COLLECTIVE BARGAINING: CONCEPTS AND PRACTICES*

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CONCEPT OF COLLECTIVE BARGAINING

Bargaining has been described as "the process by which the antithetical interests of supply and demand, of buyer and seller, are finally adjudicated, so as to end in the act of exchange."[1] It is a matter akin to a market activity — where seller and buyer of labor negotiates for the price and conditions upon which the former shall give his labor to the latter.

Collective Bargaining, therefore, could be viewed as an economic method by which a union (or anyone purporting to represent a group of workers) contracts for the sale of its members' labor in exchange for wages and other benefits. The presence of an "intermediary" in collective bargaining distinguishes it from individual bargaining where an employee directly negotiates for himself. In many respects, however, both types of bargaining seek to achieve similar and related goals, although in collective bargaining, the employees' representative seeks not only economic benefits and work security for its constituents but likewise, security for itself as an organization in the form of union security clauses.

There is no statutory definition of the term collective bargaining in the Philippines although a description of what constitutes "the duty to bargain collectively" is explicit in the Labor Code.[2]

Under the Labor Code the duty to bargain collectively means —

> the performance of a mutual obligation to meet and convene promptly and expeditiously in good faith for the purpose of negotiating an agreement with respect to wages, hours of work and all other terms and conditions of employment including proposals for adjusting any grievances or questions arising under such agreement and executing a contract incorporating such agreements if requested by either party, but such duty does not compel any party to agree to a proposal or to make any concession.[3]

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1 FLANDERS, COLLECTIVE BARGAINING 13-14 (1969).

2 Pres. Decree No. 442 (1974), as amended. Hereinafter referred to as LABOR CODE.

3 LABOR CODE, art. 253.

As defined, the duty to bargain collectively relates both to the aspects of determining the terms and conditions of employment (of present as well as future employees) and to the resolution of disputes and problems arising from the application of the collective bargaining agreement.

THE ORIGIN OF THE DUTY TO BARGAIN COLLECTIVELY

A. *Pre-Industrial Peace Act Period*

The legal duty to bargain collectively is a recent development in the Philippines. But more significantly, the system of collective bargaining was not a natural product of local industrial relations practices. It is an "imposed" system of industrial relations. Prior to the passage of the Industrial Peace Act in 1953,[4] collective bargaining was virtually unknown in the Philippines. An earlier act (Commonwealth Act No. 213) expressly recognized the right of labor unions to bargain but since there was no corresponding obligation the part of the employers to bargain, the right was practically meaningless. Where collective bargaining existed, it existed only upon the unilateral willingness of the employers without statutory compulsion.

The passage of the Commonwealth Act No. 103 in 1935 (which created the Court of Industrial Relations) did not contribute to the development of collective bargaining. Conceived and created during the social and economic upheavals of the 1930's, the Court of Industrial Relations (CIR), with its statutory mandate to settle industrial disputes by compulsory arbitration, became the final arbiter to the parties' disputes. Compulsory arbitration of such matters as wages, hours and other economic items, instead of collective bargaining over them, characterized the industrial relations of that time.

B. *Beginning or the Collective Bargaining Period*

When the Industrial Peace Act was adopted in 1953, compulsory arbitration was eliminated (though not completely). In its place, a collective bargaining system was substituted as a means of not only determining the terms and conditions of employment but, likewise, was an instrument for achieving and maintaining industrial peace and stability. The Industrial Peace Act (IPA) provided for the general framework and procedures of the collective bargaining system. But unlike its American counterpart, the IPA went further to specify the role of the government in collective bargaining. Section (c) of the Declaration of Policy stated:

> To advance the settlement of issues between the employers and employees through collective bargaining by making available full and adequate governmental facilities for conciliation and mediation to aid and encourage employers and representatives of their employees in reaching and maintaining agreements concerning terms and conditions of employment and in making all reasonable efforts to settle their differences by mutual agreement.

[4] Rep. Act No. 875 (1953). Hereinafter referred to as IPA.

THE LEGAL NATURE OF THE DUTY TO BARGAIN

A. *Early Conception*

In a case decided prior to the enactment of the IPA, the Court described collective bargaining and the nature of the duty to bargain as follows:

> Section 2 of Commonwealth Act No. 213 confers upon labor organizations the right "to collective bargaining with employers for the purpose of seeking better working and living conditions, fair wages, and shorter working hours for laborers, and, in general, to promote the material, social and moral well-being of their members." The term "collective bargaining" denotes, in common usage as well as in legal terminology, negotiations looking toward a collective agreement. This provision in granting to labor unions merely the right of collective bargaining, impliedly recognizes the employer's liberty to enter or not into collective agreements with them. Indeed, we know of no provision of the law compelling such agreements. Such a fundamental curtailment of freedom, if ever intended by law upon grounds of public policy, should be effected in a manner that is beyond all possibility of doubt. The supreme mandates of the Constitution should not be loosely brushed aside.[5]

The Court added that Section 5 of Commonwealth Act No. 213[6] and Section 21 of the IPA[7] were patterned after the American Wagner Act and, citing the case of *National Labor Relation Board v. Jones & Laughlin Steel Corp.*,[8] declared that the parties were not compelled to make agreements.

B. *Under the Industrial Peace Act*

Although the IPA did not define collective bargaining or compel the employers and the labor unions to reach agreements, the IPA nevertheless established rigid specifications to be observed in collective bargaining. Moreover, the IPA expressly characterized what constitutes the legal duty to bargain collectively:

> In the absence of an agreement or other voluntary arrangement providing for a more expeditious manner of collective bargaining, it shall be the duty of an employer and the representative of his employees to bargain collectively in accordance with the provisions of this Act. Such duty to bargain collectively means the performance of the mutual obligation to meet and confer promptly and expeditiously and in good faith, for the purpose of negotiating an agreement with respect to wages, hours,

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[5] Pampanga Bus Co., Inc. v. PAMBUSCO Employees' Union, Inc., 68 Phil. 541, 594 (1939).

[6] Section 5 of the Com. Act No. 213 (1936) states:
"Any person . . . who intimidates or coerces any employee . . . with intent of preventing such employee . . . from joining any registered labor organization of his own choosing . . . shall be guilty of a felony. . . ."

[7] Section 21 of Com. Act No. 103 (1936) states:
"It shall be unlawful for any employer to discharge or to threaten to discharge, or in any other manner discriminate against, any laborer or employee because such person has testified or is about to testify . . . in any investigation, proceeding or public hearing conducted by the Court of Industrial Relations."

[8] 301 U.S. 1 (1936).

> and/or other terms and conditions of employment and of executing a written contract incorporating such agreement if requested by either party, or for the purpose of adjusting any grievances or questions arising under such agreement, but such duty does not compel any party to agree to a proposal or to make a concession.[9]

Unlike its American counterpart, the evolution of the duty to bargain in the Philippines had a very uncomplicated and simple development. Unsaddled with past practices and administrative and judicial pronouncements, the Philippine legislature had no difficulty adopting the collective bargaining system and imposing the duty to bargain collectively upon the employers and the labor unions.

C. *Under the Labor Code*

With the imposition of Martial Law in 1972, a new trend in labor relations was initiated. A new Labor Code of the Philippines was adopted on May 1, 1974 and took effect on November 1, 1974, supplanting the IPA. The Code, however, maintained and expanded the provisions on collective bargaining. The Labor Code is a revision and consolidation of all labor and social legislations. The CIR and the ad-hoc National Labor Relations Commission under Presidential Decree No. 21 were abolished and replaced by a new set of administrative arbiters under the new National Labor Relations Commission (NLRC). There was also a policy change in the process of collective bargaining. Voluntary arbitration was imposed as a means of resolving grievances and all agreements are required to contain voluntary arbitration provisions.

Under the Labor Code, as amended, the following procedures are required to be observed in collective bargaining:

> (a) When a party desires to negotiate an agreement, it shall serve a written notice upon the other with a statement of its proposals. The other party shall make a reply thereto not later than ten (10) days from receipt of such notice;
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> (b) Should differences arise on the basis of such notice and reply, either party may request for a conference which shall begin not later than ten (10) days from the date of request;
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> (c) If the dispute is not settled, the Bureau [of Labor Relations] shall intervene upon request of either or both parties or at its own initiative and it shall be the duty of the parties to participate fully and promptly in the conciliation meetings the Bureau may call;
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> (d) During the conciliation proceedings in the Bureau, the parties are prohibited from doing any act which may disrupt or impede the early settlement of the disputes;
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> (e) The Bureau shall exert all efforts to settle disputes amicably and encourage the parties to submit their case to a voluntary arbitrator.[10]

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[9] IPA, sec. 13.

[10] LABOR CODE, art. 251, as amended by B.P. Blg. 130.

ASPECTS OF THE DUTY TO BARGAIN COLLECTIVELY

A. *To Meet and Confer*

The duty of the employer (a duty also imposed on the union except that more often than not, the latter is the suing party rather than the former) to bargain collectively does not end when he extends recognition to a labor union as his employees' bargaining representative. The next step is to meet and confer with the labor union. This must be done promptly and expeditiously. In the absence of an agreement or other voluntary arrangement providing for a more expeditous manner of collective bargaining, it is the duty of the employer and the representatives of the employees to bargain collectively in accordance with the provisions of the Labor Code.[11]

When there is an existing collective bargaining agreement, the duty to bargain collectively also means that neither party shall terminate or modify such agreement during its lifetime. However, either party can serve a written notice to terminate or modify the agreement at least sixty (60) days prior to its expiration date. Both parties are likewise mandated to keep the status quo and to continue, in full force and effect, the terms and conditions of the existing agreement during the 60-day period and/or until a new agreement is reached by the parties.[12]

1. *Demand and Reply*

The Labor Code obligates a party desiring to negotiate an agreement to serve a written notice on the other party with a statement of its demands and proposals. The other party is required to make a reply within 10 days from receipt of the notice. If a disagreement exists, either party may request a conference which must be held within 10 days from receipt of the request.

It is generally held that failure to answer a demand for negotiation within the specified statutory period constitutes an unfair labor practice. Even where a reply was duly made, a refusal to bargain may be found if the employer rejects the union demands hastily and without justification.

2. *Personal Conferences*

To meet and confer also mean direct confrontation. It has been held that the employer's duty to accept the procedure of collective bargaining also requires him to meet the bargaining representative in personal conferences and negotiations:

> Bargaining in the field of labor relations is customarily carried on over the conference table at which the representatives of both parties confront each other and exercise that personal and oral persuasion of which they are capable. While it may be that negotiations through the mails or by other

[11] LABOR CODE, art. 252.
[12] LABOR CODE, art. 254.

> indirect methods fulfills the statutory requirement when both parties accept that procedure, we think it clear that the Act contemplates that under ordinary circumstances personal conferences should be held if requested by either party.[13]

Additionally, the duty to meet and confer likewise includes an obligation to have representatives available (and accessible) for conferences at reasonable times and places.

3. *To Negotiate an Agreement*

The duty to bargain collectively is not discharged by replying to a request for and attending; a conference. There must be a real and genuine attempt to come to an agreement. A mere statement of "yes" or "no" following each proposal and counterproposal is insufficient.

4. *To Bargain with Employee's Representatives*

Negotiating with each and every employee is the antithesis of collective bargaining. Individual bargaining by the employer is always looked upon as an effort to subvert the statutory authority of certified representatives and is generally considered an unacceptable and objectionable conduct. Individual bargaining was (and in some cases, still is) deeply rooted in our industrial relations system. It is a result of weak employee organizations and also because of the paternalistic attitude of many employers toward their employees. The enactment of the IPA ended individual bargaining in theory but the practice still persists in many establishments.

Under the American Rule, an employer violates his statutory duty to bargain exclusively with the majority representative of his employees when he deals with his employees directly. Such conduct in by-passing the union, undermines its authority and defeats a primary purpose of the law which is to encourage collective bargaining.[14] Offers of employees to bargain individually, even though unsolicited, cannot be accepted by the employer.[15]

In exceptional cases, however, direct negotiations with individual employees is considered not unlawful where the employer's action is not motivated by a desire to circumvent the union and to undermine its authority. Similarly the duty to bargain collectively does not *ipso facto* prevent the execution of the individual employment contract as long as such contract does not embody matters within the statutory scope of collective bargaining or is not inconsistent with the existing collective bargaining agreement.

5. *Adjustment of Individual Grievances without the Union*

Tradition is pretty strong with respect to the right of the individual employee to see his employer without the intervention of any one, including

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[13] P. Lorrilard Company, 16 NLRB 684, 803 (1939).
[14] CCH LAB. LAW REP., par. 3147, 8011 (1969).
[15] Central Metallic Gasket Co., 91 NLRB 572 (1950).

the labor union, concerning his complaints or gripes about his job and in many cases even about his family problems. The growth from a simple and small agricultural economy to a multifaceted enterprise has not drastically changed the traditional interpersonal relationship between individual employee and his employer.

Unionization of the plant, while resulting in the erection of a wall which theoretically places the individual employee beyond the reach of the employer without the union's intervention, does not, in practice, work out completely. The individual employee still seeks to see the employer; the employer, in turn, encourages the employee since personal and direct contacts sustain its paternalistic attitude and policy. On the other hand, labor unions generally object to this arrangement for very obvious reasons: it weakens its influence on the employees and consequently undermines its bargaining position.

Under the American National Labor Relations Act, individual employees are given the right to present grievances to their employer, and to have such grievances adjusted without the intervention of the union, provided the union is given the opportunity to be present and provided the adjustment is not inconsistent with the terms of the contract. However, an employer may not invite employees to deal directly with management on grievances without notifying or consulting the union.[16]

In the case of *The Insular Life Assurance Co., Ltd. Employees Association-NATU vs. The Insular Life Assurance Co., Ltd.*,[17] the Supreme Court held:

> I[t] is an unfair labor practice for an employer operating under a collective bargaining agreement to negotiate or attempt to negotiate with his employees individually in connection with changes in the agreement. And the basis of the prohibition regarding individual bargaining with the strikers is that although the union is on strike, the employer is still under obligation to bargain with the union as the employees' bargaining representative.[18]

However, in the absence of a collective bargaining agreement, the right of an employee to bring his grievances to his employer for adjustment without the intervention of the union is still unsettled. Equally unsettled is the effect of adjustment made with the employee without the presence or consent of the bargaining representative. These uncertainties are caused by the omission in the IPA and in the Labor Code, of comparable provisions of the American National Labor Relations Act. Whether the legislative omission was deliberate is, of course, conjectural at best. As it is, there is nothing

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[16] CCH LAB. LAW REP., par. 3147, 8012 (1969).
[17] G.R. No. 25291, January 30, 1971, 37 SCRA 244.
[18] *Id.* at 257; citing Medo Photo Supply Corp. v. National Labor Relations Board, 321 U.S. 678 (1944).

in the law which prevents the employees from presenting their grievances to the employer unilaterally. Equally (but more significantly), there is nothing in the law which could prevent an employer from settling his employees' grievances without notifying or consulting the union first.

6. *Bargaining with a Minority Union*

The principle of majority rule (and exclusiveness) bars bargaining with a union which does not represent the majority of the employees in an appropriate unit. It has been consistently ruled that it is not an unfair labor practice for an employer to refuse to bargain with a minority union nor with a union which fails to prove its majority status.[19] This principle of majority determination is a recent development in Philippine industrial relations. Formerly, it was legally permissible to bargain collectively with a labor union which represented only a minority of the employees. But the passage of the IPA and now the Labor Code, made it unlawful to bargain with a minority union.

B. *Good Faith Bargaining*

The requirement of good faith negotiation and bargaining in the Philippines is uniquely American in origin. Both in practice and in law, good faith bargaining has no historical precedents in the Philippines.

Like its counterpart in the US, the IPA and the Labor Code does not contain a definition of or a characterization of what constitute good faith bargaining. Consequently the courts have to formulate their own rule with regard to good faith bargaining. Lacking Philippine precedents, the CIR adopted liberally the American labor board's rule and policy on good faith bargaining. The American labor board has constantly declared that in determining the good or bad faith in collective bargaining, all relevant facts, including any unlawful act, the sequence of events, and the time lapse between the refusal and the unlawful conduct must be examined.[20]

Paraphrasing the labor board, the CIR declared that whether the conduct of either party constitutes a bona fide effort to negotiate or is a disguised pretense, "is a question of fact to be determined by the actuations of the parties involved."[21]

The statutory obligation to bargain collectively in good faith covers the conduct or statements of the parties even prior to the actual negotiations. It likewise covers conduct or statements of the parties after an agreement has been reached. Thus, for instance, the requirement of good faith in

[19] *See* generally, Spar Lime Workers Union v. Spar Lime Development Co., Case No. 2249-ULP, May 30, 1961, July 1961 CIR Reporter 55; Freeman Shirts Employees Labor Union v. Freeman Shirts Mfg. Co., Case No. 1085-ULP, January 28, 1958, March 1058 CIR Report 187; Mindanao Federation of Labor Unions v. Basilines, Inc., Case No. 430 ULP, January 14, 1955, December 1957 CIR Report 356.

[20] Joy Silk Mills v. National Labor Relations Board, 185 F. 2d 732, 742 (1950).

[21] Philippine Collective Labor Union v. Cebu Shipyard & Engineering Works, Case No. 104-ULP (Cebu), Aug. 12, 1957, October 1957 CIR Reporter 175.

bargaining starts as soon as the union representing the majority of the employees submits its demands and proposals to the employer. Furthermore, such requirement of good faith is continuous even during the life of the agreement.

1. *Conduct Prior to Actual Bargaining*

There is no hard and fast rule to measure the conduct of the parties preliminary to the actual negotiations. Nevertheless, there are explicit procedural requirements, particularly in the IPA and now in the Labor Code, which, if disregarded, could be considered evidence of bad faith or refusal to bargain. For instance, a party is directed by law to reply to a request for negotiation within ten days; otherwise, a refusal to bargain is inferred.[22] Independent of the statutory standard, however, the conduct of the parties prior to the negotiation may be measured by past action or statement. This is particularly true in American jurisprudence where the law does not contain any procedural requirements of collective bargaining. Thus, avoiding personal conferences,[23] refusal to attend pre-arranged meetings,[24] or failure to respond to a written demand for negotiation,[25] have been considered relevant evidence on the issue of good faith bargaining. In a number of cases, insistence upon a certification election was considered as bad faith where it was motivated by a desire to gain time to undermine the union's strength.[26]

2. *Conduct During Negotiations*

Good faith in collective bargaining does not end when the parties meet and sit across each other in a bargaining table. The obligation to observe good faith continues during the actual period of negotiation up to and until an agreement is reached or an impasse has occurred. During the negotiations, the parties are required not only to listen to proposals but likewise to make counterproposals if the former are unacceptable. Outright rejection of proposals without an attempt to offer a compromise is considered an evidence of lack of good faith in bargaining.[27]

Good faith during the period of negotiations requires the parties not to commit any act or conduct inimical to the other's position. Similarly, the parties are obliged not to pursue a conduct which would jeopardize the making of an agreement. This would include, for instance, prohibition against unilateral acts during the period of negotiations. In one of its earliest

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22 *See* LABOR CODE, arts. 251 (a) and (b), 252 and 253, as amended; IPA Sec. 14(a) and 15.

23 National Labor Relations Board v. U.S. Cold Storage Corp. 203 F. 2d 924 (1953).

24 Young Engineering Company 157 NLRB 1221.

25 National Labor Relations Board v. Chain Service Restaurant, Local 11, AFL-CIO, et al., 302 F. 2d 167 (1962).

26 Fleming & Sons of Colorado, Inc., 147 NLRB No. 137.

27 *See* NLRB First Annual Report 87 (1936).

cases, the CIR characterized the duty to bargain in good faith in the following manner:

> Good faith [bargaining] requires the parties to enter upon and conduct negotiations as reasonable men with the purpose and intent of reaching mutually agreeable solutions to the problems of wages, hours, and working conditions of the employees presented and putting these solutions into written form, if requested. Mere pretense at negotiations with a completely close mind and without the spirit of cooperation and good faith runs counter to the fulfillment of the duty.[28]

3. *Bargaining Techniques*

Hard Bargaining. Hard bargaining is of itself not incompatible with good faith bargaining so long as there is an honest attempt to reach an agreement. The characteristics of a legitimate hard bargaining technique is described as follows:

> Admittedly, Respondent [employer] engaged in a course of hard bargaining. It gave little and held fast to many of its positions. We do not believe, however, that the totality of Respondent's conduct throughout the negotiations indicates that it was bargaining in bad faith after the strike began. Respondent did meet with the Union at regular intervals. Proposals were presented by both parties and the respective bargaining demands were thoroughly explored. Some agreements on contract proposals were arrived at. Some areas of disagreement were narrowed. Respondent made its officers available to the Union, submitted serious proposals, and did not engage in any of the dilatory maneuvers customarily associated with "surface bargaining." Neither did it foreclose negotiation on any mandatory subject of bargaining or insist on any non-mandatory subject. After September 19, when Respondent was alleged to have bargained in bad faith, Respondent was insisting on the same proposals which it had lawfully insisted upon prior to that date. All of these factors lead us to conclude that Respondent did not engage in conduct violative of [good faith bargaining].[29]

However, when "hard bargaining" becomes an instrument to avoid a reasonable chance for settlement, it may be considered an evidence of bad faith. Of course, the law does not compel the parties to reach an agreement but the duty to bargain in good faith is breached if the adamant or stubborn stand to a petition forecloses any room for a change or compromise.

Take-it-or-leave-it Bargaining. The process of collective bargaining is a "shared and mutual" process, where both parties take an active participation in the quest for a settlement. It is an "ask-and-bid" or an "auction" form of bargaining.[30] The parties are all participants in the process and neither one of them should be treated as a mere bystander. Consequently, where a party assumes a "take-it-or-leave-it" attitude, collective bargaining

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[28] Maritime Industrial Union v. National Development Company, Case No. 1936-ULP, September 5, 1969, October 1969 CIR Reporter 317.

[29] W. L. McKnight and Webster Outdoor Advertising Co., 170 NLRB No. 144 (1968).

[30] *See* General Electric Company, 150 NLRB 192.

is thwarted. The "take-it-or-leave-it" bargaining technique is generally considered unacceptable.

Closely resembling this type of bargaining is the so-called "Boulwareism."[31] Under this system, the company makes a "fair and firm offer" of what it thinks is right for the employees, without holding back anything for compromise, trading, or concession. The company stands firm in its offer — without compromising or conceding — unless a new set of facts or information intervenes which would make its offer no longer "right" for the employees. The company's offer is based on complete and exhaustive surveys of economic and related data, including employee interviews and evaluations of the union's demands.[32] Boulwareism is considered an unacceptable bargaining technique as it negates the substance of bargaining:

> This "bargaining" approach undoubtedly eliminates the "ask-and-bid" or "auction" form of bargaining, but in the process devitalizes negotiations and collective bargaining and robs them of their commonly accepted meaning. "Collective bargaining" as thus practiced is tantamount to mere formality and serves to transform the role of the statutory representative from a joint participant in the bargaining process to that of an advisor. In practical effect, Respondent's "bargaining" position is akin to that of a party who enters into negotiations "with a predetermined resolved not to budge from an initial position," an attitude inconsistent with good faith bargaining. In fact, Respondent here went even further. It consciously placed itself in a position where it could not give unfettered consideration to the merits of any proposals the Union might offer. Thus, Respondent pointed out to the Union, after Respondent's communications to the employees and its "fair and firm offer" to the Union, that "everything we think we should do is in the proposal and we told our employees that, and we would look ridiculous if we changed now."[33]

Use of Economic Pressure

a. *Strike.* Is the use of economic pressure to reach an agreement incompatible with good faith bargaining? According to the US Supreme Court, inference of lack of good faith in bargaining cannot be made from the use of tactics designed to exert economic pressure during negotiations.[34] The US Supreme Court observed that "at the present statutory stage of our national labor relations policy, the two factors — necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree to one's terms — exist side by side."[35]

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[31] This bargaining technique is named after Lemuel Boulware, a former General Electric Company vice president, who was credited with being the first to have devised this method of bargaining.

[32] *See* note 30, *supra.*

[33] *Id.* at 198.

[34] National Labor Relations Board v. Insurance Agents International Union, AFL-CIO, 361 U.S. 477 (1960).

[35] *Id.* at 482.

The 1981 and 1982 amendments[36] to the Labor Code expressly recognize the right of the union to strike and/or picket for purposes of collective bargaining. Therefore, the use of economic weapons by the union to influence or force the employer to agree to its collective bargaining proposals is valid and lawful. It should be noted, however, that there are certain condition precedents before the union may engage in concerted activities for collective bargaining purposes.[37] Further, in the case of certain businesses such as energy, banks, hospitals, and export-oriented industries, including those within the export processing zone, the right to engage in concerted activities as economic pressure is somewhat limited since the law allows the government to immediately intervene and assume jurisdiction over the dispute, thereby automatically enjoining or stopping the intended or impending strike or picket.[38]

b. *Lockouts.* As an employer's weapon, lockout may be used for varying purposes. Technically, a lockout may either be used as a defensive or offensive weapon. As a defensive measure, lockout is generally considered a lawful instrument of bargaining since it seeks to preserve the integrity of bargaining associations.[39] Formerly, an offensive lockout — i.e., a lockout intended solely to put economic pressure on the union to accept the employer's bargaining proposals — was considered an unlawful conduct in the absence of an imminent threat of a strike.[40] But the U.S. Supreme Court in the *American Shipbuilding* case[41] declared that the offensive use of lockout, even in the absence of a strike threat, to support a bargaining demand after an impasse, is a lawful exercise of economic power. The Court observed:

> The lockout may dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage. Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful.[42]

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[36] B.P. Blg. 130 (1981) and B.P. Blg. 227 (1982).

[37] The right of legitimate labor organizations to strike and picket, consistent with the national interest, is recognized and respected. However, no labor union may strike on grounds involving inter-union and intra-union disputes (LABOR CODE, Art. 264 [b]). In cases of bargaining deadlocks, the certified or duly recognized bargaining representative may file a notice of strike with the Ministry of labor at least thirty (30) days before the intended date thereof. In cases of unfair labor practice, the period of notice is shortened to fifteen (15) days. (LABOR CODE, Art. 264 [c]). A decision to declare a strike must be approved by at least two-thirds (2/3) of the total union membership in the bargaining unit concerned obtained by secret ballots in meetings or referenda. The union shall furnish the Ministry of Labor the results of the voting at least seven (7) days before the intended strike, subject to the cooling off period, (LABOR CODE, Art. 264 [f]). The cooling-off period and the seven (7) day strike ban after the strike vote report are mandatory. *See* National Federation of Sugar Workers v. Ovejera, G.R. No. 597-43, May 31, 1982, 114 SCRA 354.

[38] LABOR CODE, art. 264 [g]; art. 265.

[39] National Labor Relations Board v. Truck Drivers Local Union No. 449, 353 U.S. 87 (1957).

[40] *See* American Shipbuilding Co., 142 NLRB 133, enf'd. 331 F. 2d (1964).

[41] 380 U.S. 300, 85 S. Ct. 955, 13 L. Ed. 2d 855 (1965).

[42] *Id.* at 309.

In a subsequent case, a lockout of employees before an impasse in collective bargaining was held lawful.[43] The use of the lockout in collective bargaining disputes is statutorily recognized and regulated in the Philippines. Under the IPA, an employer cannot lockout his employees without first giving a 30-day notice to the then Department of Labor. Failure to follow the statutory procedure was considered a *prima facie* evidence of a refusal to bargain. The Labor Code expressly recognizes the validity of the use of lockout as a bargaining weapon, subject only to certain guidelines.[44] Although the lockout is an available employer's weapon in the Philippine industrial relation system, its use as a bargaining instrument to support a demand or proposal is still infrequent.

The question remains, however, as to the scope of the statutory regulation. The language of the IPA and the Labor Code seem broad enough to justify an employer's use of a lockout during an impasse in the negotiation so long as there has been an attempt to bargain in good faith.

Unilateral Conduct. The essence of collective bargaining is the joint determination of the hours of work, wages, and the terms and conditions of employment. Consequently, acts committed unilaterally or without prior knowledge or consent of the other party during the period of negotiation (or during the life of the agreement) are generally viewed as inconsistent with the duty to bargain collectively. The rationale of this policy was expressed in a leading case by the US Supreme Court in the following terms:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by a reason of substance.[45]

The unilateral change by the employer may come in the form of a grant of new benefit, or in deprivation on reduction of an existing employees benefits.[46]

The general proscription of unilateral actions does not include a unilateral act committed during an impasse. When the negotiation reaches a

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[43] Lane v. National Labor Relations Board (Darling & Co.) 418 F. 2d 1208 (1969).

[44] The right of employers to lockout consistent with the national interest is recognized and respected. However, no employer may declare a lockout on grounds involving inter-union and intra-union disputes. (LABOR CODE, art. 264 [b]). In cases of bargaining deadlocks, the employer may file a notice of lockout with the Ministry of Labor at least 30 days before the intended date thereof. In cases of unfair labor practices, the period of notice is shortened to 15 days. (LABOR CODE, art. 264 [c]). A decision to declare a lockout must be approved by at least 2/3 of the board of directors of the employer corporation or association or of the partners in a partnership obtained by secret ballot in a meeting called for the purpose. The employer shall furnish the Ministry of Labor the results of the voting at least 7 days before the intended lockout. (LABOR CODE, art. 264 [f]).

[45] National Labor Relations Board v. Katz, 369 U.S. 736, 747 (1961).

[46] Borden, Inc. 196 NLRB 1170 (1972).

deadlock with no apparent outlook for an agreement, either party is at liberty to undertake any action without consultation or negotiation. In this circumstance, for instance, an employer may lawfully change unilaterally the employees' terms and conditions of employment. Thus, wages might be increased, hours diminished and a fringe benefit inaugurated or improved. The right to take unilateral actions under this circumstance, however, is not absolute. The employer may lawfully offer only such changes in the existing working arrangements which have been previously offered, but turned down, in the negotiation. Any modifications above and beyond those previously offered in the bargaining table would be considered bad faith bargaining. The rationale of this post-impasse rule is that no impasse can be said to have been reached because had the employer offered the greater benefit in the bargaining table, the negotiation would not have ended in a deadlock.[47]

Unilateral action is also valid where established company policy on existing agreement permits the employer to change any of the working conditions without prior negotiation or consultation with the union.[48]

4. *Closing Down of Business*

At first glance, the employer's decision to stop doing business, like the decision to start it, appears to be absolutely a matter of the employer's sole prerogative. The requirement of good faith in bargaining has, however, restricted this employer's prerogative particularly where the employer has a bargaining agreement with a union or where he is engage in bargaining with the union.

It has been held that an employer may lawfully close down his plant without prior negotiation with the union, provided it is done in good faith and it is due to business losses.[49] The fact that the closing down took place during the period of the negotiation for a collective bargaining agreement is immaterial as long as the closing down was made in good faith.[50]

Employers, however, are required to give at least one month written notice and to pay their employees separation pay equivalent to one half month pay for every year of service where such shut down is not due to serious business losses.[51]

American jurisprudence on this area is best illustrated by the famous *Darlington*[52] case where the U.S. Supreme Court held that an employer may go out of business even if the reason is "to chill unionization" of the plant, provided that the closing down is total.

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[47] Bi-Rite Foods, Inc. 147 NLRB 59 (1964).

[48] National Labor Relations Board v. Ralph Printing & Lithog. Co., 433 F. 2d 1058 (1970), Cert. denied 401 U.S. 925 (1971).

[49] Tiong King v. Court of Industrial Relations, 90 Phil. 564 (1951).

[50] National Labor Union v. Standard Mfg. Co., Case No. 3105-ULP, December 12, 1962, Dec. 1962 CIR Reporter 471.

[51] LABOR CODE, art. 284.

[52] Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 85 S. Ct. 994 13 L. Ed. 2d 827 (1965).

> [O]ne of the purposes of the Labor Relations Act is to prohibit the discriminatory use of economic weapons in an effort to obtain future benefits. The discriminatory lockout designated to destroy a union, like a "runaway shop" is a lever which has been used to discourage collective employee activities in the future. But a complete liquidation of a business yields no such benefit to the employer, if the termination is bona-fide. It may be motivated more by spite against the union than by business reasons, but it is not the type of discrimination which is prohibited by the Act.[53]

However, the American Supreme Court observed that the closing down should be of the entire business and not just a part of it.

Partial closing down of business, if motivated by a purpose "to chill unionism," is therefore unlawful if the employer may reasonably have foreseen that such closing would likely have that effect.[54] But where the partial discontinuance of business is caused by economic difficulties, no unfair labor practice is committed by the employer.[55] However, the employer is obligated to notify the union of its intention to close down a part of the plant.[56]

In the U.S. however, this obligation does not apply where the collective bargaining agreement recognized the employer's right to close a part of his business.[57]

5. *Production of Information*

If during the course of the negotiation (or immediately preceding it), the union asks the employer for the production of certain information concerning the subject matter of bargaining, the question arises as to whether the employer has the obligation to furnish the requested information in relation to his duty to bargain collectively in good faith.

In *NLRB v. Truitt Mfg. Co.*[58] the U.S. Supreme Court held:

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. 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 or inability to pay without making the slightest effort to substantiate the claim.[59]

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53 *Id.* at 271-272.
54 *Id.* at 275.
55 National Labor Relations Board v. Royal Plating & Polishing Co., 350 F. 2d 191 (1965).
56 *Id.* at 196.
57 Ador Corp. 150 NLRB No. 161, 1658 (1965).
58 341 U.S. 149, 76 S. Ct. 753; 100 L. Ed. 1027 (1956).
59 *Id.* at 152-153.

The U.S. Supreme Court later held that the duty to disclose "extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement."[60]

In the Philippines, there is as yet no definitive administrative ruling or judicial pronouncement as to the effect of a failure to provide requested information on the duty to bargain. In one case, the Supreme Court reversed the CIR directing an employer to furnish information regarding his financial position to a union.[61] This case, however, is not in any manner indicative or authoritative of the state of the law regarding the duty (or lack of it) to furnish information inasmuch as the issue involved in the case was the correctness of the order limiting the coverage of the information to be furnished.[62]

Theoretically speaking, the National Labor Relations Commission (NLRC) in the exercise of its power and authority pursuant to the provisions of the Labor Code, may require a party to produce any or all kinds of information, whether financial or otherwise, when such information is material to a just determination of the matter under investigation. This is particularly true in the case of compulsory arbitration where the power of the NLRC is broad. Nevertheless, there is as yet no judicial determination as to the extent of this power and as well as to the duty of an employer to produce (or not to produce) certain required information during the collective bargaining sessions with the union.

When Obligation arises. The duty to furnish information upon demand arises only when a party, normally an employer, takes a bargaining position of inability to meet the union demands. Where the rejection of the demand is based on something else but inability to pay, the duty does not attach to the employer.[63] The presumption that a wide range of wage information is relevant and must be disclosed has been sustained.[64]

In judging the relevancy of the information sought, a distinction is made between wage data on the one hand, and financial data, on the other. The former includes all the factors that enter into the computation of wages and other forms of compensation whereas the latter includes such items as

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[60] National Labor Relations Board v. Acme Industrial Co., 385 U.S. 432 (1967).

[61] National Labor Union v. International Oil Factory, G.R. No. 18425, February 27, 1963, 7 SCRA 286.

[62] *Ibid.* In this case, the union demanded vacation leave with pay. The employer rejected the demand and a labor dispute ensued. Upon certification to the industrial court, the employer was required to grant vacation leave with pay depending upon his financial condition. The union moved to require the employer to submit his financial report from 1951 to 1960. The industrial court restricted the period from 1951 to 1955. Hence, the appeal to the Supreme Court.

[63] *See* e.g., Locals 6-7, Woodworkers Union v. National Labor Relations Board 263 F. 2d 483 (1959); Charles Honaker, 147 NLRB 1148; Castor Mold & Machine Co., 148 NLRB 1614; Empire Terminal Warehouse Co., 151 NLRB 1359, enf'd 355 F. 2d (1966); Castor Mold & Machine Co., 148 NLRB 1614.

[64] Boston Herald Traveller Corp. v. National Labor Relations Board, 223 F. 2d 58 (1955).

sale and production figures and other information regarding the employers' ability to meet the union demands.

Wage and Financial Data. The legal distinction between wage and financial data is crucial with respect to the employer's duty to bargain collectively. The union's right to wage data and related information relating to financial data is, at best, conditioned and subject to the particular circumstance of the case. The significance of this distinction is aptly explained by an American appellate court in the following tenor:

> The unions argue that any distinction between wage information on the one hand and production and sales information on the other is arbitrary and meaningless. According to the unions the data overlap. This is not necessarily so. Wages and hours are the heart and core of the employer-employee relationship, and information concerning existing and past wage rates and patterns is essential to the union to enable it to bargain intelligently. This is not necessarily so with respect to what the employer's records show about how much, or at what cost, or in what time he produces his goods, and how or at what cost or in what volume he sells those products. We do not say that information on production or sales would never in any circumstances be required, but only that it need not always be disclosed on request.[65]

As a rule, therefore, financial data need not be supplied in spite of the union's request as long as the employer does not place his financial position at issue in a bargaining demand for higher wages or more benefits.

The obligations to produce and to furnish particular information cannot be excused by defending that the information is confidential.[66] However, where it is claimed that the information sought is not only confidential but also involves a trade secret, the weight of authority favors its non-disclosure to the union.[67]

SUBJECT MATTER OF COLLECTIVE BARGAINING

By legislative fit, "wages, hours, and other terms and conditions of employment" are bargainable subject matters. For purposes of discussion, wages and hours will be classified as "economic matter" whereas "other terms and conditions of employment" may be grouped into what we call, for lack of a better term, as the "non-economic matter." In many respects, these categories overlap but sufficient distinctions exist for their separate examination.

A. *Economic Matter*

1. *Wage Determination*

[65] International Woodworkers of America, Local Unions 6-7 v. National Labor Relations Board, 263 F.2d 483, 485 (1959).

[66] Curtiss-Wright, Wright Aero Div. v. National Labor Relations Board, 347 F. 2d 61 (1965).

[67] Kroger Co. v. Natonal Labor Relations Board, 399 F. 2d 455 (1968).

In general, the employee regards wages primarily as a source of income which directly or indirectly affects his standard of living, community status and future economic security. On the other hand, the employer normally considers wages as an item of labor costs which affects his competitive position through increases in his cost of production, the efficiency of his employees and the profitability of his operations.[68]

Since majority of the unions achieve recognition only after the plant has already started its actual operations, wage determination through collective bargaining is characterized mostly by union demand *to increase* the existing wages or *prevent* decreases or diminutions thereof.

General Wage Increase. Much of the friction which develops in collective bargaining involves the issue of wage increases. When used in collective bargaining, the phrase "wage increases" normally have little or no relation to merit.[69] They are usually given to all workers whether or not the employer is satisfied with their individual performance. The justification for the increase may be for varied reasons. As a rule, the performance of the company as a whole is always a consideration but the performance of the individual worker is not usually an issue in the negotiation. The increases are often, but not always, uniform for all employees. Wage increase may be couched in terms of centavos per hour, pesos per month, or a percentage of so much.

Wage Criteria in Collective Bargaining. The most commonly used wage criteria in bargaining are: comparable wages, cost of living, the living wage, the ability to pay, productivity, and purchasing power.[70] The living wage and purchasing power criteria are used primarily by unions; whereas the remaining criteria are used by both employers and unions, depending upon the conditions surrounding the negotiations. But the parties do not restrict themselves to one or two criteria to justify their positions.

Power Aspects of Wage Determination. In organized firms, wage determination involves a balancing of power. It reflects the union's power to strike and the company's ability to withstand a strike and impose loss of earnings on employees.

Union's bargaining power depends upon three basic elements: the right to strike, the ability to strike successfully and the amount of loss which can be inflicted on the employer by a strike. Union negotiators must weigh all these elements in calling a strike. On the other hand, management must likewise consider the strength and weakness of its wage position.

There are no "hard and fast" rules of governing successful negotiations. The foregoing considerations plus the personalities of management and union

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68 WORTMAN & RANDLE, COLLECTIVE BARGAINING 293-294 (1966).
69 BLOOM & NORTHRUP, ECONOMICS OF LABOR RELATIONS 329-380 (1961).
70 WORTMAN & RANDLE, *supra* at 315-323.

representatives are relevant matter to be considered. But there are certain limits beyond which the employer will not agree to further increases and limits beyond which the union will not accept the offered wage, regardless of the economic situation.[71] When either of these limits is reached, or exceeded, a strike (or lockout) is inevitable.

2. *Working Days/Hours*

The existence of legislations[72] regulating days and hours of work have diminished the occurrence of serious disagreements on these matters. Often, the substance of bargaining on these items is restricted more or less to the questions of whether there should be a five-day working week and to the amount of premium pay for works in excess of eight (8) hours and for works on Sundays and holidays.

B. *Non-Economic Subject Matter*

While wages, hours or work, fringe benefits, and other related items constitute the first "priorities" for collective bargaining, no less important are matters which affect the rights, status, and positions of the union, employer, and the individual employees. These matters may be separately designated as union security and management authority.

1. *Union Security*

The demand for union security agreement is a desire by (and for) the union itself as an institution, separate and distinct from its membership. As an institutional organism, the union is primarily motivated to protect and to preserve its existence. The historical and present employers' opposition to the presence of the labor unions in their offices and plants largely contribute to the unions' unceasing demands for devices to protect and assure their survival. The motive for union security is self-preservation:

> In order to get and maintain rights for workers, the union itself needs to be strong. The union as such, therefore, attempts to achieve sovereignty, to obtain rights for itself as an organization. These rights may be described as an institution building device. They improve the unions' power to implement the rights obtained for the workers.[73]

By its nature and intent, any type of union security agreement restricts a worker's freedom to work and, in some respects, an employer's right to choose his employees. It is no wonder, therefore, that the matter of union security evokes so much arguments and emotions—from both its proponents and opponents.

Generally, union security may be classified into the following types of shop: (1) closed shop, (2) union shop, (3) preferential union shop,

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71 BLOOM & NORTHRUP, *supra* note 69, at 399-402.

72 LABOR CODE, arts. 83, 87, 91, 97; formerly Com. Act No. 444, Rep. Act Nos. 946 and 2377.

73 BAKKE & KERR, UNIONS, MANAGEMENT AND THE PUBLIC 112 (1948).

(4) agency shop, (5) maintenance of membership, (6) exclusive or sole bargaining shop, and (7) open shop. These categories are graduated from the open shop, where no union security at all exists, to the closed shop which is the most favorable of all union security as far as a union is concerned. Almost all union security shops compel the employee, once he becomes a union member, to continue his union membership as a requisite for continued employment. These may be termed compulsory shops. The other types of shops make no such requirement and leave to the employee to decide whether or not he wishes to be a union member. These shops may be termed non-compulsory shops.

Political debates and conflicting administrative and judicial decisions have characterized the development of public policy toward union security in the Philippines. As originally adopted in 1953, union security agreements were legalized by the IPA under the following broad proviso:

> . . . that nothing in this Act or in any other statute of the Republic of the Philippines shall preclude an employer from making an agreement with a labor organization to require as a condition of employment membership therein, if such labor organization is the representative of the employees. . . .[74]

The aforementioned proviso had spawned a controversy as to whether all employees may be compulsorily required to be union members under pain of loss of employment.

The Labor Code has, however, clarified some of the confusions and chaos generated by the IPA. As now worded, employees who are already members of another union at the time of the signing of the agreement cannot be compelled to join the recognized bargaining agent.[75] For practical purposes, however, this provision raises more questions than resolve the problem of scope of union security.

An amendment to the IPA further exempted from the coverage of the union security clause employees whose religious beliefs prohibit them from joining labor organizations.[76] This provisions was upheld by the Supreme Court.[77] However, the Labor Code did not carry over this particular provision. Whether an exemption from the union security clause exists on grounds of religious belief is now an open question.

Closed Shop. Under a closed shop agreement, an employer obligates himself to employ and retain in employment union members only. It is the purest form of union security.

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[74] IPA, Sec. 4 (a) (4).
[75] LABOR CODE. art. 249.
[76] Rep. Act No. 3350 (1961).
[77] Victoriano v. Elizalde Rope Workers' Union, G.R. No. 25246, September 12, 1974, 59 SCRA 54; Basa v. FOITAF, G.R. No. 27113, November 19, 1974, 61 SCRA 93; Anucension v. NLU, G.R. No. 26097, November 29, 1977, 80 SCRA 350.

Union Shop. The union shop differs from the closed shop in that the employer may hire anyone he pleases, whether a union member or non-union member. It is similar to the closed shop in that employees must maintain their union membership once employed as a condition of continued employment. This means, that while an employer may choose who to employ, such employee just join the union within a specified period of time, usually within thirty (30) days from hire, in order to retain his employment.

Preferential Union Shop. Under this type of union security, an employer is required to call the union office and ask for union members that are available. If they are available, he is free to reject them if they are not qualified. If no union member is available or qualified, the employer may hire any one he pleases through his office. Generally, employees hired through the union must maintain their union membership or they will lose their jobs. Similarly, employees hired outside of the union office must become union members lest they lose their jobs.

Agency Shop. An agency shop provides that all employees who do not wish to join the union must, as a condition of employment, pay a fixed amount each month to the union as a service charge (usually equivalent to union's monthly dues) to defray the union's expenses in acting as their bargaining agent. Advocates of agency shop argue that service charges required of non-union members are fair because the union, under the law, is obligated to represent all employees in the bargaining unit, regardless of whether or not they are union members. On the other hand, opponents of agency shop argue that although the employee pays a service charge to the union, he does not, in fact, receive the full benefits gained from being a member. For instance, he does not receive any benefit in the event of a strike nor can he participate in the union educational fund.

Maintenance of Membership. This is a lesser form of union security since there is no compulsion on the part of the employee to join the union. However, it also protects the present strength of the union while ensuring against membership losses, because employees who are already union members and those who may subsequently join the union must maintain their memberships as condition of employment. Under most maintenance of membership clauses, an employee is given at the start of the contract term, an "escape" period during which he may resign. If he chooses to stay, he cannot resign without losing his employment.

Exclusive Bargaining Shop. This is the weakest form of union security. Under this shop, there is no requirement of union membership for job retention or union preference for hiring. However, the union is recognized as the exclusive bargaining agent for all employees, whether union member or not, throughout the duration of the agreement.

Support Payment Under Agency Shops. Employees who, for personal or other reasons, refuse to join a labor union may nevertheless be required,

as a condition of continued employment, to pay a fixed amount usually equivalent to regular union dues. This amount, historically known as the "free riders fees" are deductible from the subjects' wages like union dues.[78] The instrument upon which deductions of support payments are made is invariably called the "agency shop."

In a case denominated as "one of first impression," the Philippine Supreme Court held that a "union agency fee" provision is invalid under the provision of the IPA.[79]

The Labor Code has, however, legalized the collection of agency fees. Thus —

> Employees belonging to an appropriate collective bargaining unit who are not members of the recognized collective bargaining agent may be assessed a reasonable fee equivalent to the dues and other fees paid by members of the recognized collective bargaining agent, if such non-union members accept the benefits under the collective agreement: Provided, That the individual authorization required under Article 242, paragraph (o) of this Code shall not apply to non-members of the recognized collective bargaining agent. . . .[80]

Check-off authorization is not needed in the collection of agency fees.

In spite of its apparent clarity, questions have arisen as to the scope of this agency fee, i.e., whether employees expressly excluded from the coverage of the bargaining union by agreement are liable to pay this fee and, whether all types of payments such as assessments and fines, aside from the membership dues, are payable by the non-union members.

Check-off. Check-off is a process whereby an employer deducts from the employees' wages a certain amount of money representing dues and/or assessments and remits the same to the employee's bargaining representative. It is a form of union security but it does not necessarily require employees' membership in a union. Practically speaking, when a union negotiates a union security agreement, check-off authorization inevitably follows since check-off provisions affords the union the security of its income. Nevertheless, not all unions seek check-off because it tends to insulate them from their membership. On the other hand, most unions, especially those with large membership, prefer check-off as it saves them expenses for clerical works and administrative burdens, and prevents delinquency in payments.

Check-off maybe compulsory or voluntary. The former provides that all union members, without individual employee authorization, are subject to the check-off. Union membership is therefore accompanied by the check-off authority. The voluntary type requires employees' authorization before

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[78] WORTMAN & RANDLE, *supra* note 68, at 466.

[79] National Brewery & Allied Industries Labor Union v. San Miguel Brewery, Inc., G.R. No. 18170, August 31, 1963, 8 SCRA 805.

[80] LABOR CODE, art. 249 (e).

deductions are made. Ordinarily, the authority may not be revoked during the life of the agreement; but in some cases, check-off authority may be renewable at periodic intervals.

The IPA did not regulate the making of check-off agreements. But the prevailing legal doctrine then was that a check-off was legal and may be agreed upon by the employees' bargaining representative and their employer.[81] Now the Labor Code expressly recognizes check-off of union dues. However, extra-ordinary payment such as attorney's fees, negotiation fees and the like require prior individual authorization.[82]

PROVISIONS FOR THE BENEFIT OF MANAGEMENT

Management Prerogatives Defined. The term "management prerogative" (or right as others would call it) escapes clear and precise definition or description. Functionally, it is described as including the following:

(1) to direct and control the work force;
(2) to determine the means, methods, process, materials, and schedules of production;
(3) to utilize fully the work force and machines; and
(4) to maintain employee discipline and production efficiency.[83]

Neither the IPA nor the Labor Code explicitly prescribes or enumerates acts of management that are (or are not) subject matter of collective bargaining. Aside from the definitional characterization that the duty to bargain collectively means the duty to negotiate with respect to "wages, hours of work and all other terms and conditions of employment," no other provision in either law exists which may give light to what constitutes bargainable and non-bargainable management prerogatives.

The Philippine Supreme Court in the case of *Shell Oil Workers' Union vs. Shell Company of the Philippines, Ltd.*,[84] considered the scope of manage-prerogative and its effect on collective bargaining. It ruled that:

> It is the contention of Shell Company, sustained by respondent Court, that the dissolution of the security guard section to be replaced by an outside agency is a management prerogative. The Union argues otherwise, relying on the assurance of the continued existence of a security guard section at least during the lifetime of the collective bargaining agreement. . . . It is to be admitted that the stand of Shell Company as to scope of management prerogative is not devoid of plausibility if it were not bound by what was stipulated. The growth of industrial democracy fostered by the institution of collective bargaining with the workers entitled to be represented by a union of their choice, has not doubt contracted the sphere of what appertains solely to the employer. It would be going too far to

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[81] A. L. Ammen Transportation Co., Inc. v. Bicol Transportation Employees Mutual Association, 91 Phil. 649 (1962).

[82] LABOR CODE, art. 242[0].

[83] Justin, *How to Preserve Management Rights Under the Labor Contract*, LAB. L. J. 189 (1960).

[84] G.R. No. 28607, May 31, 1971, 39 SCRA 276.

> assert, however, that a decision on each and every aspect of the productive process must be reached jointly by an agreement between labor and management. Essentially, the freedom to manage the business remains with management. It still has plenty of elbow room for making its wishes prevail. In much the same way that labor union may be expected to resist to the utmost what they consider to be an unwelcome intrusion into their exclusive domain, they cannot justly object to management equally being jealous of its prerogatives.
>
> More specifically it cannot be denied the faculty of promoting efficiency and attaining economy by a study of what units are essential for its operation. To it belongs the ultimate determination of whether services should be performed by its personnel or contracted to outside agencies. It is the opinion of the Court, that while management has the final say on such matter, the labor union is not to be completely left out. What was done by Shell Company in informing the Union as to the step it was intending to take on the proposed dissolution of the security guard section to be replaced by an outside agency is praiseworthy. There should be mutual consultation; eventually, deference is to be paid to what management decides. Thereby, in the words of Chief Justice Warren [in Fibreboard Corp. v. National Labor Relations Board, 379 U.S. 203 (1964)], there is likely to be achieved "peaceful accommodation of conflicting interest." In this particular case though, what was stipulated in an existing collective bargaining contract certainly precluded Shell Company from carrying out what otherwise would have been within its prerogative if to do so would be violative thereof.[85]

It is generally conceded even by the labor group that the initial planning, organizing, managing and running of a plant are solely management prerogatives. Included among these matters are the structuring of the corporate framework, the composition of the official and supervisory force, general business practices, the products to be manufactured, the location of the plant, the scheduling of production, methods, processes, and means of manufacturing, and the marketing of the products. Nevertheless, in exceptional circumstances, some of these matters have been held subject to bargaining on the ground that they are included in the phrase "terms and conditions of employment." For instance, the following "operational" matters were held to be negotiable: partial closing of a plant;[86] decision to remove or relocate a plant;[87] subcontracting out of unit work;[88] and lease of equipment.[89]

Finally, the requirement of good faith bargaining raises the question of whether an employer is required to bargain collectively with the union with respect to technological changes in the plant. This question is particularly important to a developing state like the Philippines where technological

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[85] *Id.* at 284-285.

[86] Ozark Trailers, Inc., 161 NLRB No. 48, 1967 CCH par. 20, 834.

[87] Garwin Corporation, 153 NLRB No. 59, enforced in part, 374 F. 2d 295 (1967), Cert. denied 55 L. Ed. 2d 971 (1966).

[88] Fibreboard Paper Co. v. National Labor Relations Board, 379 U.S. 203, 85 S. Ct. 398 13 L. Ed. 2d 253 (1964).

[89] Local 24 Teamster AFL-CIO v. Oliver, 358 U.S. 283, 79 S. Ct. 297 3 L. Ed. 2d 312 (1959).

changes are taking place in rapid fashion, leaving behind them many dislocated workers.

In practice, the following managerial actions are considered by unions as subject to negotiation: hire, replacements of vacant positions, promotions or demotions, transfer, discipline, and in most instances, dismissals and lay-offs. The unions, however, do not generally question managerial "initial" actions in these personnel matters; i.e., the unions do not demand prior approval, consent or consultation before management could act. But rather, the unions demand that in these cases, the management action be subject to union's right to appeal or to seek reconsideration. Generally, the collective bargaining practices allow the union to resort to grievance machinery to raise the question not whether the action was "managerial" but whether it is reasonbale, just or proper.

On the other hand, managerial actions concerning the actual plant operation including the right to manufacture what product, the use of machinery and equipment, the method of manufacturing, processing or assembling, and location of different branches, are generally considered by the unions as the exclusive domain of management.

PROSPECT OF COLLECTIVE BARGAINING

The right to bargain collectively is no longer subject to doubt or debate. This right is accorded to both the employees and their employer although in practice the former seeks recognition and enforcement of the right more often than the latter.

The IPA which laid the groundwork for a collective bargaining system was in existence for twenty years, while the Labor Code is now over its tenth year. To date, however, collective bargaining has not yet lived up fully to its objectives and purposes. True the number of organized labor was increased as well as the number of organized workers. Similarly true is the rise of collective bargaining agreements since the adoption of the system. But these are the inevitable effect of the mandatory character of the act and are therefore expected. The real purpose of the system — to determine the terms and conditions of employment and to resolve industrial conflict — has remained in the most part unmet and unrealized.

A. *Role of Government*

For instance, in the field of industrial disputes, it is often the practice of the parties, especially the labor group, to seek the aid of the government to settle its disputes with the employer rather thai avail of the bargaining process, either through the grievance machinery or voluntary arbitration. The net effect of this practice is to thwart the development of collective bargaining. Unlike in the U.S. where the labor group resists government intervention, Philippine unions seemingly invite it.

Active government role in the collective bargaining process is not restricted to settlement of industrial disputes. In the determination of the terms and conditions of employment, the government has assumed the role of union-negotiator in many areas. For instance, there is an existing proposal to compel employers to extend to their employees a "profit-sharing scheme." Profit-sharing is comparatively a new area in the industrial practices in the Philippines and although many labor unions have initiated negotiations on this matter, the employers have generally resisted it. If this proposal is adopted, employers would be compelled to negotiate a profit-sharing scheme with their employees. What is anomalous, however, is that under the proposal, the percentage of profit-sharing is already predetermined, leaving almost nothing to labor and industry to bargain about. Quite expectedly, the labor unions welcome and support this proposal; whereas the employers have denounced it. Most of the arguments, pro and con, are economic in character. For instance, labor argues that profit-sharing will boost production; on the other hand, the employers point out that mandatory profit-sharing is a disincentive to business. Virtually left out from the arguments is the adverse effect of the proposal on the collective bargaining process.

B. *Use of Voluntary Arbitration*

Labor unions and employers must develop complete reliance in collective bargaining process. They should strive to come into agreement by themselves without the intervention of a third party — specifically the government. The grievance machinery found in bargaining agreements must be utilized to its fullest extent in resolving work disputes. Similarly, the use of arbitration must be developed to its fullest extent.

Voluntary labor arbitration in the Philippines, unlike in the U.S., is hardly availed of by the parties to a labor contract. The labor arbiters and the NLRC are still the choice agencies in the adjustment of contractual grievances. But where arbitration is utilized, the procedure is cumbersome especially with respect to the choice of arbitrator. Both labor and capital prefer an arbitration board of three (3) members — the third member being chosen by the two arbitrators. And since the two arbitrators were chosen to represent two conflicting interest, the choice of a third arbitrator often becomes a "battle for supremacy." There are intimations however that the idea behind a tripartite body is to make sure that the arbitrators representing labor and capital do not agree on the third arbitrator — thereby prolonging the solution of the grievance.

Resolution of grievances is better solved by arbitration. Arbitration has many known advantages over judicial or administrative litigations, foremost of which are speed and "informality" of procedure. American experience in labor arbitration is most pertinent to the Philippines. In the U.S., the wide acceptance of arbitration is supported both by public policy

and practices. It is a rarity to find an American collective bargaining agreement without a binding arbitration clause as one of its provisions.

Present public policy requires that a labor contract contains provisions for voluntary arbitration of grievances. Present practices on labor arbitration however needs a great deal of reorientation and reform. There is a need to develop a crop of law practitioners, academicians and other professionals to take the job of arbitrators. In this connection, there is a need to update the present arbitration law in order to suit the present needs.

C. *Public Employees*

In the area of covered employees, it is safe to predict that in the next couple of years or so, public employees performing governmental functions will have sufficient political and economic power to compel the government to change its present policy. The off and on "sick leaves" of Manila and suburban public school teachers are harbingers of things to come. The government will have to reexamine its policy excluding this group of employees from collective bargaining. As a matter of fact, there is an immediate need to evaluate the public employees' right to bargain collectively and engage in concerted efforts considering that, lately, the public employees, particularly, the public school teachers, are engaging in strike and other concerted activity.

D. *Bargainable Subjects*

Many labor leaders visit the U.S. and Europe to undertake training and observation. Additionally, some labor leaders receive grants or study tour in these countries. When these labor leaders return, they generally bring back with them new ideas on what constitute bargainable subjects. These matters are usually the same subjects often bargained about by their American and European counterparts.

For instance, subjects such as guaranteed wage, escalator clauses, profit-sharing, shorter work week, stock options, bigger and more fringe benefits are the favorite bargaining demands of labor in the U.S. and in Europe. Present political and economic positions of labor unions in the Philippines will preclude immediate realization of majority of these demands, but it is only a matter of time when these demands become real objects of bargaining. For sure, though, labor union demands would certainly increase and would be substantially greater and more different in the forthcoming years. How fast these demands are met will be determined in the most part by the degree of public acceptance of the legitimacy of these demands and by the political power of the labor unions.

E. *Labor's New Ally*

The 1980's mark the revival of mass consciousness and activism. Students and the urban poor again took to the streets and demanded political,

economic and social reforms. The most significant effect of this development is the joining of forces among the labor group on the one hand, and the students and some members of the religious sector, on the other. Labor has indeed found a new but potentially powerful ally — a conventionally non-political, but strong and idealistic group composed of thousands.

What is the effect in collective bargaining process of this new alliance? For one thing, labor as a group, has increased its bargaining position with management. Now the employers could expect joint "assault" from labor and this new group, and as proven by recent occurrences, the students and their allies are ready and willing to man the picket lines to bolster the strength of striking unions. And lately, a number of labor unions have brought with them student and religious leaders to sit in bargaining sessions.

The new alliance has prompted some labor groups to be more militant in their demands for work improvements and social amelioration. Because of this new found strength, talks about a labor party have again started. If this materializes, labor's influence and pressure, as a group, would certainly be much stronger — both in the political arena and in the bargaining table.

In conclusion, we can state with certainty that the system of collective bargaining is definitely here to stay. What is the extent and scope of its future development is, at best, tentative in some aspects and definitive in others. Whatever may be the form and substance of its future development, however, will be influenced not only by economic considerations but more importantly by social and political factors.

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