amended, by the National Labor Relations Board before the House Comm. on Education and Labor, 89th Cong., 1st Sess. 253-56 (1956). See also note 14 supra.

19. This is in line with its policy of keeping its employees fully informed of all facts. This "communications" program, which was an important part of the new bargaining procedures, was year-round and intensified in the pre-negotiation and negotiation periods. The Second Circuit majority opinion stated:

The last step [in the new GE plan] was the most important, most innovative, and most often criticized. GE took its "product"—now a series of fully-formed bargaining proposals—and "sold" it to its employees and the general public. Through a veritable avalanche of publicity, reaching awesome proportions prior to and during negotiations, GE sought to tell its side of the issues to its employees. 418 F.2d at 740. In this telling all levels of company personnel are included, and all forms of communications are used, e.g., circulars, company newspapers, radio and TV, newspaper advertisements. The employees are kept informed not only of economic matters and issues but also of GE's views and criticism of union leadership, e.g., its "feud" with IUE's president James Carey is already part of the bargaining folklore.

See Herman Wilson Lumber Co., 149 N.L.R.B. 673, 675 (1964), where board member Leedom dissented partially because "'[h]ard bargaining' is not unlawful conduct under the Act" and because an employer is permitted to inform his employees of any bargaining disadvantages accruing, so that the "campaign material thus constituted lawful economic predictions" under the National Labor Relations Act § 8(a), 29 U.S.C. § 158(a) (1964). Id. at 675.

20. In thus seeking, obtaining, evaluating, and subjecting to union criticism and addition all these facts, a scientifically-oriented, computer-like, objectively fair deter-
would be subject to adjustment by GE "whenever (but only when) new
information from any source or a significant change in facts indicates that
its initial offer fell short of being right;" 21 (9) On the basis of all of the
proceeding, the traditional method of bargaining 22 would not be required,
*i.e.*, the give-and-take compromise need not be used; (10) Assuming no
adjustment would be necessitated by new or changed facts, then as a
matter of company policy, the determination, ultimately presented to all
unions and unrepresented employees 23 would not be changed. GE would
withstand "a strike of any duration to resist doing what it considers to be
'wrong.'" 24

Boulwarism, as so conceived and without more, did not seek to be a rigid
and inflexible disjunctive where an employer's overall proposal is immedi-
ately slapped down on a bargaining table at the first session without any "by-
your-leave" of the union. As conceived it was not meant to be unilaterally
arrived at and thereafter adhered to regardless of union arguments, facts,
concessions, or desire to discuss. 25 Boulwarism sought to set up a rational

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21. 150 N.L.R.B. at 208, continuing: "But GE believes—or at least so declares—
that if it has done its preliminary research into the facts accurately, no substantial
reason for changing its offer should ever exist, save in the event of some new unfore-
seen development having an impact on the economy as a whole." See also H. NORTH-
RUP, BOULWARISM 29 (1964).

22. E.g., the union initially presents a preposterously high demand, the company
counters with a preposterously low one, and the parties now higgle, inching forward to
where they finally meet at a compromise figure. GE may still make this method into
consideration.

23. "GE also pursued a policy of guaranteeing uniformity among unions, and between
union and non-union employees. Thus all unions received substantially the same offer,
and unrepresented employees were assured that they would gain nothing through rep-
resentation that they would not have had in any case." 418 F.2d at 741.

24. 150 N.L.R.B. at 208. The Trial examiner continued:

The Respondent extols its "fair and firm offer" approach as a straightforward
one that removes doubt from employees' minds as to precisely where it stands.
It disparagingly refers to the "ask-and-bid" or "auction" form of bargaining
as a "flea bitten eastern type of cunning and dishonest but pointless hag-
gling." Such bargaining, according to the Respondent's articulation, allows a
union to appear to get more than an employer is willing to give, though that is
often not the case, and this only serves, it says, to mislead employees into
believing that union officials are useful in ways they are not, thus falsely en-
hancing the union's prestige while diminishing that of the employer and en-
couraging employee support of union shows of strength. The Respondent's
approach on the other hand, it says, makes it obvious to employees that the
Company "is not being forced to be fair by the belligerent action of a labor
union."

25. Judge Friendly castigated Judge Kaufman for using, but not defining, the phrase
"take-it-or-leave-it," and then "suppose[d] it meant a resolve to adhere to a position
without even listening to and considering the views of the other side." 418 F.2d at 768.
procedure, albeit patterned upon marketplace merchandising, with a built-in give-and-take, although not entirely following traditional methods. Externally, and according to these procedures, the company did not enter the bargaining negotiations with a closed mind—i.e., a take-it-or-leave-it attitude; but after listening to the union's demands, if necessary GE would reevaluate its own position and then place upon the table its complete offer subject, however, to change if the union presented new facts. Throughout, GE retained an open mind, seeking an ultimate agreement fair to all parties. In other words, Boulwarism outwardly sought to meet the union at a "bargaining table where argument, persuasion, and the free interchange of views could take place," even though its eighth step placed the onus upon the union to argue and persuade after step six had occurred.

The coin-face disclosed that Boulwarism was, throughout, a one-sided type of ultimate decision-making, for it would be GE that determined which of its accumulated facts, or which of those presented by the unions, were pertinent and relevant, how these should be evaluated, what the conclusions should be, and how these fit in with company policy. Thus what was "right" for each party (i.e., what their just shares should be) was a unilateral determination. The essence of traditional "table bargaining," i.e., when the parties would formally meet openly to place upon the table and to exchange facts, views, and arguments, make adjustments and compromises, and do some horse trading was to be found somewhat touched upon in the third and eighth points and nowhere else, although this might involve dozens of sessions. But such meetings would not find GE making concessions or

26. See note 22, supra; M. FORKOSCH, LABOR LAW §§ 432-41, 452-55, 503 (2d ed. 1965) (a general analysis of bargaining pursuant to the National Labor Relations Act, §§ 8(a)(5), (b)(3), (d), 29 U.S.C. §§ 158(a)(5), (b)(3), (d) (1964)).

27. In NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960), the Court felt that "collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." Id. at 485.

28. Id. at 482, quoting from the Board's opinion, Insurance Agents Int'l Union, 119 N.L.R.B. 768, 770-71 (1957).

29. E.g., the union might be willing to come down in its wage demands if the employer would increase the pension contribution, or the employer might be willing to increase the wages if a longer term contract were signed without reopening or escalation clauses. However, wrote Boulware, "trick offers" had been shown to be poor company policy. E.g., in the past GE would make an offer and say: this "is all we will do. That's everything we've got." We might be winking at the union leader while we were saying all this. We were going to make him look good. Then after he threatened to call a strike we would give in and raise our offer 5¢. We learned that our employees thought that we were liars who would have stolen 5¢ an hour from them if it hadn't been for their union leaders. We decided that if we didn't want to be considered liars and thieves we should stop lying. So we did.

H. NORTHRUP, BOULWARISM 28 (1964).
changes unless points five or eight were applicable; that is, meetings *qua* meetings, without new and pertinent union facts being produced or without having any significant change in the facts occurring, could not result in any compromise from points six and seven. As a result GE alone would ultimately determine its no-compromise offer, thereby placing the burden upon the union to come forward with new facts which the company now would evaluate and accept or reject, otherwise the union could take the offer or strike, *i.e.*, TILI of the ultimate or second-face aspect. In addition, the unions were to become statistical appendages, serving no useful function save to check the proffered figures, making dues and memberships wasted efforts, with the IUE, for one, slowly dying.

The changeover in bargaining procedures after 1946 could not be applied in time to be effective when the 1947 negotiations rolled around, and so GE again bowed to UE. In 1948 the company offered the Union a two-year contract with a wage increase plus other benefits, which UE accepted after unsuccessful attempts at change. The new bargaining policy thus passed its first test with flying colors, with GE's procedures including direct publicity and communications to employees. Whether or not UE's internal and external union problems were the prime cause for its capitulation is immaterial; the following year it was ousted from the CIO and the International Union of Electrical Workers (IUE) was chartered as a rival union to challenge UE's dominance. IUE immediately won most of the NLRB's representation elections, although it could not eliminate UE entirely from the scene. At the 1950 bargaining table, GE's package, quickly accepted by UE, was rejected by IUE which sought to gain superior benefits by a series of "rolling strikes" (successive walkouts at GE's several plants). Eventually, after so registering its discontent, IUE agreed to the company's basic terms.

30. The NLRB majority in the GE case felt that GE "regards itself as a sort of administrative body which has the unilateral responsibility for determining wages and working conditions for employees, and it regards the union's role as merely that of a kind of adviser for an interested group—the employees." 150 N.L.R.B. at 195. See also H. NORTHRUP, Boulwarism 21 (1964): GE's "union policies of the late 1930's can be best understood as a continuation of its paternalistic policies of the two decades before." *Quaere*: did this paternalism continue into the 1960's, which Professor Northrup may possibly imply, supra note 8, although he states that by 1947 GE began "moving away from its paternalistic approach toward a 'something for something' arrangement," *id.* at 22, and that "[a]nother conclusion reached by the Boulware study group was the need to eliminate the obsolete vestiges of paternalism." *Id.* at 26.

31. Since GE's offer was also made to all nonunion employees, these received the benefits which accrued from any source. Thus, since "the 1960 strike fiasco," "IUE has lost most NLRB elections conducted among GE employees," H. NORTHRUP, Boulwarism 69 (1964), (footnoting IUE wins of three of four with a total employment of less than 100 and losses of at least 10 with total employment of about 2,000).

32. In 1949, a wage-reopening clause was unsuccessfully used by UE to request substantial increases, GE pointing to the business downturn.
This formed the pre-1960 pattern, and with the 1958 negotiations resulting in a defeat for the IUE, that union was determined to win concessions in 1960.

**Boulwarism in 1960**

The employment scene at this period showed GE's total of employees at about 250,000, less than half of whom were organized. IUE represented slightly less than 70,000, UE about 10,000, and the balance was split among a variety of independent and affiliated unions. Both sides now began to prepare for the 1960 struggle. The *IUE News* castigated the company during the entire two-year period, President James Carey and other union officials made anti-GE speeches, a half-hour TV movie was distributed, a large trailer truck moved from plant to plant exhibiting GE horrors, numerous pamphlets were distributed and one was specially prepared for the shareholder meeting. IUE obtained bargaining coordination and combined strength with the other AFL-CIO unions at GE. GE was not far behind in such activities. The economic boom had not materialized, and the cost of living escalation clauses were a yoke. GE therefore stepped up its communications, prepared and widely circulated special position papers, proselytized its views and policies among its employees, analyzed and declared meaningless the opposition's poll of the employees for their demands, spelled out to all workers GE's bargaining methods, had its staff visit the 15 largest plants and seek out supervisory and management personnel to examine issues and problems, intensified its research and analyses so as to mitigate cyclical effects, and in general sought to avoid giving Carey any emotional issues.

The 1960 "negotiations," contractually scheduled to begin in August of 1960, factually but not technically and legally (an important distinction)
began with the IUE’s letter of December 22, 1959, requesting an “informal and unpublicized discussion;” these meetings were held from January 26 to May 5, 1960. Shortly afterward GE agreed to a June 13th meeting, but solely to hear the union’s presentation and explanation of its demands, and on the express reservation that this was not the opening of negotiations. Before June 13th, however, GE publicly submitted to IUE and all its employees a group personal accident insurance policy, separate from and in addition to the existing contract’s contributory plan, but with GE now bearing all new costs. At the June 13th meeting IUE first contended this new plan was bargainable as it was connected to the existing contract’s basic plan. GE took the flat position this was not so, offered to hold off as to union-represented employees, but insisted upon making and did make it available to all others. This was the first TILI proposal and offer, and it is the specific insurance plan so referred to hereafter.

The discussions continued, and for meeting after meeting, into August, both sides made analyses and presentations, with both meanwhile publicizing their views, offers, and analyses. On August 27th GE’s final proposal was completed. Two days later it was previewed by Carey and others and on August 30th presented formally, with GE publicizing the details despite the union’s request for delay. The union “objected vigorously to the absence of a cost of living escalator. The next day... GE modified its proposal to include, as an option instead of the second 4 percent wage increase, a wage reopener ....” During the negotiations a few other insufficiencies in GE’s offer developed and, as Professor Northrup puts it, “numerous other changes in the original [GE] offer were made.” By September 29th a stalemate was clear; a strike was imminent by October 2d. GE had offered its package to the Schenectady, New York, and Pittsfield,
Massachusetts, locals directly; after the strike began GE also made the offer to other locals. The strike lasted for three weeks and was then called off, with the unions taking a beating. The NLRB and the courts now took over.

**TILI Before the Trial Examiner and Labor Board**

Charges and counter-charges were filed by the parties, those against the IUE being determined by requiring it to post notices. The basic charge against GE was that it had violated its Section 8(a)(5) statutory duty to bargain in good faith. After extended hearings the Trial Examiner made his intermediate report and the Labor Board's opinion thereafter adopted his recommendations. Both the report and the opinion referred to *NLRB v. Katz*, decided by the Supreme Court in 1962, which provides an excellent back-drop against which to cast and clarify the GE opinions and holdings.

In *Katz* the Supreme Court reviewed a Second Circuit opinion which had relied on *NLRB v. Insurance Agents' International Union*, in holding that no bargaining violation occurred “when bargaining is in fact being carried on,” unless separately there was a “finding of the respondent's subjective bad faith in negotiating.” The lower court also felt “that the unilateral acts here complained of, occurring as they did during the negotiating of a collective bargaining agreement, do not *per se* constitute a refusal to bargain collectively and *per se* are not violative of § 8(a)(5) . . . . [I]n the posture of this case a necessary requisite” is the subjective bad faith finding. Put differently, the objective unilateral acts during bargaining were felt by the lower court not to be *per se* objective violations; therefore, a finding of subjective bad faith was required to sustain the Board's holding of a Section 8(a)(5) violation.

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offer” was “on the table,” GE contrary to prior practice, brought its position home by making its three per cent wage increase offer effective for unrepresented employees before the end of the contract or IUE acceptance.

Id. at 743.

GE's reluctance to submit to further changes was explained by a GE negotiator who spoke against changing a particular proposal: “it would make GE 'look foolish in the eyes of employees and others. . . .'” Id. at 745. The specific proposal involved referred to the union's SUB proposal made September 28th, virtually at the expiration of the contract and at the end of the pre-strike bargaining.

43. For this notice, see H. NORTHROP, BOULWORKISM 93 (1964). For the eventual GE notice, see 150 N.L.R.B. at 287.


45. 150 N.L.R.B. at 268, 194.

46. 369 U.S. 736 (Brennan, J. for an unanimous Court). Brennan also wrote the *Insurance Agents*' opinion, note 47 infra.

47. 361 U.S. 477 (1960).


Both the per se position and that separately requiring the finding of subjective bad faith were rejected by the High Court which felt that each of three objective unilateral acts during bargaining of necessity indicated bad faith and therefore per se constituted violations.\(^{50}\) The first such act "frustrat[ed] the statutory objective,"\(^{51}\) the second, "conclusively manifest[ed] bad faith"\(^{52}\) and was "necessarily inconsistent with a sincere desire to conclude an agreement,"\(^{53}\) and the third "too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation . . . ."\(^{54}\)

The Court, however, did not go beyond these objective per se rulings into any subjective bad faith aspects. *Katz* is not authority for permitting a finding of general subjective bad faith to follow automatically from a particular objective-fact per se violation. Neither does it support use of a particular objective-fact per se violation (alone or in conjunction with other facts) to support a general subjective bad faith finding, *i.e.*, a "totality of circumstances" finding.\(^{55}\) The *Katz* Court noted the Board's decision "which expressly disclaimed any finding that the totality of the respondents' conduct manifested bad faith in the pending negotiations."\(^{56}\) In other words, *Katz* pointed up the Court's view that Section 8(a)(5), "may be violated without a general failure of subjective good faith [and] . . . that an employer's unilateral change in conditions of employment under negotiation is . . . a [factual] violation" per se.\(^{57}\) In Court language:

Clearly, the duty thus defined may be violated without a general

\(^{50}\) The first act was a changing of a sick-leave plan without notifying or consulting with the union.

This action plainly frustrated the statutory objective of establishing working conditions through bargaining. Some employees might view the change to be a diminution of benefits. Others, more interested in accumulating sick-leave days, might regard the change as an improvement. If one view or the other clearly prevailed among the employees, the unilateral action might well mean that the employer had either uselessly dissipated trading material or aggravated the sick-leave issue. On the other hand, if the employees were more evenly divided on the merits of the company's changes, the union negotiators, beset by conflicting factions, might be led to adopt a protective vagueness on the issue of sick leave, which also would inhibit the useful discussion contemplated by Congress in imposing the specific obligation to bargain collectively.

\(^{51}\) *Id.* at 744. The second unilateral act was increasing of wages, and the third related to merit increases.

\(^{52}\) *Id.*

\(^{53}\) *Id.* at 745.

\(^{54}\) *Id.*

\(^{55}\) *Id.* at 746.

\(^{56}\) See the GE Court of Appeals' view of this terminology, note 141 \textit{infra} and accompanying text. Conversely, *Katz* is not authority for refusing to permit an objective per se violation to be used solely for the latter purpose, *i.e.*, alone or in conjunction to support a general subjective bad faith finding.

\(^{57}\) 369 U.S. at 737.

\(^{57}\) *Id.* at 743. The time-fact of the bargaining, during which the conduct oc-
failure of subjective good faith; for there is no occasion to con-
sider the issue of good faith if a party has refused even to negotiate
*in fact*—"to meet . . . and confer"—about any of the mandatory
subjects. A refusal to negotiate *in fact* as to any subject which is
within §8(d), and about which the union seeks to negotiate,
violates §8(a)(5) though the employer has every desire to reach
agreement with the union upon an over-all collective agreement
and earnestly and in all good faith bargains to that end. We hold
that an employer's unilateral change in conditions of employment
under negotiation is similarly a violation of §8(a)(5), for it is a
circumvention of the duty to negotiate which frustrates the objec-
tives of §8(a)(5) much as does a flat refusal. 58

The quotation: (1) emphasizes "in fact," *i.e.*, a solid basis of factual
evidence to hold that a party has refused even to negotiate about any of the
mandatory subjects; 59 then (2) holds that where this preceding fact is found,
the party's subjective good faith, *i.e.*, he has every desire to reach an over-all
agreement and earnestly and in all good faith otherwise bargaining to that end,
is immaterial; and (3) declares that, similar to this preceding objective fac-
tual violation regardless of subjective good faith, an objective unilateral
change of employment conditions under negotiation is per *se* a violation.
The only other question raised by the language in *Katz* is whether the
Court's use of "an employer's unilateral change in conditions of employment
under negotiation" reads either as a change "in any of the conditions" or "in
certain conditions," *i.e.*, must each particular factual change be determined
to be or not to be such a per se violation?

The historical approach of not only the Board but also that of the Supreme
Court to this question is to particularize, decide each issue and fact as and
when it necessarily appears for determination, and not to make broad pro-
ouncements. 60 In *Katz* the Court particularly discussed and decided three
separate fact changes by the employer acting unilaterally where the union
demanded mandated items be bargained, and these are its holdings; the
generalized language as above quoted is not to be used to umbrella every
conceivable change under all circumstances. 61 The Court's final views also

58. 369 U.S. at 743.
59. On mandatory and nonmandatory subjects for collective bargaining, and
the requirement that a party, on demand by the other, so negotiate in good faith concerning
the former, although as to the latter no such duty exists under the Act, see M. FOR-
KOSCH, LABOR LAW § 434 (2d ed. 1965).
60. See, e.g., Justice Black's statement: "Each case must turn upon its particular facts.
The inquiry must always be whether or not under the circumstances of the particular
case the statutory obligation to bargain in good faith has been met." NLRB v. Truitt
61. See, e.g., the Court's final statement that "we do not foreclose the possibility that
support this conclusion for it stressed the power of the Board "to order the cessation of behavior which is in effect a refusal to negotiate," i.e., the refusal to bargain on the three mandated items, "or which directly obstructs or inhibits the actual process of discussion," i.e., the frustration resulting from the sick-leave plan, "or which reflects a cast of mind against reaching agreement," i.e., the overall problem and violation under a totality of circumstances approach. The instant unilateral conduct by the employer "must of necessity [objectively] obstruct bargaining . . . [and] will often disclose an unwillingness [subjectively] to agree with the union . . . [so] that the Board may . . . [denounce] such unilateral action . . . without also finding the employer guilty of over-all subjective bad faith." Nevertheless, the objective fact violations on a per se basis were limited in Katz to the three mentioned. Are there others that can be so held to be per se violations of Section 8(a)(5)? Obviously yes, e.g., a refusal to discuss specific wage or hour demands unquestionably constitutes such a violation.

With Katz before him, the GE Trial Examiner thus knew that TILI might be analyzed as a new tactic in the employer's (or union's) arsenal of bargaining methods, subject, however, to the time-facts before him, the General Counsel's complaint and proof, and the Board's power to decide against it. The time-facts disclosed that the insurance plan TILI was involved in the pre-bargaining stage; but the General Counsel had rejected such a finding; and therefore no present need to so determine existed. The time-facts, nevertheless, permit several questions to be conjured: (1) Is an employer "prohibited from even putting such a proposal to a union at a time when bargaining is not required under the contract unless he is willing to there might be circumstances which the Board could or should accept as excusing or Justifying unilateral action, [although] no such case is presented here." 369 U.S. at 748.

62. See note 50, supra.
63. 369 U.S. at 747.
64. Id.
66. In Local 2647, Lumber Workers, 130 N.L.R.B. 235 (1961), the parties had bargained in good faith for about five months, with an impasse finally resulting. The union then gave the employer an ultimatum, backed by a strike threat, to sign without consulting further with its bargaining agent. The Board upheld this conduct observing that a strike prior to the ultimatum would not have violated the Act, and so likewise a strike preceded by a final "take it or face a strike" basis after a breakdown in good-faith bargaining was not a violation.
67. See note 38 supra.
68. See note 78 infra.
bargain about it then and there?" 69  (2) Since the insurance plan was actually put into effect in late September, when contractually (and legally) required bargaining had begun in August, did the early TILI offer now spill over into the mandatorily bargainable area so that, upon union demand, GE was compelled to bargain, failing which a per se violation occurred?  (3) Was such a demand not made (so found by the Trial Examiner), thereby relieving GE of any obligation to bargain as to this in August or September?  (4) Regardless of the preceding second and third aspects, and even within the time element of the first, was the original TILI offer per se an objective-fact violation?  (5) Could it be used as some evidence to support a finding that it frustrated and inhibited union bargaining or a finding of a general subjective bad faith violation? 70

What the Trial Examiner did was to suggest or hint that TILI (as continued) could have been a per se violation, but to use it only to support a finding of a general violation under the totality of circumstances approach. The method he used to accomplish this was as follows: he discussed TILI in his chronology 71 and then said, "A fair reading of the record does not support that assertion [that GE refused to bargain on this insurance item], however. So far as appears, the Union never made the added accident insurance a matter of formal demand during the negotiations." 72 He thereafter discussed the "independent violations" of Section 8(a)(5) 73 under GE's refusal to furnish information and its bargaining with the locals directly, 74 finding against the company in both situations. In next analyzing the "alleged overall bad-faith bargaining" charge, he begun, "Included within the

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69. 418 F.2d at 765 (dissent).  See also note 136 infra.

70. As to this last, if the TILI evidence alone could sustain this finding then it was a per se violation; therefore the Examiner either felt that it was not a per se violation or else that even if he desired, rather, to have the general finding so as not to be confronted by the Katz dilemma, that if the Supreme Court felt it not to be a per se violation then the entire case would be dismissed, whereas if it were, then a general violation would "automatically" be supported.

71. 150 N.L.R.B. at 213-15.

72. Id. at 215. This exact factual omission is the key to the later dissent by Judge Friendly in the GE case where he felt GE committed no violation "by submitting a contributory personal accident insurance plan to the Union and declining to bargain about it until the time for reopening of negotiations." 418 F.2d at 764-65. However, what of such a refusal afterwards, and upon demand? Also, did the Judge overlook the fact that not only was there such a refusal to bargain but also submission to nonunion employees and publicizing of the offer prior to negotiations? Would these facts, if not included in the Judge's remarks, have made a difference? It is the publicizing which is at the heart of the majority's approach.

73. Throughout this discussion any charges or violations under other subdivisions are not treated, either when separately found or in conjunction with Section 8(A)(5).

74. 150 N.L.R.B. at 256-66. The Trial Examiner referred to the General Counsel's reliance on certain specific allegations in the complaint "not only as lending support to the broad bad-faith bargaining allegation, but also as spelling out in themselves independent violations . . . ." Id. at 256.
framework of that issue are the specific allegations . . . [concerning] the alleged independent violations that have already been considered and ruled upon."75 His discussion, however, did not further refer to these independent violations.76 In conclusion he found that "on the totality of the Respondent's conduct at and away from the bargaining table, without, however, giving conclusive weight to any separate element," a Section 8(a)(5) violation resulted.77

But in this totality of conduct the Trial Examiner had already included various items other than the specific violations used first as independent per se violations, and next to bolster the general finding. One of these other items was the TILI insurance plan, and this was the first item he discussed under the alleged general violation. He referred to his earlier finding that GE had not refused to bargain on the insurance plan,78 and that while the General Counsel

was not contending that it was a "per se violation," [still,] the issue relating to it was fully litigated and briefed by all parties as a distinct element in the case. On the basis of the facts developed . . . [the insurance plan] involved a bargainable subject . . . [and so] I find that the Respondent's presentation . . . on a conceded take-it-or-leave-it basis constituted a rejection of the principle of collective bargaining, violative of Section 8(a)(5) of the Act, thereby reflecting adversely on the Respondent's general attitude toward collective bargaining.79

In other words, the Trial Examiner felt that (1) while a per se violation could be used twice, i.e., to support an independent violation and to bolster a general one, and (2) that even though TILI here should be considered to be a per se violation, still, (3) he would not so find and hold as it was not so charged and claimed by the General Counsel, but that (5) it would be used as one part of the factual evidence under a general charge and finding of a Section 8(a)(5) violation.80

75. Id. at 267.
76. Although, in his penultimate conclusion, while the Examiner stated that his other findings supported "a substantial inference" of a lack of good faith by GE, the company's refusal to furnish information "goes beyond establishing an independent violation of Section 8(a)(5). It also strongly supports a finding of overall bad faith . . . [as does its] conduct in bypassing the Union . . . [which] also bears significantly on the Respondent's overall bargaining attitude." Id. at 282.
77. Id. at 283.
78. "A finding of a separate violation based [on the TILI offer] was requested by the Union in its brief and at oral argument." Id. at 269 n.114. GE had claimed the insurance plan was not a bargainable matter, but the Examiner, Board, and Second Circuit held against it on this. It nevertheless further claimed a waiver on this aspect, which is not here discussed. On waiver in general, see M. FORKOSCH, LABOR LAW 703 (2d ed. 1965). See also Henry I. Siegel Co. v. NLRB, 340 F.2d 309, 310 (2d Cir. 1965).
79. 150 N.L.R.B. at 269.
80. But the General Counsel's brief in the Second Circuit contended the contrary:
If the preceding is a correct picture of the Trial Examiner’s report, findings, and holdings, then he, the Board and the Second Circuit each erred when the TILI insurance plan came before them. The Trial Examiner’s error lay in failing to distinguish the TILI time aspects in the pre-bargaining and bargaining stages and, perhaps, holding as to the former that this “narrow issue” should be decided in favor of GE. The Board and Second Circuit affirmed his error while erring further, suggesting, without any overruling of the Trial Examiner on his finding of fact, that TILI could be considered independently as a specific violation.

The Board’s error is further disclosed by the following. Its third opening paragraph stated that the Trial Examiner had found that Respondent had not bargained in good faith as evidenced by four items: (1) failing to furnish information; (2) dealing separately with the locals; (3) presenting its insurance plan on a TILI basis; and (4) “[i]ts overall approach to and conduct of bargaining.” The Board’s language is ambiguous. The Examiner had found no separate and specific TILI per se violation, as with the information and local-dealing issues, whereas now it is separately considered; the Board is not, however, incorrect in stating that the Examiner had found a violation “as evidenced by” TILI. The TILI item was one of several to support his finding of a general violation. Nevertheless, at no time did the Board specifically and unequivocally make an affirmative statement or holding that the TILI plan was a per se violation, although by a process of reverse reasoning this may be concluded. To illustrate this reverse reasoning, there were majority, concurring, and partially dissenting opinions. The box-score discloses that: two of the five board members, Fanning and Jenkins, specifically felt that the TILI offer was not “unlawful”; Fanning nevertheless felt the TILI offer could be used to support the finding of an overall lack of good faith by GE; Jenkins felt that while the record supported the specific findings of GE’s violations by refusing to give information and deal-

We submit, however, that the Examiner plainly found an independent violation . . . .” Brief for Petitioner at 64 n.20, NLRB v. General Elec. Co., 418 F.2d 736 (1969). The Court of Appeals’ majority opinion, however, does not unequivocally so hold.

81. See note 72 supra.
82. Although Judge Kaufman, for the Second Circuit majority, did seek in a rather complex manner to overcome this time distinction element, his analysis seems to misunderstand what the Board did.
83. 150 N.L.R.B. at 193.
84. Id. at 193 n.3 (Fanning), 198 (Jenkins). Leedom, who completed the three-member majority in favor of the TILI finding (as shortly discussed), was replaced the following year; the new member (Zagoria) had not indicated his views by December 1969, when he resigned, and his replacement (possibly Edward B. Miller, as of this writing) may probably, at the least follow the Leedom approach. The term of 1960 Chairman McCulloch expires in August 1970, with the second Nixon appointee undoubtedly rejecting the McCulloch stance.
85. Id. at 193 n.3.
ing separately with the locals, he did not feel the general overall violation of a lack of good faith was proved; in this rejection of the overall finding he was joined by Leedom who nevertheless "agree[d] with the specific violations found"; the remaining two board members upheld all the specific and the general findings. Thus two specifically rejected a TILI per se violation; two rejected the overall violation; and all upheld the particular violations (save for TILI as above). One can therefore urge that unless a three-member majority specifically opposed the two-member specific rejection of TILI, there would have been no need to make any fuss about it and therefore, pari passu, three members supported and upheld a per se TILI violation.

This reasoning is, however, not sufficient to support a contention that the Board, or a majority, has definitively ruled such a TILI offer to be a per se violation of Section 8(a)(5). The reason is that the Trial examiner and the Board's three members utilized the TILI offer as part of a theoretical pattern of GE bargaining, and also within the context of the actual bargaining as it occurred. Thus it is factually impossible to disassociate the insurance offer from the other facts and discuss it in isolation. In effect, that is about what the majority may have concluded because, even though the Trial Examiner found a violation of Section 8(a)(5) as evidenced by the four items, one of which was the insurance plan offer, the three majority members refused to state their own views or to disagree squarely with the per se rejection by the two minority members. Perhaps this indicates that such a TILI offer, without other facts may conceivably not be a bargaining violation.

86. Another item is not discussed here, namely, GE's importuning of the locals to abandon or not support the eventual strike. Id. at 198 (Jenkins dissent).
87. Id. at 198: "However, in view of the fact that the majority has gone beyond conduct and indeed concedes that it is not basing its finding of overall bad faith on conduct but rather is basing that finding on an assessment of Respondent's approach to its duty to bargain in good faith, I am constrained to disavow their comments concerning the employer's bargaining technique." In this he was later joined by Judge Friendly (dissenting partially in the circuit court), who felt that specific conduct, not a generality, should be castigated.

It may be urged, of course, that no outright rejection of the overall finding is given but, rather, merely a disavowal of comments about technique. However, this is splitting hairs too finely. In the circuit court Judge Friendly agreed with Board Member Jenkins as to the legality of the TILI insurance plan offer, and also agreed with him "that other specific conduct of the Company... effective date of the pension plan... [and] the form of the strike settlement agreement... could properly have been condemned..." 418 F.2d at 765.
88. 150 N.L.R.B. at 200. He also discussed the applicability of the so-called free speech section's application to GE's communications to its employees, and while not rejecting their use as "some evidence of bad faith," desired that "guides" be given the company so that "it can with reasonable certainty determine what it can lawfully say to its employees." Id. at 203. The free speech section is National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (1964).
89. The operative term is "conceivably," and even the later Kaufman opinion may
Although if other facts are added, or the proposal is placed within a particular context, a different conclusion may be warranted. 90

To support this overall view of the Board's ambiguous, or at least non-specific, use of the TILI insurance plan, not only is the analysis which shortly follows concerning the use of TILI in a general bad faith violation applicable here, but so also is the Board majority's quotation from the 1960 Insurance Agents' case. In that case Justice Brennan, for the majority, wrote that while adding Section 8(d) to the Wagner Act (National Labor Relations Act) in the 1959 amendments and thereby defining the duty to bargain collectively, Congress simultaneously imposed the correlative duty on unions through Section 8(b)(3). The legislative history makes it plain that Congress was wary of the position of some unions, and wanted to ensure that they would approach the bargaining table with the same attitude of willingness to reach an agreement as had been enjoined on management earlier. It intended to prevent employee representatives from putting forth the same 'take it or leave it' attitude that had been condemned in management. 91

Earlier the Justice had written that collective bargaining was not a series of "purely formal meetings . . . while each [party] maintains an attitude of 'take it or leave it' . . . ." 92 In both quotations the Justice spoke of an attitude, not a proposal as such and without more; throughout their opinions the Board members echoed this view, and the majority reiterated this approach, especially in disclaiming the accusation of another member, i.e., "that our decision is not based on an assessment of Respondent's conduct, but only on its approach to or techniques in bargaining." 93 These latter are procedural, not substantive, and this differentiation may be significant.

Use of TILI as a General Bad Faith Violation

Whereas the insurance TILI plan may be considered as an objective fact,
regardless of intent, motive, or state of mind, the present overall violation is peculiarly subjective. Phrased differently, a TILI offer requires language, oral or written, which can be testified to or introduced as an exhibit and made a finding of external fact, i.e., the people involved can be disassociated from this fact which, analogous to real evidence introduced upon a trial,\(^9\) thereafter need have no connection with any individual. Whereas TILI can thus be theoretically considered in a vacuum, it would be impossible for an objective bad faith factual violation to be so conceived. Almost by common usage, regardless of dictionary or statutory definition, this objective term now connotes a state of mind which cannot be known (assuming no “confession”) without circumstantial or other evidence, inferences therefrom, and a subjective evaluation by the determiner.\(^9\) The unfair labor practice or statutory violation is merely that the employer or the union “refuse to bargain collectively,”\(^9\) but the statutory Section 8(d) definition is also not very clarifying: “to bargain collectively is the performance of the mutual obligation . . . [to] confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .” This language must be interpreted and applied, which brings us to what Congress said about it, how the Labor Board and the Supreme Court view it, and how TILI (specific or general) fits into the picture.

Just ten years ago the High Court decided the *Insurance Agents’ case.*\(^9\) There the union announced in February that if a new contract were not reached in March, when the old one expired, its “members would then participate in a ‘Work Without a Contract’ program—which meant that they would engage in certain planned, concerted on-the-job activities designed to harass the company.”\(^9\) March came, no contract emerged, the union-employer bargaining sessions and discussions continued, and the threatened program was instituted,\(^9\) but with an employer charge now filed, on which a complaint issued, charging a union refusal to bargain in good faith. The

\(^9\)See, e.g., 1 WIGMORE ON EVIDENCE \S 24 (3d ed. 1940).


\(^9\)Both Section 8(a)(5) and its counterpart Section 8(b)(3) use this identical language, 29 U.S.C. \S\S 158(a)(5), \S 158(b)(3) (1964).


\(^9\)Id. at 480.

\(^9\)The tactics included refusal to solicit new business, refusal to comply with the company’s reporting procedures, refusal to participate in campaigns, reporting late, refusal to perform customary duties, engaging in “sit-in-mornings” and “doing what comes naturally,” leaving at noon as a group, absenting themselves from specially arranged conferences, picketing and distributing leaflets outside company offices and to policyholders, soliciting policyholder signatures on petitions and presenting these “to the company at its home office while simultaneously engaging in mass demonstrations there.” Id. at 480-81.
Trial Examiner recommended that the complaint be dismissed but the Board refused and held against the union. The United States Court of Appeals for the District of Columbia felt otherwise; and the Supreme Court affirmed. The Trial Examiner had found nothing in the record to support any inference of the union's failure to bargain in good faith except the tactics engaged in by the union during negotiations; "in fact nothing else was relied upon by the Board's General Counsel in prosecuting the complaint."

On this record the Board felt that "irrespective of the union's good faith in conferring with the employer at the bargaining table for the purpose and with the desire of reaching agreement on contract terms, its tactics during the course of the negotiations constituted per se a violation of §8(b)(3)." Or, even assuming union good faith at the negotiations, the tactics themselves, without more, were a per se violation. The Supreme Court, however, felt that even if these tactics were assumed not to be protected activities under Section 7 of the Act (thereby permitting the employer to discharge the employees or take other appropriate disciplinary action against them), still, this "does not mean that it constitutes a refusal to bargain in good faith . . . [because] there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining." And so, as upon the admitted and limited fact-situation no per se violation could be inferred or found, the Court majority refused to permit the Board to move "into a new area of regulation which Congress had not committed to it, [i.e., defining] through its processes what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." The minority agreed that "upon all the evidence . . . the Board's conclusion [of a union violation] must fall" for insubstantiality; that it did not appear that the union's tactic was to stall at the bargaining table "until its conduct outside the negotiations might force Prudential to capitulate to its demands, nor does any other evidence give the color of pretence to its negotiating procedure." Therefore, according to the minority, since the Board felt that the union's "tactics were, without more, sufficient evidence of a lack of a sincere desire to reach agreement to make other consideration of its conduct unnecessary," remand to the agency should occur "for further opportunity to introduce pertinent evidence, if any there

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100. Id. at 481.
101. Id. at 482.
102. The Court first assumed, without deciding, that the union's activities "were not 'protected' under § 7 of the Act." Id. at 483 n.6. But later the Court "agree[d] arguendo with the Board . . . that the employee conduct here was not a protected concerted activity." Id. at 492-93.
103. Id. at 494-95.
104. Id. at 499-500.
105. Id. at 514.
be, of respondent's lack of good faith."106 In effect the entire Court agreed that such tactics were not in themselves necessarily to be considered a lack of good faith and therefore a per se violation, with the minority only desiring to give the Board the opportunity to bring in further evidence on a remand. The minority, however, also added in a final paragraph:

Viewed as a determination by the Board that it could, quite apart from respondent's state of mind, proscribe its tactics because they were not "traditional," or were thought to be subject to public disapproval, or because employees who engaged in them may have been subject to discharge, the Board's conclusion proceeds from the application of an erroneous rule of law.107

In effect, that is what the majority felt, i.e., that the Board's approach was erroneous unless it could be defended "as resting on some unique character of the union tactics involved here."108 The Board's power to find a violation by inferring a lack of good faith under the statutory definition must stem from "deficiencies of the union's performance at the bargaining table [and not "solely and simply"] by reason of its attempted use of economic pressure," for otherwise "the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid." In turn, this would permit the Board to "be in a position to exercise considerable influence upon the substantive terms on which the parties contract,"109 a result not desired by Congress which "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution to their differences."110

The preceding analyses and conclusions are not, however, the final High Court words on this. A possible modification, if not different result, is suggested by NLRB v. Truitt Manufacturing Co.111 At present a few preliminary and tentative conclusions and questions may be drawn. Collective bargaining may be divided, for present purposes, into substantive and procedural; the ordinary and usual bargaining tactics of a party obviously are procedural where these are used to obtain any advantage in and during the bargaining process, or to compel112 or be traded for113 a substantive

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106. Id.
107. Id. at 514-15.
108. Id. at 488.
109. "As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations." Id. at 490.
110. Id. at 488.
111. 351 U.S. 149 (1956).
112. The economic pressure resulting from a tactic necessitates capitulation in whole or in part, as where a permissible strike or lockout brings pressure upon the other
item. Regardless of what the parties could or did do prior to the statutory requirements, good faith is today a required element in such collective bargaining. Economic pressure devices or tactics, and good faith in the bargaining process, "exist side by side" and may be used and found simultaneously. Obviously there are some tactics, e.g., unadulterated violence, and some of the substantive matters in the bargaining such as a hot-cargo clause, which cannot be used or sought and which per se undoubtedly impugn one's good faith. Aside from such tactics or items, the Board does not have any power under Sections 8(b)(3) or 8(a)(5) "to distinguish among various economic pressure tactics and brand . . . [some] inconsistent with good-faith collective bargaining."116

Quaere: is a valid and ordinarily negotiable substantive item involved in the collective bargaining, which is definitely and positively submitted at the outset on a TILI basis, rendered nonbargainable because the TILI is per se sufficient to support a finding of a Section 8(a)(5) violation; or is the TILI to be considered only as one (new) form of economic pressure among various tactics in the arsenal of the bargaining process and therefore without the power of the Board? Assuming the TILI not to be sufficient for a per se violation, may such a tactic nevertheless be considered as one piece of evidence in determining a party's overall lack of good faith on the basis of substantial evidence? Conversely, assuming it per se sufficient as a violation, may the TILI item next also be used to support a second and additional, though separate, overall finding of a lack of good faith; or, if once used for a per se finding, must it be rejected for this second overall purpose?

The Board's several opinions are not absolutely conclusive as to the acceptance or rejection of the bifurcation and other aspects just discussed.

113. See, e.g., 418 F.2d at 747 (Judge Kaufman): "A collective bargaining agreement is a compromise not only between the parties, but of their past, present, and future goals. . . . [A party] may believe that it is important to keep . . . [certain] benefits within narrow bounds, so that at the next negotiating session it will be able to press more vigorously for other benefits."

114. 361 U.S. at 489.

115. See, e.g., M. FORKOSCH, LABOR LAW §§ 432-40, 452-54, 503, 504-05 (the hot-cargo clause) (2d ed. 1965).

116. 361 U.S. at 492.

117. These adverbs may go beyond the GE-IUE facts, but are used so as to eliminate any possible loophole at this point.

118. Justice Frankfurter, but not Justice Brennan, was specific in stating that "the Board's conclusion must fall for want of support in the evidence as a whole." 361 U.S. at 514. See generally M. FORKOSCH, LABOR LAW §§ 396-402, 514 (2d ed. 1965).

119. The Board and Court herein adopt this proposal, although not stating it as definitely.
The Board majority's inconclusiveness in the GE case on TILI as a per se violation nevertheless still left the total picture violation, which in effect is what the Supreme Court's minority in the Insurance Agents' case felt could be done. The Board's majority thus seemingly adopted both positions, albeit unable or refusing to make a positive holding as to the first, or per se, one. Its first statement was a rejection of Board Member Jenkins' contention:

> Our decision is not based on an assessment of Respondents' conduct, but only on its approach to or techniques in bargaining. On the contrary our determination is based upon our review of the Respondent's entire course of conduct. Its failure to furnish relevant information, its attempts to deal separately with locals and to bypass the national bargaining representative, the manner of its presentation of the accident insurance proposal, the disparagement of the Union as bargaining representative by the communication program, its conduct of the negotiations themselves, and its attitude or approach as revealed by all these factors. Our decision rests rather upon a consideration of the totality of the Respondent's conduct.

Within this totality there was included "the manner of its presentation of the accident insurance proposal." This tactical presentation, not a substantive content consideration, followed and upheld the examiner's parallel views and language. But immediately thereafter the two members (in the majority of three) pointed to the third's views on TILI,

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120. To what extent the Examiner's report, views, conclusions and recommendations influenced this indecision may be somewhat understood by examining his own bifurcation and analysis. See text and notes commencing with note 66 supra, especially the text at note 80 supra.

121. General Elec. Co., 150 N.L.R.B. 192, 196-97 (1964). Judge Friendly quoted this as a statement by the Board majority "that its finding of overall bad faith was not based upon identifiable acts or failures to act that GE could avoid in the future but rather 'upon our review.'" 418 F.2d at 765. He then stated that such Board attempts to restrict communications, or to lay down bargaining standards as to techniques, attitudes, and approaches bring a collision with Section 8(c)'s free speech, and Section 8(d)'s definition, and their policies. He cautioned against intrusion "into areas which Congress left to the parties," and in his "peroration" (per Kaufman, id. at 762) quoted present Chief Justice Burger's dissenting comment, in United Steelworkers of America v. NLRB, 390 F.2d 846, 858 (D.C. Cir. 1967), cert. denied, 391 U.S. 904 (1968), that "today's holding contains the seeds of danger for unions," as well as for employers, and added that such a "portentous step" should not be taken here. 418 F.2d at 774. To this, Judge Kaufman retorted that Friendly "conjures up the dark spectre . . . [of a] picturesque characterization [which] is unfortunate for it is a scare-phrase which tends to distract from the facts in this case." Id. at 762.

122. 150 N.L.R.B. at 196.

123. The majority emphasized that it was not discussing "any required substance or content of agreements" Id. at 197. "Nothing in our decision bans fact gathering or any specific method of formulating proposals. We prescribe no timetable for negotiators." Id. at 196-97. See also on substantive content aspect, note 195 infra.

124. See, e.g., text at note 79 supra.
and then, as "decisively answered," quoted from the *Insurance Agents'* language that Congress had "intended to prevent employee representatives from putting forth the same 'take it or leave it' attitude that had been condemned in management."\(^{125}\) In addition, the two sought further to answer the third's use of the *Truitt* case: "As one member of the Supreme Court has pointed out, good faith is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness."\(^{126}\) The two replied that "the [same] Justice also wrote: '... [good faith] is inconsistent with a predetermined resolve not to budge from an initial position.'"\(^{127}\)

The majority of the Board members in the *GE* case, and the majority of the Justices in the *Insurance Agents'* and *Truitt* cases, seem to be skirting the pre-bargaining TILI question by incorporating or relating this particular technique within or to the overall conduct of the party, albeit somewhat hinting at or slightly mouthing a condemnation along per se lines. The reasons are that the *Truitt* minority took a definite position against any per se approach by referring to the Board's view that "[t]he totality of the conduct of the negotiation was apparently deemed irrelevant to the question; one fact alone disposed of the case . . . ." The *Truitt* minority felt that "to make a rule of law out of one item—even if a weighty item—of the evidence," is "mechanical" jurisprudence not warranted under the Act. Therefore, "[s]ince the Board applied the wrong standard here, by ruling that Truitt's failure to supply financial information to the union constituted per se a refusal to bargain in good faith, the case should be returned to the Board."\(^{128}\) These minority strictures do not appear quite justified if the majority's language is checked.\(^{129}\)

There does not seem to be any majority-minority disagreement in the *Insurance Agents'*, *Truitt*, and *GE* cases as to the legal approach but, rather,

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126. 150 N.L.R.B. at 199, citing NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154-55 (1956) (Frankfurter with Clark and Harlan concurring in part and dissenting in part). Here the employer claimed financial inability to pay and refused, on demand by the union, to produce evidence to substantiate this claim, upon which facts the Board found a Section 8(a)(5) violation; which the Supreme Court upheld.
128. *Id.* at 155, 156, 157.
129. The *Truitt* majority felt that in determining whether the obligation of good-faith bargaining has been met the Board has a right to consider an employer's refusal to give information about its financial status. . . . And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim. . . . We agree with the Board that [such] a refusal . . . may support a finding of a failure to bargain in good
as to its application and use. And, if we return to the Insurance Agents' case, we may note that situation was quite similar there. In other words, the Justices apparently do not disagree on refusing to pin a per se label on the TILI tactic, although accepting it as one fact in the total picture, but do disagree in their views of the factual substantiality of this total picture for the purpose of finding a lack of good faith. The Board has seemingly followed this inconclusive approach when applying the statutes to the GE pre-bargaining TILI offer.

The Court of Appeals' Views

The Board's 1964 decision eventually came before the United States Court of Appeals for the Second Circuit which, late in 1969 directed enforcement; Judge Kaufman writing for himself and Judge Waterman (who also wrote a short concurrence), and Judge Friendly concurring and dissenting. TILI becomes more and more curious, however, with the wonderland of Trial Examiner-Labor Board-Second Circuit transformation becoming increasingly more difficult to unravel. The specific TILI insurance plan offered by GE, which the Trial Examiner had refused to find as a per se violation because of
the General Counsel's repudiation, the Trial Examiner had used as one evidentiary fact to support the overall charge of bad faith. Thereafter the Board nevertheless had ambiguously set it up as an independent holding without changing any finding of fact, simultaneously and additionally utilizing TILI to support the overall bad faith charge. Now, in the Second Circuit by Judge Kaufman not only used TILI as had the Board, but also to characterize the entirety of the GE approach. Boulwarism now became a second type of TILI. Judge Kaufman used the term TILI specifically to condemn the insurance plan offer, then generally in a second sense to characterize the entirety of GE's Boulwarism and condemn this under the overall bad faith charge. He also left TILI in a state of suspended animation, for the question whether the TILI insurance plan offer per se and independently is a violation of Section 8(a)(5) was never answered directly. Even on the overall bad faith charge Judge Kaufman equivocated, adopted ambivalent positions, and yet sought to save himself in his peroration.133

The court majority discussed two unfair labor practices. One it denominated “Overall Failure to Bargain in Good Faith;” the other, “Specific Unfair Labor Practices,” it divided into three parts, namely, the unilateral insurance proposal, the refusal to furnish information, and the bargaining directly with the locals.134 As to the insurance item, the previous analyses were not touched upon save most indirectly, and the court instead utilized “the purpose of” Section 8(d), as here applied, to find against GE. That purpose was that it “was designed to protect the status quo; it was to be used as a shield, not as a sword.”135 A “Specific Unfair Labor Practice” occurred, continued the opinion, when the original insurance proposal publicized by GE, was objected to by the union and nevertheless was thereafter unilaterally placed by the company before its employees. The cutting effect of this TILI offer within and without the union “seriously impaired” its “ability to function as a bargaining representative . . . [and] such [GE] conduct amounts to a declaration on the part of the Company [to all employees] that not only the Union, but the process of collective bargaining

133. See p. 339 infra.
134. Previously information and direct bargaining were used by the Examiner also as “evidences,” 150 N.L.R.B. at 193, and because they did not loom importantly in the analyses herein, they have not been discussed to any extent. On the information item, the Second Circuit majority held that “There can be no question that the information available would have assisted the Union here; GE committed an unfair labor practice in withholding it.” 418 F.2d at 753. On the direct bargaining item the majority supported the Examiner-Board findings (except for one incident). Id. at 756. The third judge agreed on these items as being violations, but rejected the finding on the TILI insurance plan and also on the free speech and overall bargaining violations. Id. at 764-65.
135. Id. at 747, referring to, and throughout this portion of the opinion, relying on, the Board's views in Equitable Life Ins. Co., 133 N.L.R.B. 1675 (1961).
itself may be dispensed with."  This inference was not weakened by the court's later statement that:

Although the Trial Examiner found that GE did not attempt to capitalize on the IUE's refusal to accept the personal accident insurance proposal, this case is not distinguishable from *Equitable*. The employer's attempt to use the Union's plight to its own advantage was not a determinative factor there. The dilemma created by an employer exists whether he uses it crudely or subtly; it is inherent in a take-it-or-leave-it bargaining approach. True, GE did not capitalize on the Union's refusal; but through its enrollment program late in June, and by the unavoidable controversy that the issue itself raised in Union ranks, the Company was able to profit from the situation without exploiting it outright. The rationale of the Board's *Equitable* rule reaches at least that far. Once it is clear that the party who disrupts the status quo cannot rely on section 8(d) to protect his conduct, then unilateral action over a mandatory matter [the TILI plan], joined to a refusal to bargain [i.e., conduct other than the TILI plan], represents a straightforward rejection of the collective bargaining principle in fact.

In effect a new judicial rationale was now adopted and utilized but once

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136. 418 F.2d at 748. The court's complete language is rather important:
[T]here are serious objections to permitting one party to an agreement unilaterally to hold out this type of inducement to the other. It creates divisive tensions within the Union; employees with hazardous occupations will favor the proposal, while those with routine tasks will object. Whichever way the Union moves, it loses ground with some part of its constituency. Union democracy is not furthered by permitting the Company to pick the Union apart piece by piece. The same point may be made where there are both union and non-union employees. If the Union refuses the benefit, then it may appear, at least in the short run, to have disadvantaged its members vis-à-vis non-members. Thus it may be forced to sacrifice long-term goals to avoid short-term dissatisfaction.

In the context of this case, where the Company's tactics seemed so clearly designed to show the employees that the Union could win them nothing more than the Company was prepared to offer, it is even more apparent that a unilateral offer—over which the Union may not bargain—diminishes the rewards and the importance of the bargaining at the end of the contract period. Thus the Union's ability to function as a bargaining representative is seriously impaired. Indeed, such conduct amounts to a declaration on the part of the Company that not only the Union, but the process of collective bargaining itself may be dispensed with.

*Id.* at 747-48. Judge Friendly disagreed with the time-lumping of the TILI proposal (see his formulation in text p. — supra), and desired to uphold the initial offer as "GE merely submitted a proposal and did this at a time when it had no duty to bargain at all." *Id.* at 766. He further pointed out that "the contract expressly permits" this. "The majority attempts to escalate the problems by suggesting that the course here followed would create 'divisive tendencies within the Union,' and even enable the 'Company to pick the Union apart piece by piece.' . . . These comments, unsupported by the record, are singularly inappropriate as applied to the [TILI] offer . . . ." *Id.*

137. For the type of violation involved, see note 148 infra.

138. 418 F.2d at 749. On the mandatory aspect the court earlier had stated "that insurance is a mandatory subject for collective bargaining, and the employer violates
again resulted in ambivalent determinations. One important question of fact immediately intruded, namely, at what point in time was the TILI insurance plan involved? Judge Kaufman's facts mentioned its publicity by GE prior to June 13th (enrollment to occur in July), with the union's strenuous objection to the company's failure to bargain on it. Judge Friendly emphasized that the proposal was submitted by GE "at a time when it had no duty to bargain at all." Both therefore discussed the pre-bargaining situation—or, at least, so it would appear. Judge Kaufman also used the phrase, "totality of circumstances," for which Judge Friendly expressed a "distaste." Next Judge Kaufman examined the overall violation as applied to "GE's bargaining stance and conduct, considered as a whole," i.e., Boulwarris. He felt that even the pre-bargaining TILI proposal could enter as evidence to show how and why the company violated the Act, e.g., the devastating and vicious outcome for the Union when the consequences inherent in the details of Boulwarris are followed through to their end. It is at this point that Judge Kaufman judicially adopted the Trial Examiner and Board's approach to formulate a judicial rationale, here applied within "the context of this case . . . ." But this overall concept, while using the term "take-it-or-leave-it," was not limited to the TILI insurance plan and, used in a second and different sense, was expanded to cover the entirety of Boulwarris. Later, in discussing GE's overall conduct, the Judge reiterated these views, decried by Judge Friendly, to substantiate this general bad faith violation.

section 8(a)(5) . . . by refusing to bargain over it. . . . He would, of course, also violate the Act if he unilaterally changed the conditions or terms of employment." Id. at 746. However, neither of these, as violations, was further discussed as such or was held to have occurred.

139. Id. Judge Kaufman's statement of facts at 742 is similar.
140. Id. at 766.
141. Id. at 756, 767, the term "distaste" was used by Judge Kaufman. However, by using "substantial evidence," Judge Friendly nevertheless aligned himself factually and legally with the majority.
142. Id. at 756.
143. Id. at 748.
144. Id. at 756-60. The two Judges also quibbled about the meaning and application of Judge Magruder's opinion in NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953). Judge Friendly stated that "The only standard of conduct set for GE by the Board's opinion is that a mix of the 'fair, firm offer' technique pursued to an unknown point X, plus a communications program pursued to an equally unknown point Y, plus a number of additional items, Z₁, Z₂, and Z₃, is proscribed. This already sufficient confusion is now compounded by the difference in my brothers' efforts at elucidation." 418 F.2d at 773. To which Judge Kaufman replied that Judge Magruder did not suggest that "desire not to reach an agreement" could be found, as the dissent suggests, by a clearly delineated series of steps, X₁, X₂, X₃, taken to "point Y, plus a number of additional items, Z₁, Z₂, Z₃." Far from being a devotee of the new math, he would have agreed with Learned
It is this Trial Examiner-Labor Board-Second Circuit rationale which permeates the entirety of their opinions and which sets the tone for their several holdings. But this creates problems of understanding, and Judge Friendly's objections are not inapropos, i.e., "[a]lthough both the Board and the majority here have been quite explicit in describing what they are not deciding, they are far less informative with respect to what they are. . . . While the lead opinion makes much use of the 'take-it-or-leave-it' phrase, it never defines this." Thus, was the original TILI insurance offer qua pre-bargaining tactic an independent violation per se? Judge Kaufman did not say yes or no. He first said that the GE unilateral offer and effectuating of a mandatory bargaining item was reprehensible in impaling the union on the horns of a dilemma from which it could not escape, and that this result was inherent in such TILI approach. He did not positively and clearly hold this to be a per se violation. Although absolving GE of any attempt to capitalize on the union's refusal, Kaufman felt that through the unavoidable consequences within and to the union, GE "was able to profit from the situation without exploiting it outright." He then took these Ossa-upon-Pelion inferences and held that, "joined to a refusal to bargain, [this] represents a straightforward rejection of the collective bargaining principle in fact." Why the joined "refusal to bargain," without more, was not sufficient for that conclusion was not discussed; why the TILI inherent dilemma was not likewise sufficient was also not discussed. Apparently both were required in order to find "a straightforward rejection . . . in fact"—which doesn't make sense. If a violation occurred without the TILI aspect, then such addition makes the violation more egregious but not more violative unless, and here is the nub, the words "in fact" imply that without the joining the separate violations would have had to be held to be per se ones or a combined legal conclusion, which the court did not care to do. In other words, the legal sorites created by the court was built upon implications and inferences, then its conclusion added to another one, all within the framework of its rationale, and which supposedly resulted in a violation "in fact" despite the disclaimers concerning other facts.

Hand that numbers, even more than words, "are utterly inadequate to deal with the fantastically multiform occasions which come up in human life." Id. at 761.

145. See id. at 762. See also text at note 167 infra.

146. 418 F.2d at 768.

147. Id. at 749.

148. On the basis of the opinion a contrary conclusion may also be urged, namely, that the majority did hold the TILI tactic per se bad. Support for this view may also come from Judge Kaufman's discussion of the bargaining charge. Inter alia he wrote, referring to Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944), that [the vice that Medo sought to avoid was the practice of undermining the authority of the union's bargaining representatives through direct dealings with
The majority opinion by Judge Kaufman later turned to GE's alleged overall failure to bargain in good faith, and while his treatment of this problem was initially ambiguous, he did somewhat clarify his rulings as he went along. The alleged failure to bargain, he said, was "the most troublesome and most vigorously contested of the charges;" it was "in addition to the three specific unfair labor practices . . . [and was] compounded like a mosaic of many pieces, but depending not on any one alone. They are together\textsuperscript{149} to be understood to comprise the 'totality of the circumstances.'"\textsuperscript{150} While certain employer conduct, continued Judge Kaufman, could be per se violations, and so no overall (totality) violation need therefore have been found, the Board nevertheless had "chose[n] to find" both. And it also had found that the "bargaining stance and conduct [of GE], considered as a whole, were designed to derogate the Union in the eyes of its members and the public at large. This plan had two major facets: first, a take-it-or-leave-it approach ('firm, fair offer') to negotiations in general . . . and second, a communications program.\textsuperscript{151}

The majority therefore now utilizes the full term of "take-it-or-leave-it"

the locals or employees they represented. Such tactics are inherently divisive; they make negotiations difficult and uncertain; they subvert the cooperation necessary to sustain a responsible and meaningful union leadership. The evil, then, is not in offering more. It is in the offer itself. 418 F.2d at 755.

This rationale jibes with that used in the discussion of the TILI plan, and consistency here may therefore permit the contention that "The evil, then, . . . is in the offer itself," applies likewise to TILI. However, Medo's majority opinion by Chief Justice Stone (Black and Douglas were then on the bench also) was careful in stating that the charge of "ignoring the union . . . by negotiating with its [the employer's] employees concerning wages . . . and by inducing its employees to abandon the union . . . violated § 8(1) [today's § 8(a)(1)] of the Act." 321 U.S. at 684. "Quite apart from" this violation, it was also a like Section 8(a)(1) violation "to induct them [the employees] by the grant of wage increases, to leave the union." Id. at 685. Section 8(a)(5) did not apply or, at least, was not mentioned or specifically held to apply. Additionally, however, the Chief Justice refused to permit the employer to disestablish the union through such unfair labor practice and then refuse to bargain with it as the employees' representative, as this was "an aggravation of its unfair labor practice in destroying the majority's support of the union, and it was a violation of §§ 8(a)(1) and (5) of the Act." Id. at 687.

149. Does this term mean that the three specific unfair acts are to be joined to and with the mosaic of many other pieces, or does the term refer only to the pieces of the mosaic? From what follows it would appear that the former is meant.

150. 418 F.2d at 756, citing the Insurance Agents' and Truitt cases, discussed above, with Judge Kaufman stating Judge Friendly was not receptive to the "totality of circumstances" phrase. However, Friendly had "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,'" citing NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953). This Judge Friendly felt to be a definite standard. 418 F.2d at 767.

151. 418 F.2d at 756. In both facets, said the court, the union's "powerlessness and uselessness . . . to its members" were pictured, and GE was portrayed "as the true defender of the employees' interests, further denigrating the Union, and sharply curbing
to refer to first, the insurance plan alone, and second, to the overall preparation, research, etc. by GE which culminated in its "firm, fair offer" and which it now publicized,—Boulwarism. The quoted language and the preceding bifurcation do not, however, completely square with all that has preceded. E.g., the TILI tactic and language as such had been limited throughout to the insurance plan whereas now it was applied to "negotiations in general," the "firm, fair offer" approach had nevertheless been factually breached and several minor concessions made. Nevertheless, Judge Kaufman was correct in next stating that the Board had relied on the three specific practices and on several other specific instances to show the overall (totality) bad faith violation, now instancing the TILI insurance plan as an example. But while the Judge may then have erred slightly in replying to one of GE's arguments, he recovered sufficiently to point out that TILI's legality nevertheless permitted its use as "some evidence of lack of good faith;" so that, in conjunction with, e.g., the refusal to furnish information, its total "conduct . . . was all of a piece."

It is at this point that the opinion beings to detail the general, overall, "totality of circumstances" conduct of GE, even though conclusory terms

the Company's ability to change its own position." Id. See also notes 158 and 164 infra.

Judge Waterman termed this communications program GE's "dominant wrong." 418 F.2d at 764. He also stated that "to some extent" the evils resulting from "a firm fair offer" doubtless exist, "even when there is no company publicity of the kind here involved. However, it seems clear that publicity tends to amplify these undesirable tendencies to the point that, in a case such as this one, the amplification can well be construed to have been activated by a company motive not to bargain in good faith." Id.

152. These were discounted, however, by the majority, see note 157 infra.
153. 418 F.2d at 756.
154. GE argued that Equitable Life Ins. Co., 133 N.L.R.B. 1675 (1961) had not been decided in 1960 and therefore its acts could not be characterized in the light of this decision. The court responded "that the conduct, although not yet proscribed, had not been judged proper either. . . . In any event, parties who make a practice of stretching the statutory fabric to a breaking point should not be surprised when the cloth gives way." 418 F.2d at 749.
155. Id. at 757. But then why did he continue:

Given the effects of take-it-or-leave-it proposals on the Union, already set forth in our review of the specific unfair labor practice charges, the Board could appropriately infer the presence of anti-Union animus, and in conjunction with other similar conduct could reasonably discern a pattern of illegal activity designed primarily to subvert the Union. (Emphasis added).

Id. Confusion is heightened when one goes into the above language. First, the "effects" involved factual consequences, which makes it impossible for a TILI offer to be viewed in isolation or on a per se basis. Second, "proposals" brings up a non-per se situation, so that a context, or totality of circumstances, results. Third, Judge Kaufman's previous analysis of the "specific" TILI plan was on a per se basis. Fourth, "appropriately infer" here must refer to more than one act, and yet "in conjunction" with the inference from this grouping must imply that such grouping alone could not support a bad faith ending.
156. Id.
are used, to disclose why it was upholding the bad faith charge and finding. The publicity campaign was also excoriated because it not only affected the union adversely and detrimentally, threatening its very existence, but “[t]he most telling effect . . . [was] on GE itself.” It had boxed itself in because “its communications approach determined its take-it-or-leave-it [overall] bargaining strategy [i.e., Boulwarism]. Each was the natural complement of the other; if either were substantially changed, the other would in all probability have to be modified as well.” The majority’s philosophy now emerges. The court, the Board and the Examiner all adopt and use a similar, if not identical, approach to Boulwarism. Their outlook appears to be compounded of a pragmatic-realism with a dash of soft determinism, holding GE to a standard of labor conduct envisaged as comporting with congressional and judicial views, and emphasizing the company’s ability to change to these concepts. This is disclosed in two steps.

The majority’s first step is to quote that the congressional purpose of encouraging productive bargaining requires the parties to make “‘a serious attempt to resolve differences and reach a common ground,’ an effort inconsistent with a ‘predetermined resolve not to budge from an initial position.’” Then it characterizes these as “not simple tests; they will not be re-

157. “GE displayed a patronizing attitude towards Union negotiators inconsistent with a genuine desire to reach a mutually satisfactory accord.” Its responses to “detailed proposals were vague and uninformative” and it offered lectures instead. It refused to estimate the total package it would consider reasonable although it had publicized its proposal. It “occasionally took untenable and unreasonable positions and then defended them, with no apparent purpose other than to avoid yielding.” The “most flagrant example occurred in setting the date for the beginning of pension and insurance benefits . . . GE vacillated back and forth, chose inconsistent and confusing explanations at random . . . .” Much more is related, including the period after “it had become apparent that the Union would have to end its abortive strike and concede to GE’s terms . . . .” The contention that GE made so many concessions that the charges could not be said to have been proven was rejected because “[i]n close examination, however, few of the alleged concessions turn out to have a great deal of substance.” Id. at 757-58.

158. Id. at 759. “The Company, having created a view of the bargaining process that admitted of no compromise, was trapped by its own creation. It could no longer seek peace without total victory, for it had by its own words and actions branded any compromise a defeat.” Id. at 760. And later the court wrote, “By its communications and bargaining strategy it in effect painted itself into a corner on all bargainable matters.” Id. at 762.

159. Judge Kaufman wrote, of Judge Magruder’s opinion in Reed & Prince that Magruder “was careful in his opinion not to be misled, as our dissenting brother appears to be, by words that seem on the surface quite simple but in practice require a highly pragmatic and individualized interpretation.” Id. at 761.

160. Judge Friendly thought this difficult, if not impossible, because of ambiguities and confusion in the orders and opinions. Id. at 768, 773-74.

161. Id. at 762, first quoting from the Insurance Agents’ case then from the Truitt case (Frankfurter, J., concurring).
solved by formular incantations." The difficulty "arises out of the herculean task of legislating a statement of mind," and it is compounded by the analogous one of adjudicating it; the Board so did, however, and, "on the basis of substantial evidence we agree." Judge Kaufman's second step is expressed in these words: "A pattern of conduct by which one party makes it virtually impossible for him to respond to the other—knowing that he is doing so deliberately—should be condemned by the same rationale that prohibits 'going through the motions' with a 'predetermined resolve not to budge from an initial position.'"

These two steps illustrate the premises, reasoning, and approach of, and the conclusions reached by, the majority. The premises are the congressional intent as interpreted (by the quotations); the reasoning involves the substantial evidence rule, not really any per se basis; the approach is to seek for a "totality of circumstances" or facts, or a "pattern of conduct," which emanates from the (substantial) evidence; and the conclusions include GE's self-boxing or painting of itself into a corner, via publicity, "on all bargainable matters," i.e., the general TILI approach to and conduct of bargaining which is contradictory of the above premises and interpretation. The court's overall view results in the following:

We hold that an employer may not so combine "take-it-or-leave-it" bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken. It is this specific conduct that GE must avoid in order to comply with the Board's order, and not a carbon copy of every underlying event relied upon by the Board to support its findings. Such conduct, we find, constitutes a refusal to bargain "in fact." . . . It also constitutes, as the facts of this action demonstrate, an absence of subjective good faith, for it implies that the Company can deliberately bargain and communicate as though the Union did not exist, in clear derogation of the Union's status as exclusive representative of its members under section 9(a).

In other words, the majority states that the overall TILI conduct, plus the

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162. "Sadly, neither will they be so precise that one will always know the exact limits of what is allowed, and what forbidden—but this is a problem hardly unknown in the law or to judges." Id.
163. Id.
164. Judge Waterman felt that while GE could insist on its original offer as the best (see note 169, infra), and certain of its other described conduct "do not indicate anything except that GE made and stood by what it conceived to be a fair, firm offer," still, "[w]hat makes these practices unfair is GE's 'widely publicized stance of unbending firmness,' . . . [as t]wo distinct evils derive from such publicity." 418 F.2d at 764. The first evil was to make GE "seal itself" and the second "that the union is superfluous."
165. Id. at 762-63. Judge Friendly nevertheless felt no combination of specific conduct rejection and specific compliance requirement could be found, and therefore the order and opinions were ambiguous and confusing.
publicity, equals an inability to bargain “in fact” and therefore is, as such, a general and overall violation of Section 8(a)(5). Further, from this factual violation an inference of a subjective lack of good faith flows, although no express holding is made that another violation of the section additionally occurs. If these statements are correctly put, then the original and specific pre-bargaining TILI plan is not being definitively held to be a per se violation, despite Judge Kaufman’s general language, save that insofar as it is included within a context it partakes of the overall violation. This seems to be reaffirmed negatively, as in the following quotation by which Judge Kaufman attempts to be careful as to “any misunderstanding of our holding . . .” and therefore rejects three of them:

We do not today hold that an employer may not communicate with his employees during negotiations. Nor are we deciding that the “best offer first” bargaining technique is forbidden. Moreover, we do not require an employer to engage in “auction bargaining,” or, as the dissent seems to suggest, compel him to make concessions, “minor” or otherwise.

The differences in this negative language may be significant. On the first item Judge Kaufman does not “hold;” as to the second, he is not “deciding;” and as to the third, he does not “require” or “compel.” The second is analogous to, if not, the specific and original TILI technique or tactic on the insurance plan, and Judge Kaufman is not “deciding” that it is per se forbidden, probably because of the Insurance Agents’ caveat; but does not the first clause of the third sentence, i.e., not requiring auction bargaining, suggest the decision? For if an offer is the “best” one can make, by definition it precludes any other although the coin-face also remains, that trading one “best” for another’s “best,” or any such type of conduct, still remains feasible. Although one may question that if this negative language and this writer’s reasoning give this conclusion, why does Judge Friendly argue as he does? Separately, the second time-aspect of TILI i.e., during the bargaining stage, may likewise be concluded not to have been definitively held a per se violation because it was disclaimed as such by the Trial Ex-

166. E.g., thereby derogating from the union’s exclusive representation rights under National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1964).
167. 418 F.2d at 762. The first has to do with free speech and Section 8(c). See note 131 supra. The third’s second disjunctive is conceded; it is the first clause which is here referred to. See also note 198 infra.
168. See text at note 104 supra.
169. So that on this coin-face aspect the first clause of the third sentence may not so bolster the decision implied above. Judge Waterman, concurring, also held that “a company is entitled to insist on the terms of its original offer if it believes that the union can be made to accept that offer.” 418 F.2d at 764. But see note 164 supra.
170. See note 136 supra.
aminer; the Board never overruled this finding, and the Court did not discuss this as a separate item.

However, the second face of TILI, i.e., the use of the phrase by Judge Kaufman to characterize the entirety of GE's technique, position, practice, and offer, and thereby to condemn such total conduct as an overall violation, must be factually sustainable in particular and in general. This is Judge Friendly's major quarrel with the majority. For, as already discussed, this second TILI face implies that the total GE offer was factually put on a take-it-or-leave-it basis (in conjunction with the GE communications program). This, however, the Trial Examiner and Labor Board opinions disclosed was not so, and Judge Friendly also pointed this out. Judge Friendly therefore did two things, first, questioned Judge Kaufman's factual basis, i.e., did GE actually place itself in such a TILI position, and secondly, rejected the contention that GE's communications program was violative of the Act. He therefore defined the term as he saw it, later feeling that we must "rid ourselves of the prejudice inevitably engendered by this catch-phrase," and then, as to the first above aspect, commented:

To go further and say that a party, whether employer or union, who, after listening to and considering such proposals, violates §8(a)(5) if he rejects them because of confidence in his own bargaining power, would ignore the explicit command of §8(d) . . . . Although the taking of such a hard position may be unattractive, the attitude is one which the law allows an employer or a union to take . . . [so] that an employer is not to be condemned for "take-it-or-leave-it" bargaining when, after discussing the union's proposals and supporting arguments, he formulates what he considers a sufficiently attractive offer and refuses to alter it unless convinced an alteration is "right."

Judge Friendly also rejected the self-boxing view of the majority that GE

171. 418 F.2d at 756.
172. Id. at 769. "Moreover, I find no substantial evidence that GE got itself into the predicament the majority depicts. The best evidence to the contrary consists of the changes the Company in fact made." Id. He spent the balance of the paragraph giving illustrations, and then commented: "The union's appraisals of the value of these concessions at the time is . . . impressive . . . . I find nothing on the other side substantial enough to outweigh this evidence that GE remained able to adopt changes it thought to be 'right.'" Id. at 770. He commented that "we could not uphold it [the Board's order] on that basis [that single offer bargaining is a violation] even if the evidence supported [such] a finding . . . , which it does not . . . . The lead opinion rightly does not do this, and the concurring opinion expressly disclaims any such view," Id. at 773 n.9. However, the two other opinions combined this with the communications-boxing aspect to hold the result was a violation.
173. As already seen, the combination was required by Judge Kaufman (and the Board) in order to make up the general violation.
174. See note 25 supra.
175. 418 F.2d at 769.
176. Id. at 768-69.
painted itself into a corner by its publicizing of its firm, fair offer and consequently could not retreat without losing face, regardless of the requirements of good faith bargaining. He inquired whether a union (or employer), obtaining a favorable contract from one employer (or with one union) and broadcasting it would take no less from (or give more to) others, thereby violated the Act. Factually, he found "no substantial evidence that GE got itself into the predicament the majority depicts. The best evidence to the contrary consists of the changes the Company in fact made."\textsuperscript{177} As to the second above aspect, that is, the communications program, he felt that Section 8(c), the so-called free speech section of the Act, covered the publicity and other details, which were not so egregiously promulgated, and therefore no general bargaining violation could be predicated upon it alone or in combination.\textsuperscript{178}

Aside from his preceding objections, Judge Friendly also inveighed against the details of what he felt to be a generally obscure and unenforceable order, especially as rendered basically time-innocuous.\textsuperscript{179} On this last he pointed to the "two further negotiations, in 1963 and 1966 . . . [and that] now in progress," and felt that "many of the principles in the 1960 negotiations are no longer on the scene and it is scarcely possible that the company's actions are so nearly parallel to those of 1960 . . . ."\textsuperscript{180} In this last the Judge was correct, for the 1969-70 bargaining, with the contract expiring, as had the others, on October 26th, disclosed the following: The first GE offer was made on October 7, 1969, although the negotiations had begun two

\textsuperscript{177} Id. at 769, then giving the various changes at length and commenting that "The Union's appraisals of the value of these concessions at the time is more impressive than the depreciation of them nine years after the event." Id. at 770. He felt that "nothing on the other side [is] substantial enough to outweigh this evidence that GE remained able to adopt changes it thought to be 'right.'" Id.

\textsuperscript{178} Id. at 772-73, feeling that GE's publicized "policy not to give more simply to avert a strike" was not a Section 8(a)(5) violation, and later feeling that "Congress, when it enacted § 8(c), determined the dangers that free expression might entail for successful bargaining were a lesser risk than to have the Board police employer or union speech." Id.

\textsuperscript{179} Judge Friendly was here taking an overall view of the picture he found presented, but this ignored the Examiner's (and Board adopted, and now Court enforced) report requiring affirmative action by GE, namely, that GE offer reinstatement to employees and make whole others for any loss of pay suffered due to GE's discrimination, 150 N.L.R.B. at 286. Without finding of some unfair labor practice suitable for these purposes of affirmatively so ordering, this branch of the order might have had to fall, e.g., Judge Friendly was willing to grant enforcement of the order as to the required decertal paragraphs involving information and preventing GE from bargaining directly with the locals. \textit{Quaere:} would these support a reinstatement order and back-pay award? \textit{See M. FORKOSCH, LABOR LAW §§ 517, 522-23} (2d ed. 1965).

\textsuperscript{180} He was referring to a court order in the 1969-70 negotiations, found in \textit{General Elec. Co. v. NLRB}, 412 F.2d 512 (2d Cir. 1969). He continued "that an order in
months earlier, and this offer was “emphasized” by the GE officials as “a ‘whole offer’ with nothing held back for later concessions.” A nationwide strike occurred, with the union filing charges with the Labor Board and claiming that the company’s conduct was now the same as in 1960. GE kept its plants open, both sides engaged in large-scale publicizing, advertising, and communications, and a national boycott against GE products was initiated. By the seventh week of the strike both sides exchanged further offers. GE offered specific wage increases in the three-year contract it had proposed instead of wage-reopening clauses in the second and third, and instead of a 30-month contract the union offered a 16-month one. The (eventually successful) federal mediators stepped in, and by the thirteenth week an unidentified source reported that GE had “indicated a willingness to make a further adjustment in its last economic proposal. But union officials were said to be pressing for other concessions in such areas as union security, arbitration and pensions.”

The fourteenth week of the strike found additional offers and counter-
offers sweetening the pot, e.g., the union agreed to a 40-month contract with GE upping its fringe benefits. The mediating efforts resulted in: Success by the union in breaching the overall concept of Boulwarism, i.e., the initial GE emphasized “whole offer,” with nothing held back for later horse-trading, had been bettered significantly in several respects.

Both sides had engaged in very “hard bargaining,” but in bargaining nevertheless, regardless of initial language and positions, so that adjusting, compromising, and reconciling had occurred. Both sides had also indulged in mass communicating, advertising, and other forms of publicity directed to the public and the employees.

The general details found in the 1960 concept of Boulwarism, e.g., Company research and preparation of positions throughout the year, listening to Union proposals and making “right” adjustments, placing a proposal on the table, continually publicizing all of this, and then maintaining a sticky position on such offer, was still an overall feature which undoubtedly could be continued provided “sticky” was not translated into “unyielding” or “unbending” and there was a factually significant modification in and of the initial offer. Boulwarism’s new style of factually unyielding bargaining, even though GE still felt its first and best and only offer was completely fair to all parties and employees and the result of objective research and subjective considerations, changed to a new albeit hard “traditional” type of give-and-take bargaining. GE will, while continuing all other aspects of Boulwarism but regardless of what should be the first offer, now have it purposely deflated, so as to meet inflated union demands, and so arrive with the union at a position between the two. This obviously means that the key feature or end result of procedural Boulwarism has capitulated. TILI in its general and overall aspects, as condemned by Judge Kaufman, has been laid to rest.

Questions remain concerning a specific and particular TILI proposal, e.g., the insurance plan discussed above in both its pre-bargaining and its bargaining, time aspects. This writer’s opinion is that such particular TILI, in a context free of or at least not necessarily tied to and with the
Boulwarism

hard-and-fast determined second face of TILI now laid to rest, will not necessarily and on a per se basis be denounced, but that the burden of proof to disclose such a per se violation will perhaps rest upon the (Union) General Counsel. Further, even such a limited use of TILI is not to become standardized throughout industry, nor is the New Boulwarism to become a pattern for bargaining, because in both situations the factual and objective background of research and publicity, as well as the subjective willingness and financial ability of the company to take a strike if its hard bargaining fails, are necessary and determining features which must be present. Today, in the light of Old Boulwarism's capitulation, so that its general and overall TILI approach to and the bargaining itself (i.e., its second face) has been supplanted by the New Boulwarism, GE's overall and modified (TILI) approach may come within the "economic pressure tactics" seemingly, but not quite, upheld in the Insurance Agents' case which refused to permit the Labor Board to control substantively. Nevertheless, will the New Boulwarism now be held to be without the condemnation of the some-


192. See, e.g., pp. 313-15 supra.

193. The additional observation may be made that where large-scale employers or unions are found, or industry-wide bargaining is engaged in, there may well be judicially required and applied in some manner (e.g., by injunctions) concepts found expressed by the Court in Detroit & T.S.L. R.R. v. United Transp. Union, 396 U.S. 142 (1969), even though there involved were the provisions of the Railway Labor Act of 1926, ch. 347, 44 Stat. 577, 45 U.S.C. § 151-88 (1964).

194. On pertinent language here see text and notes 23, 127 supra. The IUE has suggested that Boulwarism is today dead, but the IUE does not make the distinction here drawn between the "old" and the "new."

195. See text and notes 101-10, 115 supra. On the publicity in general see note 19 supra.

The courts and the Board have almost uniformly adhered to the generality expressed in Section 8(d), that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." See, e.g., NLRB v. Insurance Agents' Int'l, 361 U.S. 477, 485-87 (1960); M. Forkosch, Labor Law §§ 432 (2d ed. 1965). See also Forkosch, Comment on "The Myth of 'Free' Collective Bargaining", Symposium on Labor Relations Law 244-49 (R. Slovenko ed. 1961). However, Section 10(c) authorizes the Board to order a violating party "to take such affirmative action . . . as will effectuate the policies of this Act. . . ." Under this power the Board's remedial orders have been rather broad, albeit subject to judicial review, and have included, e.g., directions to resume a discontinued operation. M. Forkosch, Labor Law §§ 820-21 (2d ed. 1965). However, in United Steelworkers v. NLRB, 363 F.2d 272, 276 (D.C. Cir.) cert. denied, 385 U.S. 851 (1966) the court faced a situation where the company "had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues checkoff." A specific order to it at that time so to agree was not necessary; seven months later the court clarified its earlier views and remanded to the Board, saying inter alia, that Section 8(d)'s language did not prohibit the Board from ordering a flouting company "to make meaningful and reasonable counteroffers, or indeed even to make a concession. . . ." Thus the Board could order the granting of a checkoff "in return for a reasonable concession by the union on wages or insurance—the two issues besides checkoff that remained in dispute . . . [or even] in an appropriate case . . . simply order the company to grant a check-
what strong language used by Judge Kaufman. On the new facts and on the Judge's negating language as well as Judge Friendly's pertinent and now-applicable views, apparently this question should be answered affirmatively but, depending on a different or new rationale, may be answered negatively.

off." United Steel Workers v. NLRB, 389 F.2d 295, 299-300 (D.C. Cir. 1967). The majority then discussed the freedom of contracts concepts implicit in Section 10(d) and concluded that the checkoff here "is at most a minor intrusion on freedom of contract." Id. at 302. Thereafter the Board's supplemental decision and order directed the company to grant a checkoff, without further ado, which the court of appeals enforced. On certiorari the Supreme Court reversed and held against the Board, sub nom. H.K. Porter Co. v. NLRB, 90 S. Ct. 821 (1970).

196. See text at note 165 supra.
197. I.e., the new methods do not result in an "unbending firmness" or TILI overall bargaining.
198. See text accompanying and following note 167 supra. It may be observed that all opinions analyzed, and especially the majority ones, have a propensity to specificity in what they are not deciding but an imprecision in what they are deciding.
199. If not previously applicable, on which see text accompanying and following note 172 supra.
200. A friend in a responsible position with the NLRB, after reading this article has commented:
One of the difficulties in this labor relations area, as in many others, suggests the Holmesian posture about experience, rather than logic, shaping the law. I am increasingly of the view that complex problems in labor relations and in other areas of socio-economic relationships are not necessarily reducible to precise logical components and that such a reduction even if achieved dictates obvious and correct answers. Perhaps—I do not feel ready to accept the premise, Borg-Warner [NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958)] was incorrectly decided. Perhaps "good faith" in a contest of economic muscle is a weak crutch for resolution of economic disputes.