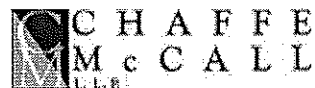


**A PRIMER/REFRESHER: THE TECHNICAL ASPECTS
OF THE NLRA SECTION 8(D) DUTY TO BARGAIN**

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A Primer/Refresher: The Technical Aspects of the NLRA § 8(d) Duty to Bargain

I. Introduction

This Paper is devoted to the technical aspects of Section 8(d) of the National Labor Relations Act (“NLRA”), and the good-faith-bargaining obligations it imposes upon employers and unions alike. While the language of Section 8(d) appears relatively straightforward, courts and the National Labor Relations Board (“the Board”) have extensively construed the statute’s requirements, and these decisions provide crucial guidance to construction employers and unions on the nuances of their respective obligations with respect to bargaining.

To begin, this Paper covers the fundamentals of Section 8(d). It then examines key aspects of the statute and the relevant obligations imposed upon employers and unions. It next distinguishes between the mandatory subjects of bargaining to which Section 8(d) applies and all other subjects of bargaining to which Section 8(d) does not technically apply. The Paper then examines the requirement and limits of “good faith,” which is explicit in this statutory duty to collectively bargain. Next, the Paper analyzes the correlative duty that Section 8(d) imposes upon employers and unions to furnish certain information to each other upon request and the relevant limitations upon this duty. The Paper next examines conduct by parties that may violate the obligations imposed by Section 8(d), the consequences of such violations, and the procedure which an employer or union must follow to complain of such violations. Finally, this Paper concludes with a discussion of Section 8(d)’s sometimes overlooked notice requirements as well as brief overview of recent legal developments regarding the duty to collectively bargain in good faith pursuant to Section 8(d).

II. Section 8(d) of the NLRA

In 1935, Congress passed the Wagner Act, thereby enacting the original version of the National Labor Relations Act. The Act contained section 8(5), now codified as section 8(a)(5), which first introduced an employer’s duty to collectively bargain with the representative of its employees.¹ In 1947, Congress enacted amendments to the NLRA, often referred to as the Taft-

¹ National Labor Relations Act, § 8(5), 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 158(a)(5) (1982) (as amended)).

Hartley Amendments.² These amendments included Section 8(d) of the NLRA, which further elaborated upon the duty to collectively bargain and designated certain subjects that should be addressed in the collective bargaining process.³

Section 8(d) of the NLRA, in relevant part, provides that the duty to collectively bargain under the Act means:

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession⁴

The NLRA imposes this duty to collectively bargain upon both employers and unions equally. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with his employees or their representatives.⁵ Likewise, Section 8(b)(3) requires unions to bargain collectively with employers.⁶

The language of Section 8(d) and the obligations it imposes are mandatory upon employers and unions in all industries, including the construction industry. Collective bargaining in the construction industry can be particularly complex for a number of reasons. First, the bargaining structure in the industry can differ depending on the geographic region.⁷ Similarly, the geographic mobility of contractors within the construction industry can complicate the bargaining structure.⁸ Moreover, the variety of bargaining agreements within the construction industry can also make the process more complicated.⁹ Despite these complexities and differences in bargaining, Section 8(d) imposes certain uniform obligations upon construction employers and construction unions. An employer and union must meet and confer at reasonable times.¹⁰ An employer and union must also bargain in “good faith.”¹¹ These

² Labor Management Relations Act, 61 Stat. 140 (1947).

³ See Labor Management Relations Act, 61 Stat. 140 (1947); 29 U.S.C. § 158(d).

⁴ 29 U.S.C. § 158(d).

⁵ 29 U.S.C. § 158(a)(5).

⁶ 29 U.S.C. § 158(b)(3).

⁷ Arthur B. Smith, Jr., CONSTRUCTION LABOR RELATIONS 3 (1984).

⁸ *Id.*

⁹ *Id.* at 7.

¹⁰ 29 U.S.C. § 158(d).

¹¹ 29 U.S.C. § 158(d).

obligations apply to the bargaining subjects of “wages, hours, and other terms and conditions of employment[.]” but do not require employers and unions to accept any proposal, make any concession, or reach any agreement.¹² Despite legislative efforts to change the structure of bargaining in the construction industry – such as the Construction Industry Collective Bargaining Bill which was passed by Congress in 1975 but vetoed by President Ford – construction employers’ and unions’ obligations under Section 8(d) persist to this day.¹³ While the language of Section 8(d) appears to be relatively straightforward, courts and the Board have extensively construed these requirements.

III. Subjects of Bargaining

The most frequent application of Section 8(d) to the construction industry involves the delineation of the subject matters of collective bargaining into those that are governed by the requirements of Section 8(d) – mandatory subjects – and those that are not governed by the requirements of Section 8(d) – permissive and illegal subjects.¹⁴ By its plain language, Section 8(d) applies only to the mandatory subjects of “wages, hours, and other terms and conditions of employment.”¹⁵ However, Section 8(d) does not further specify with any particularity which subjects fall within each category. Nor does Section 8(d) specify which subjects are excluded from these categories. As the Supreme Court noted, “Congress deliberately left the words ‘wages, hours, and other terms and conditions of employment’ without further definition, for it did not intend to deprive the Board of the power further to define those terms in light of specific industrial practices.”¹⁶ This legislative ambiguity has forced courts and the Board to interpret this language and construe the scope of the duty to bargain by balancing the interests of labor and management on a case-by-case basis.¹⁷

The standard for distinguishing between subjects of bargaining that fall within Section 8(d)’s requirements and subjects of bargaining that do not was first established by the United

¹² 29 U.S.C. § 158(d).

¹³ For further discussion of the Construction Industry Collective Bargaining Bill, see Arthur B. Smith, Jr., CONSTRUCTION LABOR RELATIONS 7 (1984).

¹⁴ Smith, *supra* note 7, at 33 (“The legal rules having the most frequent application to collective bargaining in the construction industry are those governing delineation of the subject matters of bargaining into mandatory, permissive (nonmandatory), or illegal categories.”).

¹⁵ 29 U.S.C. § 158(d).

¹⁶ *First Nat’l Maintenance Corp. v. National Labor Relations Board*, 452 U.S. 666, 675 (1981).

¹⁷ Nicholas A. Ashford & Christine Ayers, 62 NOTRE DAME L. REV. 810, 815 (1987).

States Supreme Court in *National Labor Relations Board v. Wooster Div. of Borg-Warner Corp.*¹⁸ In *Borg-Warner*, the Court examined a charge that management had breached its duty to bargain by negotiating to impasse over two contractual clauses.¹⁹ The first clause required a secret-ballot vote of all employees, union and nonunion, on the company's last, best, and final proposal, before the union could strike.²⁰ The second clause recognized the union's local affiliate instead of International Union (which had been certified by the National Labor Relations Board as the employees' exclusive bargaining agent) as the bargaining representative.²¹ The union's negotiators declared that the employees would accept no agreement that excluded International Union as a party.²²

In affirming the Board's decision that these specific managerial proposals were violations of the employer's duty to bargain, the Court distinguished between the subjects of collective bargaining specifically stated in Section 8(d) and all other matters.²³ Specifically, after examining the duty to collectively bargain pursuant to Sections 8(a)(5) and 8(d), the Court held that "[t]he duty is limited to those subjects [of "wages, hours, and other terms and conditions of employment"], and within that area neither party is legally obligated to yield. . . . As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree."²⁴

Thus, the Court held any subject falling within "wages, hours, and other terms and conditions of employment" to be a "mandatory" subject of bargaining.²⁵ While the parties are not obligated to agree on mandatory subjects of bargaining, they are obligated to meet and confer in good faith and to seek to reach an agreement. Failure by either management or labor to bargain over a mandatory subject is an unfair labor practice under section 8(a)(5).²⁶ The Court further held that subjects outside of "wages, hours, and other terms and conditions of employment" were merely "permissive" subjects of bargaining and did not fall within Section 8(d)'s requirements.²⁷

¹⁸ 356 U.S. 342 (1958).

¹⁹ *Id.*

²⁰ *Id.* at 345-36.

²¹ *Id.* at 345.

²² *Id.*

²³ *Id.* at 349.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 348.

²⁷ *Id.* at 349.

Because the obligation of employers and unions to collectively bargain in accordance with Section 8(d) only applies to certain mandatory subjects of bargaining – and not permissive or illegal subjects of bargaining – the issue has been at the center of much litigation.²⁸ After the seminal *Borg-Warner* decision, courts and the Board began categorizing union demands to bargain as mandatory or permissive on a subject-by-subject basis.²⁹

A. Mandatory

As illustrated in *Borg-Warner*, the obligation of construction employers and unions to bargain in accordance with Section 8(d) requires each party to bargain in good faith with the other party over *mandatory* subjects only.³⁰ Generally, mandatory subjects include “only issues that settle an aspect of the relationship between the employer and the employees.”³¹ However, neither Section 8(d) nor the *Borg-Warner* court specified with any particularity which subjects of bargaining are to be considered mandatory subjects. The language of Section 8(d) merely states that mandatory subjects of collective bargaining are “wages, hours and other terms and conditions of employment.”³² The terms “wages” and “hours” are relatively straightforward, but the last phrase – “other terms and conditions of employment” – has been much harder to define. This intentional statutory ambiguity has forced courts and the Board to judicially interpret the phrase anew based upon the fact of each specific dispute.

In 1964, the United States Supreme Court in *Fibreboard Paper Products Corp. v. National Labor Relations Board* examined the issue of contracting-out and offered some guidance as to which subjects are subject to collective bargaining.³³ Examining the general statutory language of “conditions of employment,” the Supreme Court construed it as follows:

[M]ost obviously the various physical dimensions of his working environment. What one’s hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one’s employment. There are other less tangible but no less important characteristics of a person’s employment which might also be deemed

²⁸ Smith, *supra* note 7, at 33.

²⁹ Ashford & Ayers, *supra* note 17, at 815.

³⁰ Smith, *supra* note 7, at 33.

³¹ *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971).

³² 29 U.S.C. § 158(d).

³³ 379 U.S. 203 (1964).

'conditions'—most prominently the characteristic involved in this case, the security of one's employment.³⁴

The *Fibreboard* Court ultimately held that an employer's decision to contract-out labor was a mandatory subject of collective bargaining because it was a "term or condition of employment" under Section 8(d).³⁵

Other mandatory subjects of collective bargaining that may be relevant in the construction industry include, but are not limited to: freedom from discriminatory discharge,³⁶ seniority rights,³⁷ the imposition of a compulsory retirement age,³⁸ the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment,³⁹ grievance procedures,⁴⁰ arbitrations,⁴¹ workloads,⁴² incentive plans,⁴³ pension plans,⁴⁴ safety,⁴⁵ no-strike clauses,⁴⁶ profit-sharing plans,⁴⁷ layoffs and recalls,⁴⁸ discharge,⁴⁹ company housing,⁵⁰ and meals and discounts.⁵¹

The obligation to collectively bargain over these mandatory subjects does not require that a final agreement be reached.⁵² Either party may suspend and, ultimately, end negotiations by refusing to agree on one or more mandatory subjects.⁵³ In fact, assuming other criteria are

³⁴ *Id.* at 222 (Stewart, J., concurring).

³⁵ *Id.* at 215.

³⁶ *National Labor Relations Board v. Bachelder*, 120 F.2d 574 (7th Cir. 1941); *see also National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350 (1940).

³⁷ *National Labor Relations Board v. Westinghouse Air Brake Co.*, 120 F.2d 1004 (3d Cir. 1941).

³⁸ *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247 (7th Cir. 1948).

³⁹ *Fibreboard Paper Prods. Corp. v. National Labor Relations Board*, 379 U.S. 203 (1964).

⁴⁰ *National Labor Relations Board v. Independent Stave Co.*, 591 F.2d 443 (8th Cir. 1979).

⁴¹ *United Elec. Workers v. National Labor Relations Board*, 409 F.2d 150, 156-57 (D.C. Cir. 1969).

⁴² *Gallenkamp Stores Co. v. National Labor Relations Board*, 402 F.2d 525 (9th Cir. 1968).

⁴³ *C & S Indus.*, 158 NLRB 454 (1966).

⁴⁴ *Carpenter Sprinkler Corp.*, 605 F.2d 60 (2d Cir. 1979).

⁴⁵ *Fibreboard Paper Prods. Co. v. National Labor Relations Board*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring); *J.P. Stevens & Co.*, 239 NLRB 738 (1978), *enforced*, 623 F.2d 322 (4th Cir. 1980).

⁴⁶ *Shell Oil Co.*, 77 NLRB 1306 (1948).

⁴⁷ *Winn-Dixie Stores, Inc. v. National Labor Relations Board*, 567 F.2d 1343 (5th Cir. 1978).

⁴⁸ *Awrey Bakeries, Inc. v. National Labor Relations Board*, 548 F.2d 138 (6th Cir. 1976).

⁴⁹ *See National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350 (1940); *National Labor Relations Board v. Bachelder*, 120 F.2d 547 (7th Cir. 1941).

⁵⁰ *National Labor Relations Board v. Lehigh Portland Cement Co.*, 205 F.2d 821 (4th Cir. 1953); *Elgin Standard Brick Mfg. Co.*, 90 NLRB 1467 (1950).

⁵¹ *See, e.g., Ford Motor Co. v. National Labor Relations Board*, 441 U.S. 488 (1979); *National Labor Relations Board v. Central Ill. Pub. Serv. Co.*, 324 F.2d 916 (7th Cir. 1963); *Chemtronics, Inc.*, 236 NLRB 178 (1978). For a list of mandatory subjects which may be especially pertinent to the construction industry, *see* Smith, *supra* note 7, at 33-34.

⁵² *National Labor Relations Board v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

⁵³ Smith, *supra* note 7, at 33.

satisfied, a union may strike and an employer may lock out its employees because of a failure to reach agreement on a mandatory subject.⁵⁴ However, a refusal by either a union or an employer to bargain in good faith over a mandatory subject constitutes an unfair labor practice.⁵⁵ Hence, an unprincipled or obstinate refusal to agree on a reasonable proposal will likely be deemed an unfair labor practice due to a lack of good faith which is covered further below.

B. Permissive

As illustrated in *Borg-Warner*, the obligation of construction employers and unions to bargain under Section 8(d) permits, but does not require, either party to propose discussion of certain *permissive* subjects.⁵⁶ Generally, a permissive subject "settles no term or condition of employment."⁵⁷ Permissive subjects which may be especially relevant to the construction industry include: pre-strike ballot clauses (which detail the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer),⁵⁸ the size and composition of the supervisory force and other general business practices,⁵⁹ the scope and definition of the bargaining unit,⁶⁰ internal union affairs,⁶¹ representation-fee clauses in right to work states,⁶² and the settlement of litigation or unfair labor practice charges.⁶³

While either party may contract for permissive subjects, neither party may condition resolution of negotiations upon the other party's agreement to permissive subjects.⁶⁴ To condition resolution of negotiations upon permissive subjects constitutes a refusal to bargain in good faith.⁶⁵ Further, a party may refuse to discuss a permissive subject.⁶⁶ And a party may not strike or refuse to sign a collective bargaining agreement if bargaining on a permissive subject reaches an impasse.⁶⁷

⁵⁴ *First Nat'l Maintenance Corp. v. National Labor Relations Board*, 452 U.S. 666, 675 (1981) (noting that both employer and union may use economic weapons when they bargain to impasse).

⁵⁵ 29 U.S.C. §§ 158(a)(5), 158(b)(3).

⁵⁶ Smith, *supra* note 7, at 33.

⁵⁷ 356 U.S. 342, 350.

⁵⁸ *Id.* at 349-50.

⁵⁹ *National Labor Relations Board v. Sheet Metal Workers Local 38*, 575 F.2d 394, 397-98 (2d Cir. 1978).

⁶⁰ Smith, *supra* note 7, at 34.

⁶¹ *Id.* at 33.

⁶² *Id.* at 34.

⁶³ *Id.*

⁶⁴ *Id.* at 33.

⁶⁵ *Id.*

⁶⁶ *National Labor Relations Board v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

⁶⁷ *Id.*

C. Illegal

Finally, construction employers and unions are legally prohibited from bargaining concerning specific subjects.⁶⁸ Issues are “illegal” subjects of bargaining if inclusion of the subjects in a contract would be unlawful or inconsistent with the policies of the NLRA.⁶⁹ Illegal subjects of collective bargaining include: closed shop agreements, contract clauses that violate Section 8(e) of the NLRA, contract clauses that require employees to be racially segregated, wage premiums for job stewards, and union political action funds not providing an employee with an option to refrain from participating.⁷⁰

IV. The Good Faith Requirement

Under Section 8(d), a construction employer and a union must bargain in “good faith” over the mandatory subjects of “wages, hours and other terms and conditions of employment.”⁷¹ Good faith bargaining essentially means that each party must make a sincere effort to reach an agreement and each party must participate in negotiations to that end.⁷² Parties must negotiate with a “sincere purpose to find a basis of agreement”⁷³ and both parties must participate in negotiations with “more than a willingness to enter upon a sterile discussion of union management differences.”⁷⁴ Although neither party is obligated to make any concession on any specific issue or adopt any particular position, a party is obligated to make “some reasonable effort in some direction to compose his differences.”⁷⁵

In evaluating whether each party has complied with its duty to bargain in good faith, courts consider the totality of each party’s conduct.⁷⁶ A single factor is rarely dispositive, but rather, a determination of good or bad faith is based upon careful consideration of many factors, such as: the frequency and duration of meetings, exchange or lack of exchange of counteroffers, willingness to consider counteroffers, repetitious offering of clearly unacceptable proposals, and

⁶⁸ Smith, *supra* note 7, at 33.

⁶⁹ See, e.g., *Hughes Tool Co.*, 147 NLRB (1964).

⁷⁰ Smith, *supra* note 7, at 35.

⁷¹ 29 U.S.C. § 158(d).

⁷² *National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956).

⁷³ *National Labor Relations Board v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

⁷⁴ *National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395, 402 (1952).

⁷⁵ *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir. 1953); *Atlanta Hilton & Tower*, 271 NLRB No. 214 (1984) (“It is necessary to scrutinize an employer’s overall conduct to determine whether it has bargained in good faith.”).

⁷⁶ *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989).

inability to reach agreement on any significant issue.⁷⁷ Parties' behavior, both at the bargaining table and its conduct away from the table, is relevant to any good faith inquiry.⁷⁸

In 1940, the United States Supreme Court in *National Licorice Co. v. National Labor Relations Board* notably addressed this concept of good faith in bargaining.⁷⁹ In *National Licorice*, an employer refused to acknowledge the union as the designated bargaining representative of all the employees during negotiations.⁸⁰ The employer declared it would negotiate with the union solely as the bargaining representative of the union members.⁸¹ During subsequent negotiations, the employer then refused to negotiate the union at all.⁸² The Supreme Court noted that this behavior evidenced that such negotiations "were not entered into by the [employer] in good faith, and were but thinly disguised refusals to treat with the Union representatives."⁸³

In 1956, the United States Supreme Court in *National Labor Relations Board v. Truitt Manufacturing Co.* further examined the good faith element of the duty to bargain under Sections 8(a)(5) and 8(d).⁸⁴ In *Truitt*, the Court examined the issue of good faith in relation to an employer's duty to furnish certain information to a union.⁸⁵ The Supreme Court held that any good faith requirement mandates "that claims made by either bargainer should be honest claims."⁸⁶ The Court noted that an employer fails to bargain in good faith when the employer refuses to make any effort to substantiate relevant claims made during negotiations.⁸⁷ Therefore, the Supreme Court held that the employer had committed an unfair labor practices by failing to bargain in good faith.⁸⁸

Since the *National Licorice* and *Truitt* decisions, the duty to bargain in good faith has been the source of much dispute, in part because lack of an agreement in bargaining – or an

⁷⁷ Martha S. West, *Life After Bildisco: Section 1113 and the Duty to Bargain in Good Faith*, 47 OHIO L.J. 65, 69-70 (1986).

⁷⁸ *National Labor Relations Board v. Billion Motors, Inc.*, 700 F.2d 454, 456 (8th Cir. 1983).

⁷⁹ 309 U.S. 350 (1940).

⁸⁰ *Id.* at 352.

⁸¹ *Id.* at 358.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 351 U.S. 149 (1956).

⁸⁵ *Id.* at 150. The duty to furnish information is addressed in detail later in this Paper.

⁸⁶ *Id.* at 152-53.

⁸⁷ *Id.* at 153.

⁸⁸ *Id.*

“impasse” – does not necessarily indicate a lack of good faith.⁸⁹ The plain language of Section 8(d) does not require employers and unions to accept any proposal, make any concession, or reach any agreement.⁹⁰ Rather, the parties may bargain in good faith until they reach an impasse.⁹¹

An impasse simply means that the parties have participated in good faith bargaining, but have failed to reach an agreement.⁹² Whether an impasse exists is a matter of judgment for courts and the Board, but generally the following factors are considered:

The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.⁹³

The policy underlying the impasse doctrine is that the employer may exercise his inherent powers of management because his statutory obligation has been fulfilled.⁹⁴ Once an employer has properly bargained to impasse, it legally may make unilateral changes in working conditions based upon its last, best, and final offer to the union.⁹⁵ However, evidence of bad faith bargaining impedes the finding of a valid impasse.⁹⁶

V. The Duty to Furnish Information

A. Obligations under the Duty

Under the NLRA, a correlative part of the duty to bargain in good faith requires parties to provide certain information to each other.⁹⁷ This duty to furnish information may be especially relevant to construction industry bargaining,⁹⁸ but it should be noted that the obligation also extends to the dispute-resolution context as well.⁹⁹

⁸⁹ *Id.* at 152.

⁹⁰ *H. K. Porter Co. v. National Labor Relations Board*, 397 U.S. 99, 108-09 (1970) (overruling the NLRB order on the basis that the labor laws require bargaining, but not agreement).

⁹¹ *National Labor Relations Board v. Insurance Agents Int'l Union*, 361 U.S. 477, 488-98 (1960).

⁹² *Carey Salt Co. v. National Labor Relations Board*, 736 F.3d 405, 412 (5th Cir. 2013).

⁹³ *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1969).

⁹⁴ Robert P. Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 278 (1964).

⁹⁵ *National Labor Relations Board v. Katz*, 369 U.S. 736, 741-42 (1962).

⁹⁶ *United Contractors*, 244 NLRB 72, enforced 713 F.2d 1322 (7th Cir. 1983); *Palomar Corp. & Gateway Serv. Co.*, 192 NLRB 592 (1971).

⁹⁷ Smith, *supra* note 7, at 35-36.

⁹⁸ *Id.* at 34-39.

⁹⁹ See *infra* note 166.

In 1956, the Supreme Court issued the seminal decision on this duty to furnish information.¹⁰⁰ In *National Labor Relations Board v. Truitt Manufacturing Co.*, the Court examined the good faith element of the duty to bargain under Sections 8(a)(5) and 8(d) and for the first time held that the duty to bargain collectively and in good faith imposed on the employer a duty to provide relevant information to labor unions.¹⁰¹ In *Truitt*, a union representing employees of Truitt Manufacturing Company (“Truitt”) asked for a wage increase of ten cents per hour.¹⁰² Truitt responded that it could not afford to pay such an increase.¹⁰³ It asserted that it was undercapitalized, had never paid dividends, and that an increase of more than two and a half cents per hour would put it out of business.¹⁰⁴ However, Truitt refused to substantiate these claims by providing evidence, such accounting sheets, financial statements, and cost expenditures, requested by the union.¹⁰⁵

The Supreme Court construed the duty to bargain in good faith to require “that claims made by either bargainer should be honest claims” and that an argument that is presented during the bargaining process “require some sort of proof of its accuracy.”¹⁰⁶ The Court noted that a trier of fact could reasonably determine that an employer who mechanically repeated a claim of inability to pay, without making any effort to substantiate that claim, has failed to bargain in good faith.¹⁰⁷ Therefore, the Supreme Court held that the employer had committed an unfair labor practices by failing to furnish this information.¹⁰⁸

However, the *Truitt* Court noted that its holding should not extend to every case in which economic inability is raised as an argument against increased wages.¹⁰⁹ Unions are not entitled to substantiating evidence whenever similar issues arise.¹¹⁰ Rather, the Supreme Court held that an examination of the duty to bargain in good faith must depend upon the particular facts and circumstances of each case.¹¹¹ To this day, the duty to bargain “in good faith” has been the

¹⁰⁰ 351 U.S. 149 (1956).

¹⁰¹ *Id.*

¹⁰² *Id.* at 150.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 152-53.

¹⁰⁷ *Id.* at 153.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 153-54.

source of much dispute because bargaining to impasse does not necessarily indicate a lack of good faith.¹¹²

Since *Truitt*, courts and the Board have further construed this duty to furnish information. The duty to furnish information arises upon the request of a party for information,¹¹³ and the request is not required to be in writing.¹¹⁴ Employers are generally required to produce information that is relevant and which would be useful to a union in discharging its statutory responsibilities.¹¹⁵ In theory, the information furnished enables a union to understand and intelligently discuss issues raised in collective bargaining and to carry out any grievance handling functions under the contract.¹¹⁶

As long as the information is "readily available," it must be produced.¹¹⁷ The fact that the information may be available from another source is irrelevant and has no effect upon a party's duty to furnish it.¹¹⁸ Likewise, information that is not in the actual possession of the requested party must be furnished if it can be obtained from a third party with whom the party has a business relationship.¹¹⁹ However, an employer is not required to furnish information that it does not have, cannot reasonably obtain, nor does an employer need to conduct studies for the purpose of supplying the union with the information requested.¹²⁰

Further, only "relevant" information is required to be furnished.¹²¹ Notably, in *National Labor Relations Board v. Acme Indus. Co.*, the Supreme Court upheld an NLRB requirement that employers disclose certain information, such as wage data, which is relevant and necessary to the union's bargaining function.¹²² Courts and the Board have applied a liberal, "discovery type" standard to this requirement of "relevance."¹²³ Accordingly, the "threshold for relevance is

¹¹² *Id.* at 152.

¹¹³ *Boston Herald-Traveler Corp.*, 102 NLRB 627 (1953).

¹¹⁴ *Bundy Corp.*, 292 NLRB 671 (1989).

¹¹⁵ *National Labor Relations Board v. Acme Industrial Co.*, 385 U.S. 432 (1967).

¹¹⁶ Smith, *supra* note 7, at 35-36.

¹¹⁷ *Holyoke Water Power Co.*, 273 NLRB 1369 (1985).

¹¹⁸ *Id.*

¹¹⁹ *Fireman & Oilers Local 288*, 302 NLRB 1008, 1009 (1991).

¹²⁰ See *Howe K. Sipes Co.*, 319 NLRB 30, 38 (1995) ("[A]n employer can be expected to supply only that information which it actually possesses or it can reasonably acquire. There is no requirement that, in response to a request for information, an employer conduct independent cost studies or analysis").

¹²¹ See *National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956).

¹²² 385 U.S. 432 (1967).

¹²³ *National Labor Relations Board v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

low.”¹²⁴ Certain categories of information are deemed to be “presumptively relevant.”¹²⁵ Generally, “[i]nformation related to the wages, benefits, hours, working conditions, etc. of represented employees is presumptively relevant to collective bargaining.”¹²⁶ The court in *Press Democrat Publishing Co. v. National Labor Relations Board* described this presumption:

[A] dichotomy has developed between data bearing directly on mandatory bargaining subjects and other kinds of information. Information in the first category, pertaining to wages, hours or conditions of employment, is *presumptively* relevant, and must be disclosed unless the employer proves a lack of relevance. On the other hand, when information not ordinarily pertinent to collective bargaining, such as information concerning nonunit employees, is requested by a union, relevance is not assumed. Instead the union must affirmatively demonstrate relevance to bargainable issues.¹²⁷

The NLRB has broadly construed this duty to furnish “relevant” information.¹²⁸ For instance, in *Dyncorp/Dynair Services*, a union requested the following information:

a list of all employees with home addresses; seniority dates of all employees; rates of pay of all employees; list of all classifications, including minimum and maximum rate range; minimum and maximum wages per hour and the rate range of each employee and also, the method of progression; a copy of the insurance plan (including the amount the company pays and the amount the employee pays); the number of paid holidays in effect at the plant; pension plan or severance plan, if any; requirements and amount of vacation; incentive plan, if any; night shift premium; any other benefit or privilege that employees receive.¹²⁹

Although the employer argued that the exhaustive list of information was not relevant, the Board disagreed and held that such information was “presumptively relevant and must be furnished on request.”¹³⁰ The information simply must be produced in a “reasonably timely manner,” which may vary on a case by case basis.¹³¹

Other types of information are not deemed to be presumptively relevant. Generally information unrelated to the wages, benefits, hours, and working conditions of represented

¹²⁴ *County Ford Trucks, Inc. v. National Labor Relations Board*, 229 F.3d 1184, 1191 (D.C. Cir. 2000).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 629 F.2d 1320, 1324 (9th Cir. 1980) (citations omitted) (emphasis in original).

¹²⁸ Smith, *supra* note 7, at 36.

¹²⁹ 322 NLRB 602, 602 (1996).

¹³⁰ *Id.*

¹³¹ *IronTiger Logistics, Inc.*, 359 NLRB No. 13 (2012), *vacated in light of NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), *reaffirmed by the Board* in 362 NLRB No. 45 (March 25, 2015).

employees is not presumptively relevant to collective bargaining.”¹³² For example, the Board has recognized that social security numbers of bargaining unit employees are not presumptively relevant.¹³³ Likewise, information that does not directly relate to the bargaining unit employees is generally not presumptively relevant.¹³⁴

However, even if information is not deemed to be presumptively relevant, an employer may be obligated to furnish it as long as a showing of relevance can be made.¹³⁵ To show relevance under the liberal standard imposed by courts and the Board, a union is not required to demonstrate that the information is “certainly relevant” or “clearly dispositive” as to the issues between the parties.¹³⁶

Rather, the fact that the information is of probable or potential relevance is sufficient to give rise to an obligation by an employer to provide.¹³⁷ Courts have described a union’s duty to show relevance when requesting information:

To demonstrate relevancy, a union must make a formal request based on a reasonable belief that the information is necessary and show that it is relevant in order to trigger the employer’s obligation to give the information . . . [I]nformation is relevant if it is germane and has any bearing on the subject matter of the case. The practical burden upon the union then is to show that the information will aid investigation of contract violations where the union has established a reasonable basis to suspect such violations have occurred. Actual violations need not be established in order to show relevancy. A union must *also* provide facts that support its assertion of relevancy and need. Reasons not brought to the attention of the Company at the time but later used to justify positions in administrative hearings should not be used to convict the Company of an unfair labor practice when these reasons were not brought to its attention contemporaneously, they being not apparent from the face of the request.¹³⁸

After a union has carried its burden of demonstrating relevance and necessity, the burden of production shifts to the employer.¹³⁹

¹³² *County Ford Trucks, Inc. v. National Labor Relations Board*, 229 F.3d 1184, 1191 (D.C. Cir. 2000).

¹³³ *Polymers Inc.*, 319 NLRB 26 (1995).

¹³⁴ *Shoppers Food Warehouse Corp.*, 315 NLRB 258 (1994).

¹³⁵ *Oil, Chemical & Atomic Workers Local Union No.6-418 v. National Labor Relations Board*, 711 F.2d 348, 359 (D.C. Cir. 1983); *National Labor Relations Board v. United States Postal Service*, 888 F.2d 1568, 1570 (11th Cir. 1989); *Walter N. Yoder & Sons v. National Labor Relations Board*, 754 F.2d 531, 535 (4th Cir. 1985).

¹³⁶ *Oil, Chemical & Atomic Workers Local Union No.6-418 v. National Labor Relations Board*, 711 F.2d 348, 359 (D.C. Cir. 1983).

¹³⁷ *Id.*

¹³⁸ *West Penn Power Co. v. National Labor Relations Board*, 394 F.3d 233, 250-51 (4th Cir. 2005) (emphasis in original) (citations omitted).

¹³⁹ *Id.* at 251.

Employers must take seriously this burden of production, as courts and the Board frequently deny employers' attempted justifications for failure to furnish information. For instance, an employer may not simply ignore a request for information that it deems to be ambiguous.¹⁴⁰ Rather, "it is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information."¹⁴¹

Construction unions have notably used this duty to furnish information to require employers to produce information about the nonunion or "double breasted" unit of its business, under the guise of administering a contract with the unionized firm.¹⁴² In these instances, the Board has held that information concerning matters outside of the bargaining unit must be furnished by construction employers if the information is "necessary" for the purpose of determining whether the union should file a grievance under the contract claiming that the nonunion unit was or should be covered by the existing agreement with the union arm of the business.¹⁴³ The Board emphasized that such construction unions must specify the particular information sought and may not make blanket requests for information.¹⁴⁴ To receive the information sought, construction unions need only show the relevance of the requested information as it relates to the contentions on possible contract violations or grievances but did not have to show a likelihood of success on the merits of any possible claims against a construction employer.¹⁴⁵

Even trade associations have not been immune to these types of union information requests. In *Associated General Contractors of California*,¹⁴⁶ the Board ordered the AGC chapter to supply the Carpenters and the Laborers information as to the names of all chapter members, including its "open shop" contractor members who were not party to any bargaining agreement.¹⁴⁷ The Board emphasized the low threshold for relevance, which it found the construction union had met by demonstrating that the information would assist in policing and

¹⁴⁰ *Birmingham Chapter, Nat'l Elec. Contractors Ass'n & Local Union 136*, 313 NLRB 770, 771 (1994).

¹⁴¹ *Id.*

¹⁴² Smith, *supra* note 7, at 37 (citing *Doubarn Sheet Metal, Inc.*, 243 NLRB 821 (1979); *Leonard B. Herbert Jr. & Co., Inc.*, 259 NLRB 881 (1981); *Boyers Contr. Co.*, 267 NLRB No. 42 (1983)).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 242 NLRB 891 (1979).

¹⁴⁷ Smith, *supra* note 7, at 37.

administering the AGC contracts with respect to contractors that may have tried to escape their contractual responsibilities by “going open shop.”¹⁴⁸ The Ninth Circuit enforced the portion of the NLRB’s order which required the AGC to disclose the “open shop” members of the AGC chapter.¹⁴⁹ However, the Ninth Circuit refused to enforce the portion of the Board’s order to disclose the AGC’s full membership roster on the basis that only the “open shop” members were relevant.¹⁵⁰

While the duty to furnish information arises more often in the context of a union seeking information from an employer, unions are also obligated to furnish information requested by employers.¹⁵¹ The duty of a union to furnish information has been characterized by the Board as “parallel” to that of an employer.¹⁵² Information especially relevant to construction employers during the bargaining process may include information about: the administration of hiring halls, the administration of fringe benefits entrusted to the union, and any agreements entered into by unions with other construction employers containing “most favored nations” clauses.¹⁵³

B. Types of Information

When considering an employer’s duty to furnish information to a union, courts and the Board have distinguished between “wage data” and “financial data.” Generally, employers are required to supply pertinent and relevant “wage data” upon request.¹⁵⁴ Wage data consists of information such as employees’ incomes, fringe benefits, wage histories, wage rates, bonuses, commissions, merit increases, hours, and overtime pay.¹⁵⁵ Such wage data concerning bargaining unit members is presumptively relevant.¹⁵⁶ An employer’s refusal to provide such information usually constitutes per se violation of duty to bargain in good faith.¹⁵⁷ Conversely,

¹⁴⁸ *Id.*

¹⁴⁹ 633 F.2d 766 (9th Cir. 1980).

¹⁵⁰ *Id.* at 773.

¹⁵¹ *Local 13, Detroit Newspaper Printing & Graphic Communications Union (The Oakland Press)*, 233 NLRB 995 (1977).

¹⁵² *Plasterers Local 346 (Brawner Plastering)*, 273 NLRB 1143, 1144 (1984).

¹⁵³ Smith, *supra* note 7, at 39.

¹⁵⁴ *Utica Observer-Dispatch v. National Labor Relations Board*, 229 F.2d 575, 576 (2d Cir. 1956).

¹⁵⁵ *Directors of the Columbia Law Review Association, Inc.*, 57 COLUM. L. REV. 112, 112-13 & n.6 (1957).

¹⁵⁶ *WCCO Radio, Inc., Div. of Midwest Communications, Inc. v. National Labor Relations Board*, 844 F.2d 51, 5141 (8th Cir. 1988).

¹⁵⁷ *Rivera-Vega ex rel. National Labor Relations Board v. Conagra, Inc.*, 876 F. Supp. 1350, 1364 (D. Puerto Rico 1995).

wage data concerning employees outside of the bargaining unit typically requires a showing of relevance by the union.¹⁵⁸

“Financial data,” on the other hand, generally is not required to be furnished unless the union first makes a showing that it is relevant to the bargaining process.¹⁵⁹ Financial data consists of information regarding management’s ability to meet labor’s economic demands, such as a company’s current and future earnings, production methods, and other matters connected with the planning and administration of the enterprise.¹⁶⁰ In order to obtain financial data, a union must do more than just claim that the data would be helpful in performing its tasks.¹⁶¹

As illustrated in *Truitt* though, an employer who claims poverty or some other inability to meet the financial burden of a union’s bargaining demands may be forced to produce financial information to support that claim.¹⁶² This baseline rule on disclosure of financial data when the employer pleads financial hardship was seemingly expanded in *Cincinnati Cordage & Paper Co.*, where the Board held that an employer’s resistance to a union’s wages demand on the ground that it could not remain competitive with comparable employers triggered an obligation to reveal financial data because it constituted a poverty plea.¹⁶³ Thus, even a basic claim of “competitive disadvantage” was in that case sufficient to trigger the duty to furnish financial data, thereby expanding an employer’s duty to furnish information. However, in 1991, the then more conservative Board narrowed this rule.¹⁶⁴ The Board in *Nielsen Lithographers* held that the duty to furnish financial data could not be triggered by an “employer’s projection of its future inability to compete,” rather the duty arises only “when the employer has signified that it is *at present* unable to pay proposed wages and benefits.”¹⁶⁵

¹⁵⁸ *Soule Glass & Glazing Co. v. National Labor Relations Board*, 652 F.2d 1055 (1st Cir. 1981), *abrogated on other grounds by National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990).

¹⁵⁹ *Rivera-Vega ex rel. National Labor Relations Board v. Conagra, Inc.*, 876 F. Supp. 1350, 1364 (D. Puerto Rico 1995).

¹⁶⁰ Directors, *supra* note 155, at 113.

¹⁶¹ *Rivera-Vega*, 876 F. Supp. at 1364.

¹⁶² 351 U.S. 149 (1956).

¹⁶³ 141 NLRB 72 (1963).

¹⁶⁴ *Nielsen Lithographers Co.*, 305 NLRB 697 (1991).

¹⁶⁵ *Id.* at 701 (emphasis added).

C. Defenses to the Duty

Confidentiality

Although the Board has liberally construed the duty to furnish information, courts and the Board have imposed some limitations. The United States Supreme Court in *Detroit Edison Co. v. National Labor Relations Board* – the seminal case concerning limitations on an employer’s duty to furnish information – notably restricted the duty to furnish information by suggesting that this duty should be balanced against the confidentiality interests of the employer.¹⁶⁶ In *Detroit Edison*, the employer was brought before the National Labor Relations Board to answer a complaint that it had violated the duty to furnish information, when it refused to disclose certain information about employee aptitude tests requested by a union in order to prepare for arbitration of a grievance.¹⁶⁷ The employer supplied the union with much of the information requested, but refused to disclose three items: the actual psychological test questions, the employee answer sheets to the psychological test, and the scores linked with the names of the employees who received them.¹⁶⁸ The Board concluded that all of the items requested were relevant to the grievance and would be useful to the union in processing it, thereby ordering the employer to turn over all of the materials directly to the union.¹⁶⁹

In examining the employer’s obligations, the Supreme Court noted that “[a] union’s bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested.”¹⁷⁰ In refusing to disclose the testing scores received by named employees, the employer argued that, even if the scores were relevant to the Union’s grievance, the Union’s need for the information was not sufficient to justify such a breach of confidentiality and potential embarrassment and harassment of at least some of the examinees.¹⁷¹ The Supreme Court recognized that the NLRB had cited “no principle of national labor policy” that would warrant the violation of the employees’ interest in

¹⁶⁶ 440 U.S. 301 (1979).

¹⁶⁷ *Id.* at 303.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 303-04.

¹⁷⁰ *Id.* at 314.

¹⁷¹ *Id.* at 317.

confidentiality.¹⁷² Accordingly, the Court held that the employer did not violate its statutory obligation to bargain in good faith by withholding the psychological test information.¹⁷³

Although the *Detroit Edison* Court recognized that confidentiality interests may prevent an employer from furnishing certain information, an employer has the burden of proving that such confidentiality interests exist.¹⁷⁴ Confidentiality is essentially a “defense” against the duty to furnish information.¹⁷⁵ The Board has repeatedly rejected blanket confidentiality claims as an inadequate defense for an employer’s absolute refusal to furnish any information from an employee’s file.¹⁷⁶ Rather, an employer must present sufficient evidence that “an employee’s right to maintain the confidentiality of certain relevant information outweighs a union’s statutory right to obtain that information.”¹⁷⁷

Courts and the Board have found varying types of information to be sufficiently “confidential” to justify withholding from a union. For instance, the Board has found personal information, such as the identity of individuals who suffer from medical disorders, to be confidential.¹⁷⁸ Similarly, proprietary and trade secret information may be deemed to be sufficiently confidential, although neither is an absolute defense to the duty to furnish information.¹⁷⁹

Bad Faith

Courts and the Board have further limited the duty to furnish information when the requests are made in bad faith. Like confidentiality, bad faith is an affirmative defense that must be pleaded and proven by an employer.¹⁸⁰ In *National Labor Relations Board v. Wachter*

¹⁷² *Id.* at 315.

¹⁷³ *Id.* at 318.

¹⁷⁴ *Lasher Service Corp.*, 332 NLRB 834 (2000); see also *Retlaw Broadcasting Co. v. National Labor Relations Board*, 172 F.3d 660, 670 (9th Cir. 1999) (“When raising confidentiality as a justification for non-disclosure, the employer has the burden of establishing a legitimate claim of confidentiality.”); *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995) (“[T]he party making a claim of confidentiality has the burden of proving that such interests are in fact present.”).

¹⁷⁵ *Lasher Service Corp.*, 332 NLRB 834 (2000).

¹⁷⁶ *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980); *Fawcett Printing Corp.*, 201 NLRB 964 (1973).

¹⁷⁷ *Retlaw Broadcasting Co. v. National Labor Relations Board*, 172 F.3d 660, 670 (9th Cir. 1999) (citation omitted).

¹⁷⁸ *Johns-Manville Sales Corp.*, 252 NLRB 368 (1980).

¹⁷⁹ *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. National Labor Relations Board*, 711 F.2d 348, 362 (D.C. Cir. 1983).

¹⁸⁰ *Island Creek Coal Co.*, 292 NLRB No. 49, at *14 n.14 (1989).

Construction, Inc., the Eighth Circuit noted that the good faith requirement applies to the duty to furnish information.¹⁸¹ The court held that:

Allowing a party, whether it be an employer or a union, to predicate a voluminous request for information on any “boilerplate” type of asserted good faith rationale will wreak havoc on a negotiating process. This is evident from the facts of the instant case, where the union representative sought to overburden the employer with information requests so as to prevent the employer from subcontracting any work to nonunion workers, even though concededly the collective bargaining agreement provided such subcontracting was permissible.¹⁸²

Accordingly, the court held that the employer did not commit an unfair labor practice when it failed to provide the bulk of the requested information, since the union’s bad faith alleviated the employer’s duty to respond.¹⁸³

Like the Courts, the Board has also ruled that requests for information cannot be made in bad faith. As an example, if the sole reason for the request is harassment, an employer is not required to comply with the request.¹⁸⁴ Under such circumstances, the burden would again fall to the party invoking the defense to make a threshold showing of bad faith.

Unduly Burdensome

Courts and the Board have further limited the duty to furnish information when the requests are unduly burdensome.¹⁸⁵ “Even when the information is objectively relevant, however, a union’s request may be denied if its compilation would be unduly burdensome”¹⁸⁶ Similar to the confidentiality and bad faith defenses to the obligation to furnish information, an employer has the burden of proving undue burden.¹⁸⁷ To show undue burden, an employer must generally prove that it made a diligent effort to obtain the information, but was unsuccessful.¹⁸⁸ Requests for information that are overly voluminous, intricate, or complex may

¹⁸¹ 23 F.3d 1378, 1385 (8th Cir. 1994).

¹⁸² *Id.* at 1386.

¹⁸³ *Id.* at 1389.

¹⁸⁴ *Island Creek Coal Co.*, 292 NLRB No. 49, at *14 (1989).

¹⁸⁵ *See, e.g., See Westinghouse Elec. Corp.*, 129 NLRB 850, 864 (1960) (“[T]he obligation of an employer to bargain in good faith does not require him to comply with a Union’s request for information if compliance is ‘unduly burdensome.’”).

¹⁸⁶ *Safeway Stores, Inc. v. National Labor Relations Board*, 691 F.2d 953, 956 (10th Cir. 1982).

¹⁸⁷ *West Penn Power Co. v. National Labor Relations Board*, 394 F.3d 233, 246 (4th Cir. 2005).

¹⁸⁸ *Id.*

be deemed unduly burdensome.¹⁸⁹ Likewise, requests for information that are expensive may be unduly burdensome.¹⁹⁰ Of note, when production of information may be burdensome, courts and Board have held that an employer may provide the requested information in any reasonable form.¹⁹¹ More specifically, “[i]t is sufficient if the information is made available in [any] manner not so burdensome or time-consuming as to impede the process of bargaining.”¹⁹²

VI. Violations of Section 8(d)

A. Per Se Violations

Section 8(d) requires construction employers and unions to “meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”¹⁹³ Given this statutory language, either party violates its obligations under Section 8(d) when it refuses to meet and confer about a mandatory subject of bargaining, even absent any failure of good faith.¹⁹⁴ Courts and the Board have identified certain conduct, which is so contrary to the language and intent of Section 8(d), that it constitutes an automatic violation of the duty - regardless of any inquiry into good or bad faith. Beginning in 1941, the Supreme Court issued a series of opinions identifying specific conduct that constituted a refusal to bargain, thereby automatically violating the duty imposed by the NLRA.

First, the Supreme Court in *H.J. Heinz Co. v. National Labor Relations Board* held that an employer may not refuse to sign a written contract after the agreement has been bargained for and voluntarily agreed to.¹⁹⁵ In *Heinz*, the employer reached an agreement with the union concerning wages, hours, and working conditions, but then refused to sign any contract memorializing the terms of the agreement.¹⁹⁶ The Supreme Court held that “[t]he freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not,

¹⁸⁹ *National Labor Relations Board v. Tex-Tan, Inc.*, 318 F.2d 472, 477 (5th Cir. 1963).

¹⁹⁰ *Westinghouse Elec. Corp.*, 129 NLRB 850, 861 (1960).

¹⁹¹ *Cincinnati Steel Castings Co.*, 86 NLRB 592, 593 (1949).

¹⁹² *Id.*

¹⁹³ 29 U.S.C. § 158(d).

¹⁹⁴ *National Labor Relations Board v. Katz*, 369 U.S. 736, 742-43 (1962) (“The duty ‘to bargain collectively’ enjoined by s 8(a)(5) is defined by s 8(d) as the duty to ‘meet * * * and confer in good faith with respect to wages, hours, and other terms and conditions of employment.’ Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider 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.”).

¹⁹⁵ 311 U.S. 514 (1941).

¹⁹⁶ *Id.* at 523.

once it is reached, to its expression in a signed contract, the absence of which, as experience has shown, tends to frustrate the end sought by the requirement for collective bargaining.”¹⁹⁷ Therefore, the employer’s refusal to sign was a refusal to bargain and, thus, an unfair labor practice.¹⁹⁸

Next, in 1944, the Supreme Court in *Medo Photo Supply Corp. v. National Labor Relations Board* held that an employer that bargains directly with employees, who have not revoked their designation of the union as their bargaining agent, automatically violates its obligation to bargain.¹⁹⁹ Because the NLRA imposes a duty upon employers to bargain collectively with chosen representatives of employees, the Supreme Court held that “by ignoring the union as the employees’ exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages,” the employer had violated its duty.²⁰⁰

Finally, in 1962, the Supreme Court in *National Labor Relations Board v. Katz* notably held that an employer generally may not unilaterally change a term or condition of employment without first discussing the issue with the union, and any such unilateral change constitutes a refusal to bargain.²⁰¹ This decision developed the “per se doctrine” by which conduct may constitute a refusal to bargain, regardless of any good or bad faith.²⁰² In *Katz*, an employer unilaterally granted numerous merit increases, automatic wage increases and changes in sick leave policy, prior to negotiations with the union that were discontinued before an impasse occurred.²⁰³ The employer argued that such unilateral action was merely evidence relevant to the issue of good faith and could not constitute a per se violation.²⁰⁴ The Supreme Court disagreed with the employer and held that “[u]nilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment

¹⁹⁷ *Id.* at 526.

¹⁹⁸ *Id.*

¹⁹⁹ 321 U.S. 678 (1944).

²⁰⁰ *Id.* at 684.

²⁰¹ 369 U.S. 736, 743 (1962).

²⁰² Robert P. Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 276 (1964).

²⁰³ 369 U.S. at 741-47.

²⁰⁴ *Id.* at 742.

under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.”²⁰⁵

However, the *Katz* Court cautioned that it could not “foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action.”²⁰⁶ And subsequent rulings by courts and the Board have found that unilateral changes that are not material, substantial, and significant do not violate Sections 8(a)(5) and 8(d).²⁰⁷

B. Violations of the Good Faith Requirement

While certain conduct may constitute a discrete, per se violation of the duty, courts and the Board more often consider whether the requisite good faith was employed throughout the bargaining process. While they consider the totality of each party’s conduct during the bargaining process, courts and the Board have identified certain characteristics that may be indicative of a lack of good faith.²⁰⁸

First, delay tactics during negotiations may be indicative of a lack of good faith.²⁰⁹ For example, the Second Circuit in *Continental Ins. Co. v. National Labor Relations Board* examined negotiations that had been marked with a series of delays and that continued almost six years after certification of the union as the exclusive bargaining agent.²¹⁰ The Second Circuit reviewed the entire record and agreed with the Administrative Law Judge who had held that “the

²⁰⁵ *Id.* at 747.

²⁰⁶ *Id.* at 748.

²⁰⁷ *In re Falcon Wheel Div., LLC*, 338 NLRB 576, 579 (2002) (“The Board has consistently reaffirmed that it is not enough that an alleged unilateral change involves a mandatory subject of bargaining; it also must be a material, substantial, and significant change in the terms and conditions of employment to trigger the employer’s statutory bargaining obligation.”).

²⁰⁸ The court in *Rivera-Vega ex rel. National Labor Relations Board v. Conagra, Inc.*, 876 F. Supp. 1350, 1363 (D. Puerto Rico 1995) explained this inquiry:

In determining whether an employer has engaged in good faith as opposed to surface bargaining, the Board and the courts must engage in the task of examining the total conduct of the employer. The examination includes a review of the following: (a) delaying tactics, (b) unreasonable bargaining demands, (c) unilateral changes in mandatory subjects for bargaining, (d) efforts to bypass the Union, (e) failure to designate an agent with sufficient bargaining authority, (e) withdrawal of provisions already agreed upon, (f) arbitrary schedule of meetings.

²⁰⁹ *National Labor Relations Board v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965); *Crane Co.*, 244 NLRB 103 (1979); *Continental Ins. Co. v. National Labor Relations Board*, 495 F.2d 44 (2d Cir. 1974).

²¹⁰ *Continental Ins. Co.*, 495 F.2d at 47.

Company had prolonged negotiations unduly by various delaying tactics, including unreasonable fragmentation of bargaining sessions, captious questioning of the Union's proposals, and presentation of Company proposals that were unnecessarily complicated, outside of the scope of mandatory collective bargaining, or patently unfair and unreasonable."²¹¹ Therefore, the court held that the employer had bargained in bad faith.²¹²

Similarly, the Board in *Crane Company* held that an employer had violated its duty to bargain in good faith by unreasonably delaying an agreement on a time and place for bargaining sessions.²¹³ In *Crane Company*, the employer asserted that its negotiators were so busy with other matters that they could not meet, and the first available date the union could get from the employer was four months after the certification issued.²¹⁴ The next available date was almost three months later.²¹⁵ The Board held that "[t]he fact that a respondent or its designated negotiators are so busy that they cannot get around to meeting promptly with union negotiators is no defense" and, thus, held that the employer had violated its duty to bargain in good faith.²¹⁶

Unreasonable bargaining demands may also be indicative of a lack of good faith. In *National Labor Relations Board v. Holmes Tuttle Broadway Ford*, the Ninth Circuit required "some cognizance of the reasonableness of the position taken by an employer in the course of bargaining negotiations" if parties are not to be "blinded by empty talk and by the mere surface motions of collective bargaining."²¹⁷ The Board more recently applied this principle in *Regency Service Carts, Inc.*, which examined several "take it or leave it" comments made during bargaining by the employer.²¹⁸ During bargaining, the employer's negotiator drew proverbial "lines in the sand" over various subjects and even stated that the employer was "not going to be reasonable."²¹⁹ The Board thus held that the employer lacked good faith in bargaining as its behavior clearly evidenced that it had no intent to compromise or reach a mutual agreement.²²⁰

²¹¹ *Id.*

²¹² *Id.* at 50.

²¹³ *Crane Co.*, 244 NLRB 103 (1979).

²¹⁴ *Id.* at 111.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ 465 F.2d 717, 719 (9th Cir. 1972).

²¹⁸ 345 NLRB 671 (2005).

²¹⁹ *Id.* at 672.

²²⁰ *Id.*

Although unilateral changes to a mandatory subject may be an automatic violation of Section 8(d), it also evidences a lack of good faith. In *National Labor Relations Board v. Fitzgerald Mills Corp.*, the Board examined circumstances in which an employer informed the union, during negotiations, that it had changed the wages and duties of a driver.²²¹ Additionally, during the course of bargaining, the employer had changed the wage rate and workload of loomfixers without consulting the Union.²²² The Board determined that “that both incidents occurred at times when the parties were in the course of negotiations” and, thus, the employer’s “unilateral institution of its wage increase . . . was not privileged and is further evidence of the [employer’s] bad faith.”²²³

Along these same lines, efforts to bypass the union are further evidence of an employer’s bad faith. In *Cal-Pacific Poultry*, the Board examined an employer’s overall conduct during bargaining and concluded that employer was “seeking to bypass and undermine the Union which was the exclusive bargaining representative of Respondent’s employees.”²²⁴ Specifically, during bargaining, the employer had interfered with, restrained, and coerced its employees by offering its striking employees higher wage rates than had been offered the Union.²²⁵ The employer also provided a striking employee with a copy of another employer’s contract with the Union, so as to determine whether the strikers would accept the terms of that contract.²²⁶ This conduct evidenced the employer’s efforts to bypass and undermine the union, and the Board held that such conduct evidenced the employer’s bad faith during the bargaining process.²²⁷

Appointing negotiators who either lack the authority or refuse to carry on meaningful bargaining may also indicate a lack of good faith.²²⁸ For example, in *National Labor Relations Board v. Alterman Transport Lines, Inc.*, the bargaining parties met 26 times over a 2-year period.²²⁹ The employer’s principal negotiator was a company vice president, but the president attended the first meeting, at which time he reserved the right to ratify any agreement

²²¹ 133 NLRB 877, 881-82 (1961).

²²² *Id.* at 882.

²²³ *Id.*

²²⁴ 163 NLRB 716, 718 (1967).

²²⁵ *Id.* at 717.

²²⁶ *Id.* at 718.

²²⁷ *Id.*

²²⁸ *In re JHP Mgmt., Inc.*, 337 NLRB No.7, at *5 (2001).

²²⁹ 587 F.2d 212 (5th Cir. 1979).

subsequently reached.²³⁰ The president resumed direct participation only in the last three meetings, where he proposed additions, deletions, and modifications concerning matters that had already been agreed upon.²³¹ The court consequently held that the president's "reservation of a right to ratify and his failure to attend to the course of negotiations simply will not justify this perversion of the bargaining process. The inference of intent to string out negotiations and avoid reaching an agreement is well-nigh inescapable."²³²

Withdrawal of already agreed-upon provisions also evidences a lack of good faith. In, *Valley Oil Co.*, the Board held that an employer's changes of positions during negotiations – including multiple withdrawals of agreed-upon provisions – evidenced bad faith during the bargaining process.²³³ The Board noted the following conduct by the employer:

[H]aving once agreed to a 4-hour guarantee for work on Saturdays and Sundays, it withdrew the agreement. Having agreed to a \$5,000 life insurance coverage and \$75-a-week disability pay on December 13, it changed its position on December 28. Having agreed to retroactivity on all benefits on November 29, it changed its position on December 28. Having agreed on November 22 to a 2-year contract, leaving open the amount of the second year increase, [the employer] on January 3 [] changed its position. . . .²³⁴

This repeated pattern of withdrawing from agreed-upon matters led the Board to conclude that the employer had not bargained in good faith.²³⁵

Finally, the arbitrary scheduling of meetings may evidence a lack of good faith.²³⁶ In *Moore Drop Forging Co.*, the Board held that an employer's conduct "was demonstrative of the [its] intent not to reach an agreement which the Union, as the representative of the employees, could reasonably accept."²³⁷ Specifically, the Board pointed to the employer's negotiator's practice of "arbitrarily setting up a precise schedule of days and times he would agree to come to

²³⁰ *Id.* at 217.

²³¹ *Id.* at 219.

²³² *Id.* at 218.

²³³ 210 NLRB 370 (1974).

²³⁴ *Id.* at 387.

²³⁵ *Id.* at 386.

²³⁶ This list of conduct evidencing a lack of good faith is illustrative only. Further conduct, not examined in this Paper, may certainly evidence a party's lack of good faith during the bargaining process, and this list is not intended to be exhaustive in any way. *See, e.g., Darling and Co.*, 171 NLRB 801 (1968) (noting that if one party resorted to the use of economic weapons too prematurely in the bargaining process, it could very well indicate a lack of good faith and an evasion of the duty to bargain).

²³⁷ 144 NLRB 165, 172 (1963).

Hillsboro for negotiations.²³⁸ By doing so, the employer made it plain to the union that surface bargaining of an indefinite period and not a mutually agreed-upon contract was the end he sought.²³⁹

VII. Section 8(d) Notices

Section 8(d) also imposes certain notice requirements upon parties. Specifically, when a collective bargaining contract is already in effect, the duty to bargain collectively includes the requirement that neither party can terminate or modify the contract, unless the party desiring such termination or modification:

- (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
- (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
- (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
- (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.²⁴⁰

Therefore, Section 8(d)(1) and 8(d)(3) impose sixty day and thirty day notice requirements upon parties, as part of the duty to collectively bargain in good faith. These notice requirements relate to mandatory bargaining subjects only,²⁴¹ and it is the obligation of the "initiating party" or the party seeking to modify or terminate the contractual terms to provide the notice.²⁴²

²³⁸ *Id.*

²³⁹ *Id.* at 173.

²⁴⁰ 29 U.S.C. § 158(d).

²⁴¹ *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157 (1971).

²⁴² *Nabors Trailers, Inc. v. National Labor Relations Board*, 910 F.2d 268, 276 (5th Cir. 1990).

Section 8(d)(1) imposes the initial notice requirement that any party seeking to modify or terminate the terms of an existing collective bargaining agreement must serve written notice on the other party.²⁴³ This notice must be given sixty days prior to the expiration date of the contract, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification.²⁴⁴ During these sixty days (or until the expiration date of the contract, whichever is later), there can be no strike or lockout.²⁴⁵ This notice should include an offer to meet and confer to negotiate a new or modified contract, and the parties must continue all existing contractual terms and conditions for sixty days after such notice is given or until the contract expiration, whichever is later.²⁴⁶

Additionally, Section 8(d)(3) imposes a thirty day notice requirement. Under Section 8(d)(3), the party seeking contract modification or termination must, within thirty days of notifying the other party, simultaneously notify the Federal Mediation and Conciliation Service (FMCS) and any comparable state agency.²⁴⁷ Failure to file such notice does not preclude the non-initiating party from undertaking otherwise lawful economic action.²⁴⁸

Parties who fail to comply with these notice provisions may face severe penalties. First, failure to comply with Section 8(d)'s notice requirements may constitute an unfair labor practice, or more specifically an unlawful refusal to bargain under Section 8(a)(5) and Section 8(b)(3).²⁴⁹ Moreover, employees who engage in a strike, without complying with these notice provisions, forfeit their status as employees under the NLRA and become unprotected activity strikers.²⁵⁰ As noted by the Board in *Boghosian Raisin Packing Co.*, forfeiture of employee status is a severe penalty that can occur even when failure to comply with the notice provisions occurs by

²⁴³ 29 U.S.C. § 158(d)(1).

²⁴⁴ 29 U.S.C. § 158(d)(1).

²⁴⁵ *Snivley Groves, Inc.*, 109 NLRB 1394, 1395 (1954).

²⁴⁶ 29 U.S.C. § 158(d)(2) & (4).

²⁴⁷ 29 U.S.C. § 158(d)(3).

²⁴⁸ *United Artists Communications*, 274 NLRB 75, 77 (1985), *review denied, decision aff'd*, 779 F.2d 552 (9th Cir. 1985).

²⁴⁹ *Nabors Trailers, Inc. v. National Labor Relations Board*, 910 F.2d 268 (5th Cir. 1990) (employer violated § 8(a)(5) by unilaterally implementing wage reduction less than 30 days after informing FMCS that negotiations were ongoing); *Boghosian Raisin Packing Co.*, 342 NLRB No. 32, at *19 (2004) ("Early on, the Board held that the notice requirements of Section 8(d) are mandatory and a strike without giving notice to the FMCS was unlawful and caused the union to be in violation of its duty to bargain under Section 8(b)(3).").

²⁵⁰ *See Fort Smith Chair Co.*, 143 NLRB 514 (1963), *aff'd*, 336 F.2d 738 (D.C. Cir. 1964); *see also* 29 USC § 158(d) ("Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute. . . .").

mistake.²⁵¹ In *Boghosian*, the union drafted written notice of a pending dispute to the FMCS as required under Section 8(d)(3), but the notice was never mailed due to a clerical error at the union's office.²⁵² The union then went on strike.²⁵³ Although the Board acknowledged that its decision appeared "harsh," the Board held that the "lack of notice caused the strike to be illegal and caused the strikers to lose their status as employees under the Act."²⁵⁴ Courts and the Board have consistently held that the notice requirements of Section 8(d), and the penalties for failing to do so, are clear and unambiguous.²⁵⁵ These Section 8(d) notices are mandatory, and failure to comply places a party in violation of its duty to bargain and any strikers lose their status as employees under the NLRA.²⁵⁶

VIII. Procedure for Complaining of Violations of Section 8(d)

If a construction employer or union believes the other party has violated its obligations under Section 8(d), either party may take action under the procedure mandated by the NLRA and enforced by the Board.

As established by the NLRA, the Board consists of five members and the General Counsel, and under these presidentially-appointed officials, a series of Regional Offices exist across the Nation, each led by a Regional Director.²⁵⁷ If an employer or union believes that the other party had failed to bargain in good faith, a party may file an unfair labor practice charge with a Regional Director within the Board.²⁵⁸ The Regional Director investigates and then determines whether formal action should be taken.²⁵⁹ The Regional Director can choose to issue a complaint and notice of hearing, pursuant to which a respondent has 10 days to file an answer.²⁶⁰ An administrative law judge (ALJ) then presides over a hearing and issues a decision.²⁶¹ The ALJ's decision can be appealed to the Board, in Washington D.C., which can

²⁵¹ 342 NLRB No. 32 (2004).

²⁵² *Id.* at *1.

²⁵³ *Id.* at *19.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ 29 U.S.C. § 153.

²⁵⁸ *Unfair Labor Practice Process Chart*, National Labor Relations Board, available at <http://www.nlr.gov/resources/nlr-process/unfair-labor-practice-process-chart> (last visited April 1, 2015).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

then choose to either: dismiss the complaint, find that the respondent did commit an unfair labor practice, or remand the matter back the ALJ.²⁶² If no exceptions are filed to the ALJ's decision, within 28 days, then the findings of the ALJ automatically become the decision and order of the Board.²⁶³

In accordance with Section 10(e) of the NLRA, the decision of the Board may then be appealed to the federal court of appeals where the unfair labor practice in question occurred.²⁶⁴ On appeal, the findings of the Board with respect to questions of fact shall be conclusive if they are supported by substantial evidence on the record.²⁶⁵ Courts also grant considerable deference to the Board's conclusions concerning the duty to bargain in good faith. Courts have held that the "classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise," and it is evident that Congress assigned to the Board the primary task of construing these provisions in the course of adjudicating charges of unfair refusals to bargain.²⁶⁶ Therefore, the United States Supreme Court has held that the Board's "judgment as to what is a mandatory bargaining subject is entitled to considerable deference."²⁶⁷ Further, courts have long recognized that "[t]he question of good faith bargaining is for the Board's expertise more than ours."²⁶⁸

Therefore, while the judgment of the Board is subject to judicial review, the Board's construction of Section 8(d) is generally not rejected merely because the courts might prefer another view of the statute.²⁶⁹ Rather, courts refuse enforcement of Board orders almost exclusively where they had "no reasonable basis in law," either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning.²⁷⁰ Courts have also refused enforcement of Board orders where the Board's ruling was "fundamentally inconsistent with the structure of the Act" and an attempt to usurp "major policy decisions properly made by Congress."²⁷¹ Any decision

²⁶² *Id.*

²⁶³ *Id.*; 29 U.S.C. § 160(c); 29 C.F.R. §§ 102.46, 102.48.

²⁶⁴ 29 U.S.C. § 160(e).

²⁶⁵ 29 U.S.C. § 160(e).

²⁶⁶ *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 685-686 (1965).

²⁶⁷ *Ford Motor Co. v. National Labor Relations Board*, 441 U.S. 488, 495 (1979).

²⁶⁸ *Kellwood Co. v. National Labor Relations Board*, 434 F.2d 1069, 1074 (8th Cir. 1970).

²⁶⁹ *National Labor Relations Board v. Iron Workers*, 434 U.S. 335, 350 (1978).

²⁷⁰ *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971).

²⁷¹ *American Ship Building Co. v. National Labor Relations Board*, 380 U.S. 300, 318 (1965).

by the federal court of appeals may be finally appealed to the Supreme Court upon writ of certiorari or certification.²⁷²

IX. Recent Developments

The Board has recently issued several notable decisions regarding an employer's and a union's duties under Section 8(d).

Expanding the Burden Upon Employers' Duty to Furnish Information

In October 2012, the Board issued its decision in *IronTiger Logistics, Inc.*, where it significantly broadened the burden upon employers when responding to unions' requests for information.²⁷³ The Board in *IronTiger* examined labor practices involving a freight shipping company, IronTiger Logistics, Inc., and a second shipping company under common ownership, TruckMovers.com.²⁷⁴ Drivers employed by IronTiger were represented by the International Association of Machinists and Aerospace Workers, but drivers employed by TruckMovers were not.²⁷⁵ After filing a grievance against IronTiger, the union requested information concerning all units of work dispatched to both IronTiger's and TruckMovers' drivers over the past 6 months.²⁷⁶

IronTiger provided the information, but four days after receipt of the information, the union requested supplemental information, most of which concerned TruckMovers' drivers who were not represented by the union.²⁷⁷ Four and a half months after receiving these supplemental requests, IronTiger objected to the requests as harassing, irrelevant, and burdensome. It specifically argued that: the information requested pertained to loads that did not belong to IronTiger, the information requested about TruckMovers's drivers involved nonunit employees and was thus irrelevant, and the union needed to substantiate the relevance of the specific information requested concerning IronTiger's drivers.²⁷⁸

²⁷² 29 U.S.C. § 160(e).

²⁷³ 359 NLRB No. 13 (2012), *vacated in light of National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550 (2014), *reaffirmed by Board* in 362 NLRB No. 45 (March 25, 2015).

²⁷⁴ *Id.* at *1.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

Although the Board found that the supplemental information requested by the union was irrelevant and not required to be furnished, the Board still held that IronTiger had violated its good faith duty to furnish.²⁷⁹ In reaching this holding, the Board stated:

[A]n employer must respond to a union's request for relevant information within a reasonable time, either by complying with it or by stating its reason for noncompliance within a reasonable period of time. Failure to make either response in a reasonable time is, by itself, a violation of Section 8(a)(5) and (1) of the Act. Some kind of response or reaction is mandatory.²⁸⁰

Therefore, the Board held that IronTiger “was obligated to inform the Union in a timely manner of the reasons that it did not believe that the information sought was relevant” and its failure to respond in any manner during a four and a half month period violated that obligation.²⁸¹ Inasmuch as the Board did not define “timely manner,” the definition will vary from case to case but, from Iron Tiger, it is clear this Board does not consider four months “timely.”

Discretionary Discipline: A Mandatory Subject of Bargaining

On December 14, 2012, the Board in *Alan Ritchey, Inc.* held that discretionary discipline is a mandatory subject of bargaining and that an employer has a duty to bargain with a union, prior to the finalization of a first collective bargaining agreement, before imposing discretionary discipline on an employee.²⁸² In *Alan Ritchey, Inc.*, employees of a company elected to be represented by a union during bargaining, but prior to negotiating a collective bargaining agreement, the employer disciplined multiple employees in accordance with its existing discipline policy.²⁸³ The discipline imposed upon the employees was discretionary, and ranged from written warnings to discharges.²⁸⁴ The employer never provided the union with notice or an opportunity to bargain about any of the disciplinary actions at issue.²⁸⁵

²⁷⁹ *Id.* at *2.

²⁸⁰ *Id.* (internal citations omitted).

²⁸¹ *Id.*

²⁸² 359 NLRB No. 40 (2012).

²⁸³ *Id.* at *1-2

²⁸⁴ *Id.* at *2.

²⁸⁵ *Id.* at *4.

The Board agreed with the union and the Board's General Counsel that "like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and that employers may not impose certain types of discipline unilaterally."²⁸⁶ The Board held that:

Accordingly, where an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintain the fixed aspects of the discipline system and bargain with the union over the discretionary aspects (if any), e.g., whether to impose discipline in individual cases and, if so, the type of discipline to impose. The duty to bargain is triggered before a suspension, demotion, discharge, or analogous sanction is imposed, but after imposition for lesser sanctions, such as oral or written warnings.²⁸⁷

However, the Board also limited its holding by stating that, in "exigent circumstances," an employer may act immediately, provided that, promptly afterward, it provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects.²⁸⁸ The Board also noted that its holding would apply only prospectively.²⁸⁹

Emphasizing the Duty to Collectively Bargain in Good Faith

In August 2014, the Board in *Hospital of Barstow, Inc.* emphasized an employer's obligations under Section 8(d) and ruled that an employer had violated this duty by (i) refusing to offer proposals or counterproposals until the union offered a full contract proposal and by (ii) prematurely declaring impasse and refusing to bargain unless the union directed employees to stop using a union-provided forms.²⁹⁰ In reaching this conclusion, the Board noted that the employer had deliberately acted to prevent any meaningful progress during bargaining sessions.²⁹¹ The employer had refused to provide any proposals or counterproposals during the first five bargaining sessions until it received a full set of proposals from the union, and only after the union satisfied an unlawful demand for a full contract proposal, did the employer finally proffer some proposals during the next three bargaining sessions.²⁹²

²⁸⁶ *Id.* at *1.

²⁸⁷ *Id.* at *7.

²⁸⁸ *Id.* at *10.

²⁸⁹ *Id.* at *1.

²⁹⁰ 361 NLRB No. 34 (2014).

²⁹¹ *Id.* at *4.

²⁹² *Id.*

Further, at a subsequent bargaining session, the employer threatened to stop bargaining if the union persisted in encouraging employees' use of a union provided form.²⁹³ At a mediated bargaining session, the employer yet again refused to bargain, erroneously claiming that the use of the union forms caused the parties to be at impasse.²⁹⁴ The employer then repeatedly refused to respond to the union's requests for future bargaining dates, despite the Union's open invitation to discuss any matter.²⁹⁵ Given this pattern of behavior, the Board decisively held that the employer failed to bargain in good faith, and as a remedy for the employer's failure to bargain in good faith, the Board ordered the employer to reimburse the union for costs and expenses that it incurred during the bargaining process.²⁹⁶

Closing Note: The author wishes to acknowledge and sincerely thank Amy L. McIntire, Esquire for her invaluable research, writing, and editing in the preparation of this paper.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at *5.