

# Tulsa Law Review

---

Volume 16 | Number 4

---

Summer 1981

## Preliminary Issues as Permissive Subjects of Bargaining: The Implications of NLRB v. Bartlett-Collins Co.

Brian J. Stark

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Brian J. Stark, *Preliminary Issues as Permissive Subjects of Bargaining: The Implications of NLRB v. Bartlett-Collins Co.*, 16 Tulsa L. J. 691 (1981).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol16/iss4/3>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# PRELIMINARY ISSUES AS PERMISSIVE SUBJECTS OF BARGAINING: THE IMPLICATIONS OF *NLRB v. BARTLETT- COLLINS CO.* \*

Brian J. Stark\*\*

## I. INTRODUCTION

Company and union representatives meet to negotiate a collective bargaining agreement. The chief negotiator for the company announces the presence of a professional stenographer to transcribe all bargaining sessions. The union vehemently objects to the procedure, but the company refuses to bargain unless the negotiations are recorded by a court reporter.

Two recent circuit decisions<sup>1</sup> have upheld rulings of the National Labor Relations Board<sup>2</sup> that insistence to impasse<sup>3</sup> upon such a threshold<sup>4</sup> or preliminary<sup>5</sup> matter constitutes a per se violation of section 8(a)(5)<sup>6</sup> of the National Labor Relations Act.<sup>7</sup> The Board's position overrules a long line of cases in which it had applied a good faith anal-

---

\* The views expressed in this article are those of the author and do not reflect the views of Judge Seymour, author of *Bartlett-Collins*, or the U.S. Court of Appeals for the Tenth Circuit.

\*\* A.B., Brown University; J.D., Harvard Law School. Former law clerk to U.S. Tenth Circuit Judge Stephanie K. Seymour, 1980-81; Adjunct Professor of Law, The University of Tulsa, College of Law, 1981; Associate, Coghill and Goodspeed, Denver, Colorado.

1. *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652 (10th Cir. 1981); *Latrobe Steel Co. v. NLRB*, 630 F.2d 171 (3d Cir. 1980).

2. 29 U.S.C. § 153(a) and § 153(b) (1976) provide for the creation, composition, and powers of the National Labor Relations Board [hereinafter referred to as the Board].

3. Impasse is a "state of facts in which the parties, despite the best of faith, are simply deadlocked." *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 482 (5th Cir. 1963). See notes 191-201 *infra* and accompanying text.

4. *Bartlett-Collins Co.*, 237 N.L.R.B. 770, 773, 99 L.R.R.M. 1034, 1036, (1978), *enforced*, *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652, 655 (10th Cir. 1981).

5. *Id.*

6. Section 8(a)(5) defines employer unfair labor practices. Subsection (5) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representative of his employees, . . ." *Id.* Conversely, if the union were the insisting party rather than the employer-company, the union would be in violation of 29 U.S.C. § 158(b)(3) (1976). This section imposes a

ysis in assessing the legality of a party's insistence upon recording of bargaining sessions as a prerequisite to continued bargaining.<sup>8</sup> In the Board's own words, it had, "treated the issues of the presence of a court reporter or a recording device at negotiations as a mandatory subject of bargaining"<sup>9</sup> and as such, it was a matter upon which a party could lawfully insist to impasse, unless the insistence was done in bad faith.<sup>10</sup>

The Board's new policy of treating the recording of negotiations as a permissive subject of bargaining,<sup>11</sup> a matter upon which a party cannot condition further negotiations or agreement,<sup>12</sup> has obvious implications for the collective bargaining process. Knowledge that one's exact words are being recorded can substantially influence a negotiator's conduct and the course of bargaining.<sup>13</sup> The frequency of this practice and the degree to which reticent parties can be forced to expose their verbatim statements to Board, judicial, and public scrutiny, depends largely upon the Board's willingness to allow a party to insist on recording and to bolster its demand with economic pressure. The Board's newly expressed position, as interpreted by the Third and Tenth Circuits<sup>14</sup> potentially has much broader implications. Arguably the switch from a

---

duty on the union similar to the employer's duty to bargain pursuant to 29 U.S.C. § 158(a)(5) (1976).

The Board also found the company's insistence on the stenographer violative of § 8(a)(1) which states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157." *Id.* Section 157 establishes the employees' right "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157 (1976).

7. 29 U.S.C. §§ 151-169 (1976) (Original version at ch. 372, §§ 1-19, 49 Stat. 449 (1935). (References in text and footnotes to single digit sections are to the original sections of the Act.) (Hereinafter referred to as the Act.)

8. See notes 22-34 *infra* and accompanying text.

9. *Bartlett-Collins Co.*, 237 N.L.R.B. 770, 772, 99 L.R.R.M. 1034, 1035 (1978). 29 U.S.C. § 158(d) (1976) provides: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . ." *Id.* Wages, hours, and working conditions comprise the mandatory subjects of bargaining. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348 (1958). An employer's refusal to bargain in good faith concerning any of these subjects violates 29 U.S.C. § 158(a)(5) (1976). See *id.* 342-49. Similarly, a union's refusal to bargain in good faith would violate 29 U.S.C. § 158(b)(3) (1976). See note 6 *supra*.

See notes 55-69 *infra* and accompanying text for a more comprehensive discussion of the duty to bargain pursuant to *Borg-Warner*.

10. See *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342, 349 (1958).

11. Permissive, non-mandatory subjects of bargaining are matters outside the statutory phrase "wages, hours, and other terms and conditions of employment, . . ." 29 U.S.C. § 158(d) (1976), construed in, *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342, 349 (1958).

12. See *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163-64 (1971).

13. See notes 122-35 *infra* and accompanying text.

14. See note 1 *supra* and accompanying text.

good faith analysis to a per se standard extends beyond court reporters and recording devices to all "preliminary" matters.<sup>15</sup> The scope of this new policy warrants analysis, because the positions taken in a number of Board opinions may now be subject to modification.

The Board's new ruling also raises questions about the utility of applying traditional impasse analysis to bargaining disputes over threshold issues. Impasse is a popular term in Board and judicial opinions, but legal commentary on the subject has been restricted to determining when negotiations are so deadlocked that impasse exists and the legal significance of such a finding.<sup>16</sup> However, when a preliminary issue causes the breakdown in negotiations, the more problematic issue presented to the Board and courts is not whether impasse has occurred, but rather, who bears responsibility for the impasse. This issue will be discussed after examining the evolution of the legal attitude toward the recording of collective bargaining sessions.

## II. DEVELOPMENT OF BOARD POLICY TOWARD DEMANDS TO RECORD NEGOTIATIONS

### A. *Good Faith Analysis*

The National Labor Relations Board has always considered stenographic recording of negotiations to be harmful to the collective bargaining process. The Board expressed this belief in *Reed & Prince Manufacturing Company*,<sup>17</sup> the first case in which it considered whether insistence upon stenographic transcription of negotiations constituted a refusal to bargain in violation of section 8(a)(5). The Board declared that "[t]he presence of a stenographer at such negotiations is not conducive to the friendly atmosphere so necessary for the successful termination of the negotiations,"<sup>18</sup> and that it "is not the approach usually taken by a participant in collective bargaining negotiations seeking and expecting in good faith to reach an agreement; it is more consistent with the building of a defense to anticipated refusal to bargain charges."<sup>19</sup> The Board in *Reed & Prince*, however, did not hold the

---

15. See notes 144-58 *infra* and accompanying text.

16. See, e.g., Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1 (1977); Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEX. L. REV. 470 (1966); Comment, *Impasse in Collective Bargaining*, 44 TEX. L. REV. 769 (1966); Stewart & Engeman, *Impasse, Collective Bargaining and Action*, 39 U. CIN. L. REV. 233 (1970).

17. 96 N.L.R.B. 850, 28 L.R.R.M. 1608, *enforced on other grounds*, 205 F.2d 131 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953).

18. 96 N.L.R.B. 850, 854, 28 L.R.R.M. 1608, 1610 (1953).

19. *Id.*

employer's insistence on a stenographer to be a per se violation of the Act. The finding of a section 8(a)(5) violation was based on the conclusion that the employer's overall pattern of bargaining demonstrated a lack of good faith.<sup>20</sup> The employer's insistence on a stenographer was treated only as "further evidence of its bad faith."<sup>21</sup>

The Board continued to apply a good faith standard in subsequent cases.<sup>22</sup> It consistently examined the surrounding circumstances to determine "if the insistence either on a court reporter in negotiations or on a device to record those sessions was made in bad faith; i.e., to avoid or frustrate the legal obligation to bargain."<sup>23</sup>

In *St. Louis Typographical Local 8*,<sup>24</sup> the Board adhered to this policy, but for the first time was divided over the question of whether a party may ever lawfully insist to impasse that bargaining sessions be recorded.<sup>25</sup> A three member majority felt that it was not for the Board to "endorse or condemn the practice of utilizing a stenographer during bargaining sessions."<sup>26</sup> The majority limited its task to determining whether the party had "acted in a manner consistent with the principles of good faith,"<sup>27</sup> reasoning that a "*preliminary matter*" such as the stenographer issue should be resolved "by the same methods of compromise and accommodation as are used in resolving equally difficult differences relating to substantive terms and conditions of employment."<sup>28</sup> The majority relied on the Board's steadfast policy of avoiding the establishment of rigid standards regarding "conditions

---

20. *Id.* The statutory source establishing the duty to bargain in good faith is contained in 29 U.S.C. § 158(d) (1976): "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . ." *Id.*

For discussions of the duty to bargain in good faith, see Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988 (1961); Mack, *The Duty to Bargain in Good Faith—Recent Problems*, 47 TENN. L. REV. 293 (1980).

21. Reed & Prince Mfg. Co., 96 N.L.R.B. 850, 854, 28 L.R.R.M. 1608, 1610 (1953).

22. See Allis Chalmers Mfg. Co., 106 N.L.R.B. 939, 950, 32 L.R.R.M. 1585, 1589 (1953); East Tex. Steel Castings Co., 108 N.L.R.B. 1078, 1084-85, 34 L.R.R.M. 1152, 1153 (1954).

23. Bartlett-Collins Co., 237 N.L.R.B. 770, 772, 99 L.R.R.M. 1034, 1035 (1978).

24. 149 N.L.R.B. 750, 57 L.R.R.M. 1370 (1964).

25. In this case the employer filed the unfair labor practice charge. The employer had insisted on the presence of a court reporter to make a verbatim transcript, and the union refused to negotiate in the presence of the stenographer. The employer asserted that the union's refusal to bargain violated section 8(b)(3) of the Act. The Board disagreed, finding that the union had acted in good faith in rejecting the use of the stenographer. 149 N.L.R.B. 750, 751, 57 L.R.R.M. 1370, 1370-71 (1964).

26. *Id.*

27. *Id.*

28. *Id.* (Emphasis added).

*preliminary* to actual bargaining,"<sup>29</sup> in favor of a case-by-case determination of whether a position was taken to frustrate the duty to bargain, with the "ultimate issue" being the party's "state of mind."<sup>30</sup> The two concurring members viewed the recording of bargaining sessions as falling within the Supreme Court's definition of a permissive subject of bargaining in *NLRB v. Wooster Division of Borg-Warner Corp.*<sup>31</sup> Accordingly, the insisting party's state of mind was deemed irrelevant; a party could never insist to impasse on recording collective bargaining sessions.<sup>32</sup>

Decisions subsequent to *St. Louis Typographical* continued to apply a good faith analysis to the stenographer issue,<sup>33</sup> although the Board remained divided over the issue.<sup>34</sup> With its decision in *Bartlett-Collins Co.*,<sup>35</sup> however, the Board has now unanimously adopted the position taken by the concurring members in *St. Louis Typographical*.

### B. *Per Se Standard*

In *Bartlett-Collins*, the newly certified union, American Flint Glass Workers of North America, and the Bartlett-Collins Company began collective bargaining in July 1974.<sup>36</sup> After seven bargaining sessions, the Union filed several unfair labor practice charges, including the charge that the company had violated section 8(a)(5) of the Act by engaging in bad faith bargaining.<sup>37</sup> Following an Administrative Law Judge's decision that the company had failed to bargain in good faith, the parties met for further negotiations in July 1976.<sup>38</sup> The company's

---

29. *Id.* (Emphasis added).

30. *Id.* at 1371 n.6.

31. 356 U.S. 342 (1958). The Supreme Court's definition evolved from its interpretation of §§ 8(a)(5) and 8(d) of the Act. The Court stated: "[T]hese provisions establish the obligation of the employer and the representative of the employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . .'" *Id.* at 349 (quoting § 8(d) of the Act).

32. *St. Louis Typographical Local 8*, 149 N.L.R.B. 750, 754, 57 L.R.R.M. 1370, 1372 (1964).

33. See *American Ship Bldg. Co.*, 226 N.L.R.B. 788, 800-01 (1976), *enforced*, No. 77-1178 (D.C. Cir. April 5, 1978); *Inter-Polymer Indus.*, 196 N.L.R.B. 729, 762, 80 L.R.R.M. 1509, 1511 (1972); *West Coast Casket Co.*, 192 N.L.R.B. 624, 638, 78 L.R.R.M. 1026, 1026 (1971); *Architectural Fiberglass*, 165 N.L.R.B. 238, 239, 65 L.R.R.M. 1331, 1332 (1967); *Southern Transp. Co.*, 150 N.L.R.B. 305, 311, 58 L.R.R.M. 1017, 1018 (1964), *enforcement denied*, 355 F.2d 978 (8th Cir. 1966).

34. See, e.g., *Architectural Fiberglass*, 165 N.L.R.B. 238, 239 n.8, 65 L.R.R.M. 1331, 1333 n.8 (1967); *Southern Transp. Co.*, 150 N.L.R.B. 305, 311 (1964), *enforcement denied*, 355 F.2d 978 (8th Cir. 1966).

35. 237 N.L.R.B. 770, 99 L.R.R.M. 1034 (1978), *enforced*, 639 F.2d 652 (10th Cir. 1981).

36. See 639 F.2d 652, 653 (10th Cir. 1981).

37. *Id.*

38. *Id.*

negotiator announced the presence of a court reporter, who was to record and prepare a transcript of the proceedings.<sup>39</sup> The negotiator explained that because the prior unfair labor practice proceeding had raised questions about the accuracy of testimony concerning the first seven bargaining sessions, a stenographic transcript was necessary to prevent similar questions from arising.<sup>40</sup> The Union representative protested, but after forty minutes of heated discussion, he agreed to the use of the court reporter for that session only.<sup>41</sup>

No further negotiations transpired until after the Board's June, 1977, affirmance of the decision rendered by the administrative law judge that the company had failed to bargain in good faith.<sup>42</sup> The parties then agreed to additional meetings but in a subsequent letter the company informed the union that it intended to have a court reporter transcribe all bargaining sessions, entirely at its own expense if necessary, with the record binding on both parties.<sup>43</sup> The company again stated that since it felt the Board's decision had turned on credibility determinations, it would protect all parties to have a certified court reporter's transcript of the negotiations.<sup>44</sup> In an answering letter, the union renewed its objections to the procedure. Its position was that the presence of a court reporter would "interfere with and unduly impede negotiations and frank discussions between the parties"<sup>45</sup> and would cause some of its negotiators "feelings of discomfort, tension and reluctance to state their views,"<sup>46</sup> because of their unfamiliarity with proceedings at which stenographic transcripts were made.<sup>47</sup> The union proposed, as an alternative, that each party be free to record negotiations with its own electronic equipment and then transcribe the recordings.<sup>48</sup> The company rejected this alternative and continued to insist upon a court reporter's transcript as a prerequisite to further bargaining.<sup>49</sup> The scheduled bargaining session was cancelled, and the union filed an unfair labor practice charge with the Board, alleging that the company had violated sections 8(a)(5) and 8(a)(1) of the Act by insist-

---

39. *Id.*

40. *Id.*

41. *Id.* at 654.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 654 n.2.

46. *Id.*

47. *Id.*

48. *Id.* at 654.

49. *Id.*

ing to impasse on the presence of a court reporter at collective bargaining sessions.<sup>50</sup>

The Board agreed. It found the company's conditioning of further negotiations on stenographic transcription to be a violation of sections 8(a)(5) and 8(a)(1) regardless of whether such insistence was in good faith.<sup>51</sup> The Board acknowledged that its prior decisions rested upon a determination of whether such insistence was in good faith,<sup>52</sup> but stated that it now considered this standard to be irrelevant<sup>53</sup> and expressly overruled its decisions to the contrary.<sup>54</sup>

The Board's abandonment of the good faith standard was based on the Supreme Court's decision in *NLRB v. Wooster Division of Borg-Warner Corp.*<sup>55</sup> In *Borg-Warner* the Court declared that sections 8(a)(5) and 8(d) of the Act together:

establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment. . . ." The duty is limited to those subjects 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.<sup>56</sup>

The Court thereby divided lawful subjects of bargaining into two categories,<sup>57</sup> mandatory and permissive.<sup>58</sup> The mandatory subjects of bar-

50. *Id.*

51. *Bartlett-Collins Co.*, 237 N.L.R.B. 770, 773, 99 L.R.R.M. 1034, 1036 (1978).

52. *Id.*

53. *Id.*

54. *Id.*

55. 356 U.S. 342 (1958). For a detailed discussion of this case, see Note, *The Impact of the Borg-Warner Case on Collective Bargaining*, 43 MINN. L. REV. 1225 (1959); Comment, 11 STAN. L. REV. 188 (1958).

56. 356 U.S. at 349 (citation omitted).

57. Illegal subjects of bargaining comprise a third category. Parties are not free to agree on such matters because an illegal subject may not be included in a collective bargaining agreement. *Honolulu Star-Bulletin, Ltd. v. NLRB*, 123 N.L.R.B. 395, 43 L.R.R.M. 1449 (1959), *enforcement denied on other grounds*, 274 F.2d 567 (D.C. Cir. 1959); *NLRB v. National Maritime Union*, 78 N.L.R.B. 971, 22 L.R.R.M. 1289 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 754 (1950). Illegal subjects clearly include those matters which expressly violate the National Labor Relations Act, for example: closed shop clauses, *see American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782 (7th Cir. 1951), *enforcing in part*, 86 N.L.R.B. 951, 25 L.R.R.M. 1001 (1949); and hot cargo clauses, *see Lithographers Local 17*, 130 N.L.R.B. 985 (1961).

Beyond specific violations of the Act, the breadth of the category of illegal topics is unsettled. *See Comment, Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918, 920-21 & n.15 (1974).

58. The distinction between mandatory and permissive subjects of bargaining is discussed at length in Comment, *Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918, 919-23 (1974).



gaining are "wages, hours, and other terms and conditions of employment . . . ." <sup>59</sup> A party can make a proposal involving any of these topics and insist upon its inclusion in the collective bargaining agreement. <sup>60</sup> The party is free to reach an impasse over these demands and to back them with economic pressure. <sup>61</sup> Permissive subjects of bargaining, <sup>62</sup> on the other hand, are items outside the scope of "wages, hours, and other terms and conditions of employment . . . ." <sup>63</sup> A party may propose a permissive item, and the two sides are free to bargain and reach an agreement if they so choose <sup>64</sup> but neither side has a duty to agree or even to bargain about such terms. <sup>65</sup> A party cannot, however, insist to impasse upon permissive matters. <sup>66</sup> The Court in *Borg-Warner* deemed the company's refusal to enter into agreements which did not include a proposal under a permissive subject of bargaining "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining," <sup>67</sup> and hence a violation of section 8(a)(5). <sup>68</sup> The court indicated that it is irrelevant that the insistence is in good faith. <sup>69</sup>

Applying the *Borg-Warner* subject matter dichotomy to the demand made in *Bartlett-Collins*, the Board declared that "the question whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase 'wages, hours, and other terms and conditions of employment.'" <sup>70</sup> The Board further asserted that it would be avoiding its statutory responsibility of fostering

59. 356 U.S. at 349 (quoting 29 U.S.C. § 158(d) (1958)).

60. *Id.*

61. *Id.* See *NLRB v. Davison* 318 F.2d 550, 554 (4th Cir. 1963).

62. See, e.g., *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958) (recognition clause); *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 963 (10th Cir. 1980) (modification in scope of bargaining unit); *NLRB v. Massachusetts Nurses Ass'n*, 557 F.2d 894, 898 (1st Cir. 1977) (interest arbitration clause).

63. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348 (1958) (quoting 29 U.S.C. § 158(d) (1976)).

64. See 29 U.S.C. § 158(d) (1976); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *NLRB v. Davison*, 318 F.2d 550, 554 (4th Cir. 1963).

65. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

66. *Id.* See *National Fresh Fruit & Vegetable Co. v. NLRB*, 565 F.2d 1331, 1334 (5th Cir. 1978); *NLRB v. Davison*, 318 F.2d 550, 554 (4th Cir. 1963).

67. 356 U.S. at 349.

68. If the union is the insisting party, this conduct would be violative of section 8(b)(3), 29 U.S.C. § 158(b)(3) (1976). See note 9 *supra*.

69. See 356 U.S. at 349. The *Borg-Warner* opinion has been criticized by many commentators. For a summary of these criticisms, see Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1, 5 n.16 (1977).

70. 237 N.L.R.B. 770, 99 L.R.R.M. 1034 (1978), enforced, 639 F.2d 652 (10th Cir. 1981).

meaningful collective bargaining if it allowed "a party to stifle negotiations in their inception over such a threshold issue,"<sup>71</sup> citing labor relations experts who consider the presence of a stenographer to have a stifling effect on negotiations.<sup>72</sup> Based upon these considerations, the Board held the issue of the presence of a court reporter during bargaining, or alternatively the use of a device to record negotiations, to be a permissive subject of bargaining.<sup>73</sup> Accordingly, it found Bartlett-Collins' insistence to impasse on the stenographic recording of negotiations to be a violation of sections 8(a)(5) and 8(a)(1) of the Act,<sup>74</sup> and ordered the company to cease its insistence.<sup>75</sup>

In so ruling, the Board rejected the company's contention that the union was equally responsible for the impasse. The Board stated that the company alone was to blame<sup>76</sup> noting that the union had demonstrated a willingness to compromise by proposing electronic recording as an alternative to a stenographer, but had not insisted upon it.<sup>77</sup>

### III. CIRCUIT COURT TREATMENT OF THE STENOGRAPHER ISSUE

In *NLRB v. Bartlett-Collins Co.*,<sup>78</sup> the Tenth Circuit granted enforcement of the Board's order against the Bartlett-Collins Company. The court rejected the company's arguments that a court reporter is a mandatory subject of bargaining and held that the company, rather than the union, was responsible for the resulting impasse.<sup>79</sup> Asserting that a circuit court must give "considerable deference,"<sup>80</sup> to the Board's classification of bargaining subjects, the Tenth Circuit held that the Board's decision was not without "reasonable basis in law,"<sup>81</sup> was not "fundamentally inconsistent with the structure of the Act,"<sup>82</sup> and was not an "attempt to usurp major policy decisions properly made by Congress".<sup>83</sup>

---

71. *Id.* at 773.

72. See notes 126-34 *infra* and accompanying text.

73. 237 N.L.R.B. at 772-773; see notes 61-53 *infra* and accompanying text.

74. *Id.* at 773.

75. *Id.* at 774. The Board also ordered the Company to bargain in good faith upon the Union's request and to post notices of the Board's order.

76. *Id.* at 773 n.10.

77. *Id.* at 773.

78. 639 F.2d 652 (10th Cir. 1981).

79. *Id.* at 654, 658.

80. *Id.* at 655 (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979)).

81. *Id.* (quoting 441 U.S. at 497).

82. *Id.*

83. *Id.*

The Board's conclusion that the presence of a stenographer constituted a permissive subject of bargaining was said to have a reasonable basis in law because the matter did not fall within wages, hours, and other terms and conditions of employment, the mandatory bargaining subjects established in *Borg-Warner*.<sup>84</sup> The court rejected the company's assertion that recording of bargaining is "such a part of the fabric of bargaining that it constitutes a term and condition of employment."<sup>85</sup> The court reasoned that the matter did not have a "'direct, significant relationship to wages, hours, or terms or conditions of employment,'"<sup>86</sup> nor did it "'settle an aspect of the relationship between the employer and employees.'"<sup>87</sup> Moreover, the Tenth Circuit found the Board's interpretation to be consistent with the Act's purpose of fostering collective bargaining and resolving industrial disputes because it minimized the risk of negotiations floundering over a "threshold procedural issue."<sup>88</sup> The court acknowledged that there is not universal agreement about the impact of recording labor negotiations,<sup>89</sup> but held that the Board's determination that the presence of a court reporter has an inhibitory effect on collective bargaining was reasonable and hence, enforceable.<sup>90</sup> The court did not find the reasonableness of the Board's view undermined by the fact that the Board had previously treated the issue of recording of negotiations as a mandatory subject of bargaining.<sup>91</sup> The court found the Board's movement from a good faith standard to a per se approach to be a "fully explained . . . fair and reasoned one within the scope of the Board's authority"<sup>92</sup> and that the Board was free to change its position if its accumulated experience demonstrated change was warranted.

Nor did the Tenth Circuit find judicial precedent an obstacle to

---

84. *See id.*

85. *Id.*

86. *Id.* at 656 (quoting *NLRB v. Massachusetts Nurses Ass'n*, 557 F.2d 894, 898 (1st Cir. 1977)). Other circuits have applied a similar standard. *See Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 176 (3d Cir. 1980); *NLRB v. Columbus Printing Pressmen and Assistants' Union*, 543 F.2d 1161, 1165-66 (5th Cir. 1976); *Seattle First Nat'l Bank v. NLRB*, 444 F.2d 30, 33 (9th Cir. 1971).

87. *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652, 655 (10th Cir. 1981) (quoting *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). This test is derived from the statements in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958), that a no-strike clause is a mandatory subject of bargaining because "[i]t regulates the relations between the employer and the employees. The ballot clause, on the other hand, deals 'only with relations between the employees and their unions.'" *Id.* (citation omitted).

88. 639 F.2d at 656.

89. *See* note 136 *infra* and accompanying text.

90. 639 F.2d at 657.

91. *Id.*

92. *Id.* at 658.

change. It recognized that the Eighth Circuit, in *NLRB v. Southern Transport Inc.*,<sup>93</sup> had spoken favorably of stenographic recording of bargaining,<sup>94</sup> but the Tenth Circuit noted that this had been said in support of a ruling that the insistence on a stenographer had been in good faith.<sup>95</sup> The Eighth Circuit had not considered whether the issue was a mandatory subject of bargaining.<sup>96</sup> The Tenth Circuit also noted that the only other circuit case decision on the matter, *Latrobe Steel Company v. NLRB*,<sup>97</sup> agreed with its view, and had, in fact, relied upon the Board's ruling in *Bartlett-Collins* in reaching its decision.<sup>98</sup>

Regarding the company's contention that the union was equally responsible for the impasse, the Tenth Circuit said that it was clear that only the company wanted to record the negotiations.<sup>99</sup> The court rejected the contention that the issue dividing the parties was how to record the negotiations rather than whether to record at all.<sup>100</sup> The court noted that the union had vigorously and repeatedly objected to recording and had only suggested electrical transcription in an effort to reach a compromise.<sup>101</sup> Moreover, even assuming the issue thereby became how to record, the Tenth Circuit held that it was the company who went to impasse<sup>102</sup> by expressly making stenographic recording a condition precedent to further bargaining.<sup>103</sup>

The Tenth Circuit was not the first circuit court to rule on the propriety of the Board's per se approach to the stenographer issue. Five months prior to the Tenth Circuit's decision in *Bartlett-Collins*, the Third Circuit issued an opinion addressing the question. In *Latrobe Steel Company v. NLRB*,<sup>104</sup> the Third Circuit was asked to review a decision of the Board holding Latrobe Steel guilty of three unfair labor practices for refusing to bargain with the United Steelworkers of America Union.<sup>105</sup> One of the unfair labor practices was based upon the company's insistence upon the presence of professional stenogra-

---

93. 355 F.2d 978 (8th Cir. 1966).

94. *Id.* at 984-86.

95. *See* 639 F.2d at 658.

96. *Id.*

97. 630 F.2d 171 (3d Cir. 1980).

98. *See* 639 F.2d at 658.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. 630 F.2d 171 (3d Cir. 1980).

105. *See* 630 F.2d at 173.

phers at bargaining sessions. The company's chief negotiator had introduced a court reporter at the first meeting, indicating that all negotiations would be recorded, with nothing off the record.<sup>106</sup> As in *Bartlett-Collins*,<sup>107</sup> the union strongly objected, but here the negotiations never ground to a halt over the matter.<sup>108</sup> The parties met twenty-seven times before the union went on strike, and they continued to bargain thereafter.<sup>109</sup> The union continued to object to the recordings throughout the course of negotiations, but the stenographers were present at every session before the strike and at almost all sessions subsequent to it.<sup>110</sup> Bargaining ceased only when the union filed a section 8(a)(5) unfair labor practice charge with the Board.<sup>111</sup>

As the Tenth Circuit was to do later, the Third Circuit upheld the Board's conclusion that the stenographic recording of bargaining sessions is a permissive subject of bargaining.<sup>112</sup> It found no significant relationship between the presence or absence of a stenographer and the terms or conditions of employment.<sup>113</sup> The Third Circuit also believed that it would be contrary to the policy of the Act to allow negotiations to break down over this "*preliminary* procedural issue."<sup>114</sup> The court rejected the assertion that the Board had committed reversible error by overruling "a long line of cases which had, in effect treated issues *preliminary* to the negotiations of an agreement . . . as mandatory subjects of bargaining."<sup>115</sup> Since the Board's new interpretation was fully reasoned and explained and did not exceed the bounds of the Act, the Board was free to abandon its prior position.

The Third Circuit also had to contend with the company's argu-

---

106. *Id.* at 174.

107. See note 41 *supra* and accompanying text.

108. 630 F.2d at 174.

109. *Id.*

110. *Id.* at 174.

111. *Id.* The Union also alleged that the Company had violated § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976), by insisting to impasse on the inclusion of three clauses pertaining to non-mandatory subjects of bargaining. *Id.*

112. 630 F.2d at 176.

113. *Id.*

114. *Id.* at 177 (emphasis added).

115. *Id.* (emphasis added). The Third Circuit also rejected the argument that the Board's new position unduly expanded the concept of permissive bargaining subjects. The Company had argued that *Borg-Warner* intended the mandatory/non-mandatory dichotomy to be limited to issues which a party sought to incorporate into a collective bargaining agreement. *Id.* at 178. The court, however, said that *Borg-Warner* requires the parties to bargain only on the "core issues" of wages, hours, and working conditions, and if the issue falls outside these core issues, it is a permissive bargaining subject, regardless of whether the issue concerns a clause to be inserted in the contract. *Id.*

ment that no *Borg-Warner* violation had been committed because an impasse had not occurred over the stenographer issue. The company pointed out that after it had insisted upon a stenographer, the parties continued to negotiate and that when impasse finally did occur, it had nothing to do with the recording of bargaining sessions.<sup>116</sup> The court, however, ruled that impasse, in the sense of a complete breakdown in negotiations, is not a condition precedent to a finding of unlawful insistence upon a nonmandatory bargaining subject.<sup>117</sup>

#### IV. THE IMPLICATIONS OF *BARTLETT-COLLINS*

##### A. *Recording of Collective Bargaining*

The Board's adoption of a per se approach to demands to record bargaining sessions will have its most obvious impact on the frequency with which negotiations are recorded. Making use of court reporters and recording devices a permissive bargaining subject means that a party cannot lawfully condition bargaining or agreement upon the other's acceptance of a proposal to record negotiations.<sup>118</sup> The parties remain free to voluntarily agree to record sessions,<sup>119</sup> but no longer can one side lawfully use economic weapons to coerce unwilling parties to bargain "on the record." Thus, less recording of collective bargaining is likely to occur.<sup>120</sup>

The Board contends this is a desirable result. Its representative argued before the Tenth Circuit in *NLRB v. Bartlett-Collins Company*,<sup>121</sup> that "the field of labor relations reflects the overwhelming opinion of experts and practitioners that the practice of recording negotiations interferes with the collective bargaining process and should not be used unless the parties have a harmonious relationship of long

---

116. *Id.* at 179.

117. *Id.*

118. See notes 62-68 *supra* and accompanying text.

119. See note 64 *supra* and accompanying text.

120. This result will not occur if a party can insist on a permissive subject by maintaining that it is related to a mandatory subject, while surreptitiously implying that he will yield on the mandatory issue when the other side yields on the sought after permissive topic. Some commentators, claiming that parties in strong bargaining positions are able to camouflage their insistence, criticize *Borg-Warner's* ban on insistence upon permissive subjects as impractical. See Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1, 5 n.16 (1977). Although this may be true of permissive subjects in general, it is unlikely that parties will be able to camouflage their insistence regarding preliminary matters, since these are issues which must be settled at the outset.

121. 639 F.2d 652 (10th Cir. 1981).

standing and they mutually agree to the use of such a procedure."<sup>122</sup>

Neither the Third nor the Tenth Circuit expressly adopted this view,<sup>123</sup> although both did state that it would undermine the policy of the Act to allow negotiations to breakdown over the stenographer issue.<sup>124</sup> Nevertheless, it is apparent that a reduction in the frequency of negotiation deadlocks over this matter, or alternatively in the number of instances where unwilling parties are coerced into negotiating in recorded sessions, should have a beneficial effect on the collective bargaining process.<sup>125</sup> Numerous experts in the field of labor relations have expressed the opinion that the presence of a stenographer or recording device has an inhibiting effect on the free and open discussion necessary for successful collective bargaining.<sup>126</sup> Parties not accustomed to speaking while their statements are being recorded may be self-conscious, nervous, and intimidated.<sup>127</sup> Regardless of the experience of the negotiators, the making of a verbatim transcript which can be used in subsequent litigation is likely to cause both sides to talk as much for the purpose of making a record as for the purpose of advancing toward an agreement.<sup>128</sup> Posturing and speechmaking are apt to be

122. Brief for Petitioner on Application for Order at 18, *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652 (10th Cir. 1981).

123. The Third Circuit declared that "the substantive question of the appropriateness of stenographers" was not at issue. *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 178 (3d Cir. 1980). The Tenth Circuit, however, found the Board's view a reasonable one. *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652, 657 (10th Cir. 1981).

124. See *Latrobe Steel Co., v. NLRB*, 630 F.2d at 177; *NLRB v. Bartlett-Collins Co.*, 639 F.2d at 656.

125. *But cf. Modjeska, Guess Who's Coming to the Bargaining Table?* 39 OHIO ST. L.J. 415, 419-23 (1978) (the author believes the Board's per se approach will have a damaging effect on collective bargaining).

126. See e.g. E. BEAL, E. WICKERSHAM, & P. KENAST, *THE PRACTICE OF COLLECTIVE BARGAINING* 217 (5th ed. 1976); W. MAGGIOLO, *TECHNIQUES OF MEDIATION IN LABOR DISPUTES* 63 (1971); S. SLICHTER, J. HEALY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 938 (1960).

127. The union in *Bartlett-Collins* objected to the Company's announcement that negotiations would be recorded, fearing it would cause several members of their negotiating committee "feelings of discomfort, tension and reluctance to state their views," because they were not accustomed to proceedings where stenographic transcripts are made. Letter from John Keefer to Harold Mueller (July 8, 1977), quoted in *NLRB v. Bartlett-Collins*, 639 F.2d 652, 654 n.2 (10th Cir. 1981).

Many commentators agree that: "[w]hen there is a stenographer taking down what people say . . . only a trial lawyer would feel at ease. Speeches 'for the record' take the place of honest bargaining. Spontaneity, and the flexibility of give-and-take disappear; the people freeze and act unnaturally." L. BEAL, L. WICKERSHAM, & P. KENAST, *THE PRACTICE OF COLLECTIVE BARGAINING* 217 (5th ed. 1976). See also note 135 *infra*.

128. 639 F.2d at 656. See *St. Louis Typographical Local 8*, 149 N.L.R.B. 750, 754, 57 L.R.R.M. 1370, 1372 (1964) (Fanning, J. and Brown, J., concurring); W. MAGGIOLO, *TECHNIQUES OF MEDIATION IN LABOR DISPUTES* 63 (1971); S. SLICHTER, J. HEALY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 938 (1960).

substituted for frank communication and honest bargaining.<sup>129</sup> In short, the recording of negotiations when not favored by both sides is likely to impede the "spontaneous, frank, no-holds-barred interchange of ideas and persuasive forces that successful bargaining often requires."<sup>130</sup>

Recording negotiations may act to retard fruitful bargaining in another manner. The demand for a verbatim transcript can open negotiations on a discordant note.<sup>131</sup> Attitudes of suspicion and distrust may be generated.<sup>132</sup> The demand often will indicate to the other side that its opponent lacks faith in the negotiations and anticipates litigation rather than agreement.<sup>133</sup> Because verbatim recording tends to sap the spontaneity and flexibility of negotiations and to generate distrust,<sup>134</sup> the infrequency of its use is not surprising.<sup>135</sup>

The recording of labor negotiations, however, is not without its benefits. The company in *Bartlett-Collins* argued that the transcript frees the parties from having to take notes, aids them in later interpreting ambiguous provisions of the contract, and facilitates Board and judicial review of the negotiations and settlement agreements.<sup>136</sup> As the Tenth Circuit noted, however, these benefits are not as great as they

---

129. See 639 F.2d at 657.

130. *Id.*

131. *Id.* at 656; Reed & Prince Mfg. Co., 96 N.L.R.B. 850, 854 28 L.R.R.M. 1608, 1610 (1951), enforced on other grounds, 205 F.2d 131 (1st Cir. 1953), cert. denied, 346 U.S. 887 (1953).

132. As one commentator put it:

Insistence upon a formal reporting of conference proceedings, however, has sometimes been rooted in a distrust of the other party. As a result, anxiety to get everything down in black and white is in some instances regarded as a presumptive evidence of suspicion of the other's good faith, introducing an element of friction into negotiations. N. CHAMBERLAIN, COLLECTIVE BARGAINING PROCEDURES 62 (1944).

133. See 639 F.2d at 656; St. Louis Typographical Local 8, 149 N.L.R.B. 750, 754, 57 L.R.R.M. 1370, 1372 (1964) (Fanning, J. and Brown, J., concurring).

134. See 639 F.2d at 656; E. BEAL, E. WICHERSHAM & P. KENAST, THE PRACTICE OF COLLECTIVE-BARGAINING 217 (5th ed. 1976); W. MAGGIOLO, TECHNIQUES OF MEDIATION IN LABOR DISPUTES 63 (1971).

135. See B. MORSE, HOW TO NEGOTIATE THE LABOR AGREEMENT 44 (5th ed. 1974); S. SLICHTER, J. HEALY, & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 938 (1960). A survey of 239 United States and Canadian companies found that only twenty-four of them make verbatim records of negotiations, and in eleven of these, recording machines or stenographic transcripts were used primarily in the final phases of negotiations. See NATIONAL INDUS. CONFERENCE BOARD, INC., CONFERENCE BOARD REPORTS: PREPARING FOR COLLECTIVE BARGAINING 40 (1959). See also Reed & Prince Mfg., 96 N.L.R.B. 850, 854, 28 L.R.R.M. 1608, 1610 (1951). ("[T]he business world itself frowns upon the practice in any delicate negotiations").

136. See 639 F.2d at 656. For a more detailed discussion of how a verbatim transcript can aid the parties, arbitrators, the Board, and reviewing courts, see Modjeska, *Guess Who's Coming to the Bargaining Table?* 39 OHIO ST. L.J. 415, 420-22 (1978). See also NLRB v. Southern Transport, Inc., 355 F.2d 978, 984-87 (8th Cir. 1966).



might appear, particularly when recording takes place over the objection of one side.<sup>137</sup> A verbatim transcript will not always facilitate contract interpretation, because the contractual controversy might expand to include disputes over what the negotiators meant by their statements.<sup>138</sup> Moreover, the parties remain "free to discuss points outside of the bargaining room and even while in bargaining sessions they are free to make 'off the record' statements."<sup>139</sup> Therefore, the Board would still need to take testimony and make findings of fact concerning what happened while the parties were not speaking on the record.<sup>140</sup> Most importantly, the central purpose of collective bargaining is to reach a labor agreement,<sup>141</sup> not to prepare an accurate record. Some degree of accuracy in later ascertaining what was said or intended during negotiations can be wisely sacrificed to ensure that negotiations flow smoothly toward agreement.<sup>142</sup>

In summary, it is difficult to fault the Board's adoption of a per se approach toward stenographers and recording devices on policy grounds. By treating them as permissive subjects of bargaining, the Board has forbidden insistence to impasse on the issue of recording of negotiations, even if done in good faith. This should effectuate the Act's goal of fostering meaningful collective bargaining.<sup>143</sup>

#### B. *Effect on Other Preliminary Matters*

The significance of the Board's decision in *Bartlett-Collins* in large

---

137. See 639 F.2d at 656.

138. See 639 F.2d at 657.

139. NLRB v. Southern Transp., Inc. 355 F.2d 978, 984 (8th Cir. 1966).

140. 639 F.2d at 657.

141. The introduction to the National Labor Relations Act states that it is: "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . and designation of representatives of 'the workers' own choosing, for the purpose of negotiating the terms and conditions of their employment . . . ." 29 U.S.C. § 151 (1976).

142. 639 F.2d at 657. The court rejected the company's analogy to Board proceedings which are recorded stating:

The purposes of collective bargaining and those of the judicial process are not the same. Court reporters are an integral part of an adjudicatory hearing because they facilitate the main goal of adjudication, ascertaining the truth. Collective bargaining, on the other hand, "cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one."

*Id.* (quoting NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488 (1960)).

The court also recognized that the number of labor contracts negotiated is likely to dwarf the number of times parties will adjudicate a matter that depends upon a precise record of negotiations. 639 F.2d at 657. This supports the view that the advantages of recording negotiations are outweighed by its negative effects on bargaining.

143. See note 142 *supra*.

part depends on how broadly it can be read. The Board held that the demand to record bargaining sessions is a permissive subject because it "is a threshold matter, preliminary and subordinate to substantive negotiations" about wages, hours, and working conditions.<sup>144</sup> Were the Board's references to "preliminary" and "threshold" simply descriptive terms intended only to support the conclusion that this particular issue is a permissive one, or were these terms used as labels for a category of bargaining subjects which are automatically to be deemed nonmandatory? While it is still too early to be certain, the latter appears to be the more accurate conclusion. An identifiable concept of preliminary bargaining issues seems to be slowly developing. Although the Board has used the term sparingly in its opinions,<sup>145</sup> the courts have begun to pick up on it.<sup>146</sup> In addition, commentators are beginning to use the term as an organizing device in their writings.<sup>147</sup>

The Board and the courts seem united in the conception that the category of preliminary issues consists of procedural matters concerning the setting and arrangements for bargaining. They have used the label to refer to the time when negotiations are to be held,<sup>148</sup> to the place<sup>149</sup> or site<sup>150</sup> of bargaining, to stenographic or electrical recording of negotiations,<sup>151</sup> and to "early meetings . . . to establish the ground work for . . . more formal negotiations."<sup>152</sup> It is likely that they would also use it to refer to demands regarding the duration of meetings, the order or agenda of discussions, use of interpreters,<sup>153</sup> and the many things which can affect the atmosphere in which bargaining takes

144. *Bartlett-Collins Co.*, 237 N.L.R.B. 770, 773, 99 L.R.R.M. 1034, 1036 (1978), *enforced*, 639 F.2d 652 (10th Cir. 1981).

145. *Id.*, *General Elec. Co.*, 173 N.L.R.B. 253, 257, 69 L.R.R.M. 1305, 1310 (1968); *St. Louis Typographical Local 8*, 149 N.L.R.B. 750, 752, 57 L.R.R.M. 1370, 1371 (1964).

146. *See NLRB v. Bartlett-Collins Co.*, 639 F.2d 652, 656 (10th Cir. 1981); *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 176 (3d Cir. 1980).

147. *See C. MORRIS, THE DEVELOPING LABOR LAW* 422-23 (1971); Mack, *The Duty to Bargain in Good Faith—Recent Problems*, 47 TENN. L. REV. 293, 294 (1980); Modjeska, *Guess Who's Coming to the Bargaining Table*, 39 OHIO ST. L.J. 415, 417 n.6 (1978).

148. *See St. Louis Typographical Local 8*, 149 N.L.R.B. 750, 752, 57 L.R.R.M. 1370, 1371 (1964). It is necessary to distinguish disputes over the time and the frequency of meetings, from the refusal to meet. The latter constituted a per se violation of 29 U.S.C. § 158(a)(5) (1976), even prior to *Bartlett-Collins*. *See C. MORRIS, THE DEVELOPING LABOR LAW* 324-25 (1971).

149. *See St. Louis Typographical Local 8*, 149 N.L.R.B. 750, 752, 57 L.R.R.M. 1370, 1371 (1964).

150. *See Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 177 (3d Cir. 1980).

151. 639 F.2d at 656; *Latrobe Steel Co.*, 630 F.2d 171, 177 (3d Cir. 1980); *St. Louis Typographical Local 8*, 149 N.L.R.B. 750, 754, 57 L.R.R.M. 1370, 1371 (1964).

152. *General Elec. Co.*, 173 N.L.R.B. 253, 257, 69 L.R.R.M. 1305, 1310 (1965).

153. *Cf. 102 West 94 Corp.*, 49 L.R.R.M. 1426 (1961)(decision of New York State Labor Relations Board).

place.<sup>154</sup>

The logic of the Board's opinion in *Bartlett-Collins* certainly leads to the conclusion that a per se approach is to be applied to all preliminary matters. The narrow holding that court reporters and recording devices are permissive bargaining subjects,<sup>155</sup> was derived from the fact that such matters are "preliminary and subordinate" to substantive negotiations about wages, hours, and working conditions.<sup>156</sup> The same is true of any other issue concerning the setting and procedural arrangements for bargaining. The Third Circuit in *Latrobe Steel* accepted this expansive reading:<sup>157</sup>

In *Bartlett-Collins Co.*, the Board overruled a long line of cases which had, in effect, treated issues preliminary to the negotiation of an agreement, including the issue of the presence of a court reporter at negotiations, as mandatory subjects of bargaining. The Board's prior position had been that "preliminary matters are just as much part of the process of collective bargaining as the negotiations over wages, hours, etc." . . .<sup>158</sup>

If the Third Circuit's conclusion is correct, then *Bartlett-Collins* will have significant carry-over effects. As that court noted, the Board's

154. See C. MORRIS, *THE DEVELOPING LABOR LAW* 422-23 (1971); Mack, *The Duty to Bargain in Good Faith—Recent Problems*, 47 TENN. L. REV. 293, 294-96 (1980).

Objections to the composition of the opposition's negotiating team seem to fit the basic definition of a preliminary matter. Such objections appear procedural, rather than substantive, addressing the arrangements for negotiations, rather than wages, hours, or working conditions. But a refusal to negotiate until there is a change in the opposition's negotiators has never been construed to be a preliminary matter. Moreover, even when preliminary matters were treated as mandatory subjects of bargaining in the pre-*Bartlett-Collins* era, conditioning negotiations on a change in the opposition's negotiating team was almost always treated as an unlawful insistence upon a permissive subject. See *NLRB v. Deena Artware, Inc.*, 198 F.2d 645 (6th Cir. 1952); *AMF, Inc.—Union Mach. Div. & Lodge 1738*, 219 N.L.R.B. 903, 90 L.R.R.M. 1271 (1975); *F.W. Woolworth Co.*, 179 N.L.R.B. 748, 72 L.R.R.M. 1465 (1969). "[A] clear and present danger to the bargaining process" must be shown to justify a refusal to bargain on the basis of an objection to an opponent's bargaining representative. See *General Elec. Co. v. NLRB*, 412 F.2d 512, 517 (2d Cir. 1969) (quoting *NLRB v. David Buttrick Co.*, 399 F.2d 505, 507 (1st Cir. 1968)). The cases in which an objection has been upheld involved "unusual situations where the chosen representative is so tainted with conflict or so patently obnoxious . . . as to make good faith bargaining 'inherently impossible.'" *General Elec. Co.*, 173 N.L.R.B. 253, 255, 69 L.R.R.M. 1305, 1307 (1968) (footnote omitted).

155. See *Bartlett-Collins Co.*, 237 N.L.R.B. 770, 773, 99 L.R.R.M. 1034, 1036 (1978), *enforced*, *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652 (10th Cir. 1981).

156. *Id.*

157. The Tenth Circuit construed the Board's decision more narrowly, declaring that the Board limited its ruling to demands for a court reporter or a recording device. See *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652, 656 n.3 (10th Cir. 1981). It reserved judgment on the issue of whether there are some preliminary matters that constitute mandatory subjects of bargaining. *Id.* at 656.

158. *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 176 (3d Cir. 1980) (quoting *General Elec. Co.*, 173 N.L.R.B. 253, 257, 69 L.R.R.M. 1305, 1310 (1968)).

position had been that all preliminary matters, not just the stenographer issue, were as much a part of the collective bargaining process as the mandatory subjects of bargaining.<sup>159</sup> Treated, in effect, as mandatory subjects of bargaining, a good faith analysis had been applied to a party's insistence upon preliminary matters such as the place<sup>160</sup> or time<sup>161</sup> of bargaining. If done in good faith, a party could lawfully insist upon a threshold issue,<sup>162</sup> though adamance on a particular position was often treated as evidence of bad faith.<sup>163</sup> For instance, in *McCulloch Corp.*,<sup>164</sup> an employer insisted that negotiations be conducted at a hotel instead of the plant.<sup>165</sup> The Board rejected the argument that the employer had thereby violated sections 8(d) and 8(a)(5).<sup>166</sup> It noted that the employer had offered to meet at its attorney's offices, which the union rejected, and that the employer had a justifiable apprehension that holding negotiations at the plant would

159. *Id.* See also *St. Louis Typographical Local 8*, 149 N.L.R.B. 750, 752, 57 L.R.R.M. 1370, 1377 (1964).

160. See, e.g., *General Motors Acceptance Corp. v. NLRB*, 476 F.2d 850 (1st Cir. 1973); *Mid-America Transp. Co. v. NLRB*, 325 F.2d 87 (7th Cir. 1963); *North Carolina Coastal Motor Lines, Inc.*, 219 N.L.R.B. 1009, 90 L.R.R.M. 1114 (1975); *McCulloch Corp.*, 132 N.L.R.B. 210, 48 L.R.R.M. 1344 (1961). See also *B.F. Diamond Constr. Co.*, 163 N.L.R.B. 161, 175 n.93, 64 L.R.R.M. 1333 (1967).

161. In *Indiana & Mich. Elec. Co.*, 229 N.L.R.B. 576, 576, 95 L.R.R.M. 1122, 1123 (1977), the Board stated: "We do not suggest that an employer is compelled to yield to a union's request for negotiations outside normal business hours. It is free to insist on bargaining during the working day, if it prefers, . . ." *Id.*

See, e.g., *Holmes Typography, Inc.*, 218 N.L.R.B. 518, 89 L.R.R.M. 1731 (1975); *Florida Mach. & Foundry Co.*, 174 N.L.R.B. 1156, 70 L.R.R.M. 1411 (1969); *ITT Henze Valve Serv., Controls & Instruments Div.*, 166 N.L.R.B. 592, 65 L.R.R.M. 1654 (1967); *Waycross Sportswear, Inc.*, 166 N.L.R.B. 101, 65 L.R.R.M. 1586 (1967); *Beverage-Air Co.*, 164 N.L.R.B. 1127, 65 L.R.R.M. 1377 (1967); *B.F. Diamond Constr. Co.*, 163 N.L.R.B. 161, 64 L.R.R.M. 1333 (1967); *Frick Co.*, 161 N.L.R.B. 1089, 63 L.R.R.M. 1397 (1966); *International Tel. & Tel. Corp. (ITT Fed. Laboratories)*, 159 N.L.R.B. 1486, 61 L.R.R.M. 1578 (1966); *Insulating Fabricators, Inc.*, 144 N.L.R.B. 1325, 54 L.R.R.M. 1246 (1963); *Moore DropForging Co.*, 144 N.L.R.B. 165, 54 L.R.R.M. 1024 (1963); *Taylor Foundry Co.*, 141 N.L.R.B. 765, 52 L.R.R.M. 1407 (1963); *Aztec Ceramics Co. (Operative Potters)*, 138 N.L.R.B. 1178, 51 L.R.R.M. 1226 (1962); *Tennessee Chair Co.*, 126 N.L.R.B. 1357, 45 L.R.R.M. 1472 (1960). See also *Gagnon Plating & Mfg. Co.*, 103 N.L.R.B. 263, 31 L.R.R.M. 1523 (1953).

162. See, e.g., *Holmes Typography, Inc.*, 218 N.L.R.B. 518, 89 L.R.R.M. 1731 (1975); *ITT Henze Valve Service, Controls & Instruments Div.*, 166 N.L.R.B. 592, 65 L.R.R.M. 1654 (1967); *Waycross Sportswear, Inc.*, 166 N.L.R.B. 101, 65 L.R.R.M. 1586 (1967); *Frick Co.*, 161 N.L.R.B. 1089, 63 L.R.R.M. 1397 (1966); *International Tel. & Tel. Corp. (ITT Fed. Laboratories)*, 159 N.L.R.B. 1757, 62 L.R.R.M. 1339 (1966); *McCulloch Corp.*, 142 N.L.R.B. 201, 48 L.R.R.M. 1344 (1961); *Tennessee Chair Co.*, 126 N.L.R.B. 1357, 45 L.R.R.M. 1472 (1960).

163. See, e.g., *Semperit Pacific Inc.*, 237 N.L.R.B. 478, 99 L.R.R.M. 1029 (1978); *Case, Inc.*, 346 N.L.R.B. 798, 99 L.R.R.M. 1159 (1978); *Gulf Concrete Co.*, 165 N.L.R.B. 627, 65 L.R.R.M. 1448 (1967); *Wavetronics Indus. Inc.*, 147 N.L.R.B. 238, 56 L.R.R.M. 1212 (1964).

164. 132 N.L.R.B. 201, 48 L.R.R.M. 1344 (1961).

165. *Id.* at 205, 48 L.R.R.M. at 1345.

166. *Id.* at 205, 48 L.R.R.M. at 1344-45.

interfere with production.<sup>167</sup> There had been a bitter pre-election campaign and prior bargaining sessions had been used as a medium of propaganda by both sides.<sup>168</sup> On the other hand, when a party's insistence on a preliminary matter was in bad faith, the Board found a refusal to bargain. For example, in *North Carolina Coastal Motor Lines*,<sup>169</sup> an interstate motor carrier insisted upon holding bargaining sessions with the union representing its Baltimore, Maryland terminal employees at its principal office in Raleigh, North Carolina. The carrier claimed that the duties of the three officials who composed its management required them to stay close to Raleigh.<sup>170</sup> The Board held that the carrier was in violation of section 8(a)(5), finding proof of bad faith in the carrier's failure to give prompt attention to the union's initial efforts to arrange a place and time for the start of negotiations, and in the fact that a management official had traveled to Baltimore during the disputed time period and "could have negotiated with the union for three or four hours."<sup>171</sup>

If the per se approach is to be applied to all preliminary matters, then such examinations of the surrounding circumstances and of the intentions of the insisting party will no longer be necessary. If the party insisted to impasse on a particular time<sup>172</sup> or place for bargaining, on a specific agenda of negotiations, or on various other possible preliminary

---

167. *Id.*

168. *Id.*

169. 219 N.L.R.B. 1009, 90 L.R.R.M. 1114 (1975).

170. *Id.* at 1013, 90 L.R.R.M. at 1115.

171. *Id.*

172. The impact of *Bartlett-Collins* on disputes over the frequency of bargaining sessions will be quite limited. A refusal to meet altogether has always been a per se violation of § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976). See C. MORRIS, *THE DEVELOPING LABOR LAW* 324-25 (1971). Less adamant behavior is unlikely to create a *Borg-Warner* problem, for typically a party will not condition further bargaining, or the signing of an agreement, on the other side's acceptance of a specified schedule of meeting dates. Rather, the party will simply refuse to agree to meet other than at the times and dates it wishes. Thus, there will be no impasse, and hence, no *Borg-Warner* violation, for bargaining will be occurring, simply not at the rate the other side desires. The charge before the Board will be that the party has refused to meet with sufficient frequency to satisfy section 8(a)(5), 29 U.S.C. § 158(a)(5) (1976). This type of allegation falls within the language of § 8(d), that the duty to bargain involves the obligation to "meet at reasonable times and confer in good faith", 29 U.S.C. § 158(d) (1976), and will be tested under a good faith standard. See *General Motors Acceptance Corp. v. NLRB*, 476 F.2d 850, 855-56 (1st Cir. 1973); *A.H. Belo Corp. (WFAA-TV) v. NLRB*, 411 F.2d 959, 968 (5th Cir. 1969).

This does not mean, however, that some time-related matters will not be subject to a per se analysis. If a party were to refuse to continue bargaining unless the other side agreed to a particular schedule mandating the time, duration, or frequency of bargaining, this would be an automatic violation of § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976), according to the logic of *Bartlett-Collins*. For example, a party frustrated by the lack of progress in negotiations might refuse to continue bargaining unless the other party agreed to non-stop, marathon bargaining, in the hopes of forcing a breakthrough.

subjects,<sup>173</sup> then he will have violated section 8(a)(5). The Board and the courts have stated that such a per se approach will help prevent early breakdowns in negotiations over subordinate matters.<sup>174</sup> It also has the seeming advantage of relieving these bodies of the need to assess whether the insistence on the preliminary subject was in good faith. The following section examines whether applying a per se approach to preliminary matters will actually have these results.

### C. *Impasse Over Permissive Subjects of Bargaining*

The implication left by *Bartlett-Collins* is that a collective bargaining party may no longer insist to impasse on a threshold issue without committing a section 8(a)(5) refusal to bargain violation.<sup>175</sup> The term "impasse" is widely used in Board and judicial decisions, and commentators have given some attention to the concept.<sup>176</sup> These writers have discussed the criteria used in determining if an impasse exists and the legal significance of its occurrence.<sup>177</sup> The traditional definitions, however, are not always suited to impasse situations involving nonmandatory bargaining subjects. Moreover, in the context of bargaining over preliminary matters, the difficult issue may prove to be not whether an impasse existed, but who is to be held responsible for the impasse. The remainder of this article will explore the problems in applying traditional impasse analysis to permissive bargaining subjects, with a special focus on preliminary issues.

#### 1. Determination of Impasse

The National Labor Relations Act<sup>178</sup> does not expressly mention the term impasse, but the concept is implicit within its structure. Sections 8(a)(5)<sup>179</sup> and 8(b)(3)<sup>180</sup> make it an unfair labor practice for employers and unions to refuse to bargain collectively with their counterparts, and section 8(d)<sup>181</sup> defines collective bargaining as the

---

173. See notes 148-54 *supra* and accompanying text.

174. See 639 F.2d at 656; *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 177 (3d Cir. 1980); *Bartlett-Collins Co.*, 237 N.L.R.B. 770, 773, 99 L.R.R.M. 1034, 1036 (1978), *enforced*, 639 F.2d 652 (10th Cir. 1981).

175. See notes 151-157 *supra* and accompanying text.

176. See note 16 *supra*.

177. *Id.*

178. 29 U.S.C. §§ 151-169 (1976).

179. *Id.* § 158(a)(5).

180. *Id.* § 158(b)(3).

181. *Id.* § 158(d).

duty "to meet at reasonable times and confer in good faith"<sup>182</sup> regarding the mandatory subjects of bargaining.<sup>183</sup> A party must come to the bargaining table with "an open mind and a sincere desire to reach agreement,"<sup>184</sup> and must "participate actively in the deliberations so as to indicate a present intention to find a basis for agreement."<sup>185</sup> But section 8(d) also expressly states that the obligation to bargain in good faith "does not compel either party to agree or require the making of a concession . . . ."<sup>186</sup> "Adamant insistence on a bargaining position . . . is not in itself a refusal to bargain in good faith."<sup>187</sup> Thus, parties may bargain in complete good faith and nonetheless find themselves stalemated. It would be senseless in such circumstances to require them to continue to negotiate endlessly when irreconcilable differences exist, and the Act does not require "a party to engage in fruitless marathon discussions at the expense of frank statement and support of his

---

182. *Id.* In *NLRB v. Big Three Industries, Inc.* 497 F.2d 43, 46 (5th Cir. 1974), the court summarized the test of good faith:

Determining whether a party's conduct at the negotiating table evinces an unlawful failure to abide by the statutory mandate to bargain in good faith is an inescapably elusive inquiry. Once the parties embark on the ritual of convening and conversing together, objective standards against which statutory duties can be measured are not readily at hand. But at bottom we know that merely meeting together or simply manifesting a willingness to talk does not discharge the federally imposed duty to bargain. Indeed, "to sit at a bargaining table . . . or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail."

Mechanically plodding through the forms of collective bargaining therefore does not suffice, for Congress has required the parties not simply to convene, but to meet and negotiate in a certain frame of mind—to bargain in good faith. Negotiating parties are thus statutorily adjured to enter discussions with an "open and fair mind, and a sincere purpose to find a basis of agreement . . . ." But once the parties are physically engaged in the rituals of bargaining, as the employer and union were here, piercing through the formal litany to detect a want of good faith must rest in great measure on reasoned inferences. And it is beyond dispute that the reservoir of experience and expertise which enhances the likely reasonableness of such inferences is found in the Board itself.

*Id.* (citations omitted). See note 20 *supra*.

183. The object underlying the statutory scheme is "to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions, leading, it was hoped, to mutual agreement." *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 103 (1970).

184. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943); *accord*, *NLRB v. Big Three Indus.*, 497 F.2d 43, 46 (5th Cir. 1974).

185. 133 F.2d at 686.

186. 29 U.S.C. § 158(d) (1976). See *NLRB v. Tanco Communications Inc.*, 567 F.2d 871, 877 (9th Cir. 1978). See generally Marcus, *The Employer's Duty to Bargain: Counterproposal v. Concessions*, 16 LAB. L.J. 541 (1966).

187. *Chevron Oil Co. v. NLRB*, 442 F.2d 1067, 1072 (5th Cir. 1971). See also *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960), where the court stated: "If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produces a stalemate." *Id.*

position.”<sup>188</sup> When the parties have bargained in good faith to impasse over a mandatory issue, the statutory obligation to bargain collectively is suspended as to that issue.<sup>189</sup> In other words, impasse is a defense to a refusal to bargain charge.<sup>190</sup>

Definitions of impasse typically center upon the notion of a stalemate over an unresolved issue. The most widely accepted definition of impasse,<sup>191</sup> holds that it is a “state of facts in which the parties, despite the best of faith, are simply deadlocked.”<sup>192</sup> Expanding further, the Board in *Hi Way Billboards, Inc.*,<sup>193</sup> stated that a “genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.”<sup>194</sup>

These definitions do not lend themselves to a precise test for determining when an impasse occurs, and no “rigid formula” exists.<sup>195</sup> Rather, the Board and the courts usually point to a number of facts in the record which are indicative of a legitimate stalemate, and then sim-

188. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

189. The general rule is that deadlock on one issue does not suspend the duty to bargain as to the other issues. *See Chambers Mfg. Co.*, 124 N.L.R.B. 721, 44 L.R.R.M. 1477 (1959); *American Laundry Mach. Co.*, 107 N.L.R.B. 1574, 33 L.R.R.M. 1457 (1954).

190. *See, e.g., Chaney Cal. Lumber Co. v. NLRB*, 319 F.2d 375 (9th Cir. 1963); *NLRB v. Intra-Coastal Terminal, Inc.*, 286 F.2d 954 (5th Cir. 1961); *Alsey Refractories Co.*, 215 N.L.R.B. 785, 88 L.R.R.M. 1071 (1974); *Lengel-Fencil Co.*, 8 N.L.R.B. 988, 3 L.R.R.M. 184 (1938). *See generally* Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. Pitt. L. Rev. 1, 3-4 (1977); Comment, *Impasse in Collective Bargaining*, 44 TEX. L. REV. 769, 769-70 (1966).

191. Parties are relieved of the statutory duty to bargain only so long as the impasse exists. *See NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966). An impasse is a fragile state of affairs. Almost any event which suggests the possibility of further negotiations being fruitful will revive the duty to bargain. *Dorsey Trailers, Inc.*, 80 N.L.R.B. 478, 23 L.R.R.M. 1112 (1948), *enforced as modified*, 179 F.2d 589 (5th Cir. 1950). *See generally* Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. Pitt. L. Rev. 1, 17-19 (1977).

192. *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 482 (5th Cir. 1963); *accord*, *Hi-Way Billboard, Inc.*, 206 N.L.R.B. 22, 23, 84 L.R.R.M. 1161, 1162 (1973). *Newspaper Drivers & Handlers Local 372 v. NLRB*, 404 F.2d 1159, 1160 (6th Cir. 1968); *Dallas Gen. Drivers, W. & H., Local 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966). *See generally* Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. Pitt. L. Rev. 1, 7 (1977).

Another typical definition of impasse is that it is a stage of bargaining “where it is clear that further negotiations would be fruitless.” *Duro Fittings Co.*, 121 N.L.R.B., 377, 383 App. (1958). *See American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).

193. *Hi-Way Billboards, Inc.* 206 N.L.R.B. 22, 84 L.R.R.M. 1161 (1973).

194. 206 N.L.R.B. at 23, 84 L.R.R.M. at 1162 (footnote omitted).

195. *See Dallas Gen. Drivers, W. & H., Local 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966), where the court stated: “There is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations which arise in the field of industrial bargaining. Nor is there a rigid formula for assessing so subtle an issue as the precise time when impasse occurs; . . .” *Id.*



ply conclude that impasse had occurred.<sup>196</sup> In *Taft Broadcasting Co.*,<sup>197</sup> the Board listed some of the factors to be considered in deciding whether an impasse is reached:

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.<sup>198</sup>

The need to resolve whether impasse has occurred is not limited to cases in which a party attempts to defend a refusal to bargain further on impasse. The existence of an impasse is important in several other contexts. Impasse demarcates the point after which an employer is free to make unilateral changes<sup>199</sup> in wages, hours, and working conditions without violating section 8(a)(5); impasse may permit an employer to withdraw from a multi-employer bargaining unit;<sup>200</sup> and most importantly from the perspective of this article, it "triggers the *Borg-Warner* unfair labor practice."<sup>201</sup>

It is in the last context that the standard definition of impasse, a breakdown in negotiations over an unresolved issue,<sup>202</sup> has the least utility. In making insistence to impasse on permissive bargaining sub-

196. See, e.g., *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 65 (2d Cir. 1979); *National Fresh Fruit & Vegetable Co. v. NLRB*, 565 F.2d 1331, 1334-37 (5th Cir. 1978). See generally, Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1, 7 (1977).

197. *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 64 L.R.R.M. 1386 (1967), *petition denied sub nom.* *American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

198. 163 N.L.R.B. at 478, 64 L.R.R.M. at 1388.

199. A unilateral change is an action by an employer altering wages, hours, or terms or conditions of employment without consulting the union. See *NLRB v. Katz*, 369 U.S. 736 (1962). Such action generally amounts to a refusal to negotiate with the union and therefore constitutes a violation of section 8(a)(5), 29 U.S.C. § 158(a)(5) (1958). *Id.* at 747-48. There is no such violation, however, where the unilateral change has followed good faith bargaining to impasse. See *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 64-65, 56 L.R.R.M. 1150, 1150-51 (1964).

200. Once negotiations have commenced, an employer cannot withdraw from a multi-employer bargaining unit, unless by mutual consent or unless unusual circumstances excuse the withdrawal. See, e.g., *NLRB v. Johnson Sheet Metal, Inc.*, 442 F.2d 1056, 1059 (10th Cir. 1971); *Retail Assoc.*, 120 N.L.R.B. 388, 395, 42 L.R.R.M. 1119, 1121 (1958). The Board has taken the view that impasse does not constitute "unusual circumstances." *Accord*, *Bill Cook Buick, Inc.*, 224 N.L.R.B. 1091, 1096, 92 L.R.R.M. 1582, 1582 (1976); see *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23, 84 L.R.R.M. 1161, 1162 (1973) *enforcement denied*, 500 F.2d 181 (5th Cir. 1974). *But see*, *Beck Engraving Co.*, 522 F.2d 475, 483 (3d Cir., 1975); *NLRB v. Associated Shower Door Co.*, 512 F.2d 230, 232 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975); *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181, 182-84 (5th Cir. 1974); *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1173 (8th Cir. 1972).

201. *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 179 (3d Cir. 1980).

202. See notes 192-94 *supra* and accompanying text.

jects a violation of section 8(a)(5),<sup>203</sup> the Court in *Borg-Warner*<sup>204</sup> sought to ensure that a party would suffer no adverse consequences for failing to agree or even for refusing to bargain over a nonmandatory issue.<sup>205</sup> Thus, a determination that a party unlawfully insisted to impasse should not be contingent upon a finding that negotiations broke down or even that the matter remained unsettled. Adherence to the letter and spirit of *Borg-Warner* requires only that a party made a permissive bargaining subject a condition precedent to further bargaining or to entering an agreement.<sup>206</sup> To require the other party to have refused to bargain in the face of the unlawful insistence would defeat *Borg-Warner*'s goal of preventing breakdowns in negotiations over nonmandatory bargaining subjects.<sup>207</sup> A party should not lose *Borg-Warner*'s protection simply because it did not refuse to bargain in the face of clear intransigence.

The Third Circuit adopted this view in *Latrobe Steel*.<sup>208</sup> There, in defending against a section 8(a)(5) charge, the company had argued that no impasse had resulted from its demand for a stenographer to record bargaining sessions<sup>209</sup> because negotiations had never halted over the matter. Following the company's demand, bargaining had proceeded with stenographers present at practically every meeting.<sup>210</sup> The Third Circuit disagreed, finding that the company had insisted on the presence of stenographers "as a precondition to bargaining and, a fortiori, as a precondition to any agreement on mandatory issues."<sup>211</sup> The court relied on the vigorous and repeated objections by the union throughout the course of negotiations and on the fact that the hour-long debate which followed the Company's demand had ended with the company representative's statement that "[w]e can talk about it for another hour, but I have to inform you that the transcripts will be at the personnel office. That is as blunt as I can put it."<sup>212</sup> The court concluded that "to require the union to have refused to bargain in the face of this insistence would be contrary to the purpose of *Borg-Warner*."<sup>213</sup>

---

203. See notes 65-68 *supra* and accompanying text.

204. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1957).

205. See *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 179 (3d Cir. 1980).

206. *Id.*

207. *Id.*

208. 630 F.2d 171.

209. *Id.* at 174, 179.

210. *Id.* at 179.

211. *Id.*

212. *Id.* at 174.

213. *Id.*

Thus, neither deadlock nor even that the matter remained unsettled is necessary to a finding of impasse in the *Borg-Warner* setting. It is enough that a party insisted upon a nonmandatory subject as a condition precedent to further bargaining or agreement.

## 2. Application of the Per Se Approach to Impasse Over Preliminary Issues

The mandatory-permissive dichotomy in *Borg-Warner* has spawned much litigation.<sup>214</sup> The principle issues in these cases have been the determination of whether a particular bargaining demand involved a mandatory or permissive subject of bargaining and whether impasse had occurred. Typically, the problem has not been in determining who was responsible for the impasse. For instance, in *NLRB v. Davison*,<sup>215</sup> a company conditioned its acceptance of a collective bargaining agreement upon inclusion of a clause requiring the union to indemnify the company for any losses resulting from secondary boycotts by a third party union.<sup>216</sup> The classification of this topic as a mandatory or permissive subject of bargaining was legitimately debatable.<sup>217</sup> But once it was determined that the indemnity clause was a permissive subject of bargaining and that the parties had bargained to impasse over the matter, it was self-evident that the employer was responsible for the impasse. This was obvious because the issue would not have arisen had the employer not raised it. Lying outside the core subjects of bargaining, the labor contract could have been executed without the issue ever having been before the parties. Accordingly, it was clear that when the employer insisted upon the indemnity clause, he was responsible for the impasse. The same would have been true had the employer insisted on a ballot clause, performance bond, industry fund contribution, or any of the other subjects which have been deemed permissive bargaining subjects.<sup>218</sup>

The same clarity, however, will not always be present when the dispute centers on a preliminary matter. Some preliminary issues are not as easily divorced from the mandatory subjects of bargaining as are other types of permissive subjects. Whereas resolution of the core is-

---

214. See generally Note *Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918 (1974).

215. 318 F.2d 550 (4th Cir. 1963).

216. *Id.* at 522-53.

217. The hearing officer and the Board reached opposite conclusions. *Id.* at 553.

218. See note 62 *supra*.

sues of wages, hours, and working conditions need not turn upon deciding a nonmandatory subject like an indemnity clause, the same is not true of a preliminary issue such as the place or the time of bargaining. These matters must be brought up and resolved if bargaining is to occur, and each side has a right to press for its position. For these reasons, it may be unclear which party is responsible for the impasse.

It is not surprising, then, that the company in *Bartlett-Collins* argued that it was no more to blame for the impasse than was the union.<sup>219</sup> The company asserted that the union had insisted upon a preliminary matter to the same extent that it had—the union on tape recording, the company on stenographic recording—and that it was unfair to punish the company, solely, for the deadlock.<sup>220</sup> The Board had little difficulty disposing of the argument because it was apparent that the union had not insisted on tape recording the meetings.<sup>221</sup> The union did not want any recording; it had only suggested tape recording in an effort to reach a compromise.<sup>222</sup> It was the company which would not budge.<sup>223</sup>

The Board's per se approach will work well where the disputed matter is subject to compromise and at least one party is willing to do so. Then, whoever is the first to insist to impasse on a particular position will commit the unfair labor practice. For instance, one party may want a bargaining schedule which amounts to almost continuous negotiations, while the other desires intervals between sessions. The parties will have to discuss their disagreement until they reach a mutual understanding and the first to refuse to bargain further until its schedule is adopted, will violate section 8(a)(5) of the Act. In such a case, the Board's objective of creating a bargaining dynamic in which negotiations cannot break down over preliminary topics it considers subordinate to wages, hours, and working conditions, functions well. Not all circumstances lend themselves to such an easy resolution. For example, what happens when there are two equally stubborn parties? One party wants to negotiate in Milwaukee, the other in Tulsa, and neither is willing to settle on an alternative. Similarly, what happens when a preliminary issue arises in which there really is no room for

---

219. See *Bartlett-Collins Co.*, 237 N.L.R.B. 770, 773 n.10, 99 L.R.R.M. 1034, 1036 n.10 (1978), *enforced*, 639 F.2d 652 (10th Cir. 1981).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

compromise? For example, one party demands verbatim recording of bargaining sessions to ensure equitable results in the event of litigation, and the other side opposes any recording, fearing that it will intimidate its novice bargaining team and stifle negotiations. The Third Circuit was cognizant of the dilemma inherent in the Board's per se approach, stating: "[i]t would appear that it is equally violative of the Act to insist on the absence of stenographers as to insist that stenographers be present. The fact that an issue is a non-mandatory subject of bargaining does not of itself require that one substantive result be favored over another."<sup>224</sup>

The Board has not stated how it will deal with situations in which parties insist upon conflicting positions regarding a preliminary matter which must be resolved if bargaining is to occur, such as the time or place of bargaining. One remedy, suggested in dictum by the Third Circuit in *Latrobe Steel*, is to find each party in violation of section 8(a)(5) and to issue cease and desist orders against both parties, and if this does not break the deadlock, the Board must then resolve the matter "by examining the totality of the circumstances in the case."<sup>225</sup> Presumably this means that the Board would assess the reasonableness of the positions and choose between them. This runs afoul of the basic premise of the Act, that the Board is only to induce good faith bargaining by the parties, not force substantive positions upon them.<sup>226</sup> A different resolution would be to fall back upon a good faith analysis. It may be that one party is insisting on its demand in bad faith, while the other is not. The person insisting in bad faith would then be held responsible for the impasse. If both are found to be acting in good faith, however, each would be permitted to insist to impasse, as they were allowed to do before *Bartlett-Collins*, with economic pressures being the arbiter of the outcome. This solution, of course, would effectively reverse *Bartlett-Collins*. Alternatively, because of the possible unforeseen difficulties in applying the per se approach to preliminary issues,

---

224. *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 178 (3d Cir. 1980).

225. *Id.* at 178 n.7.

226. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 145 (1937); see *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970). A frequently quoted comment from the 1935 debate on the Wagner Bill, is that of Senator Walsh, the chairman of the Senate Committee on Education and Labor:

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

P. ROSS, *THE GOVERNMENT AS A SOURCE OF UNION POWER* 87 (1965), quoted in Marcus, *The Employer's Duty to Bargain: Counterproposal v. Concession*, 17 LAB. L.J. 541, 542 (1966).

the Board could limit *Bartlett-Collins* to its facts. Only the stenographer issue would be deemed a nonmandatory subject of bargaining, with other preliminary issues continuing to be tested under a good faith analysis. While not reversing *Bartlett-Collins*, this solution would mean that almost all preliminary issues would be analyzed according to the traditional good faith standard.

The Board's objective in apparently moving to a per se test of preliminary bargaining subjects is an admirable one. The prior practice of allowing a party to insist to impasse upon such matters, if in good faith, invited breakdowns in negotiations before anything of real substance had been put on the table. The good faith approach created a tool of avoidance for a party hostile to the collective bargaining process. Moreover, it seems contrary to the Act's purposes of fostering meaningful collective bargaining to permit going to impasse over subjects, such as the time or place of bargaining. These are relatively insignificant matters compared to the central concerns of labor negotiations: wages, hours, and working conditions. In the case of the stenographer issue, not only is the subject subordinate to these core subjects, but it can have a harmful effect on the whole bargaining process. Recording bargaining sessions can generate distrust and sap the spontaneous, frank, no-holds-barred interchange required for successful bargaining.

Admirable intentions by themselves do not ensure the desired results. While the language and logic of *Bartlett-Collins* point to the application of the per se approach to all disputes over preliminary matters, it does not seem that this will be possible. The per se approach works well with most permissive bargaining subjects because they can be isolated from the mandatory subjects. Resolution of the latter does not depend upon the former, so whoever insists to impasse upon the permissive subject can be blamed for the breakdown in negotiations. But many preliminary subjects are prerequisites to bargaining about mandatory issues, and each side has a right to press for its view. When, however, the favorable circumstances of *Bartlett-Collins* (a preliminary subject and a party amenable to compromise) are not present, the Board's per se approach will not be easy to apply. The Board has not yet said how it intends to apply the approach, but the possible resolutions all point to a return to something similar to a good faith analysis. Thus, the impact of the Board's adoption of a per se test in *Bartlett-Collins* may actually augur much less change than first appears from the face of the opinion.