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BLIND FAITH OR EFFICIENCY? THE DIFFERENCES BETWEEN THE FIFTH CIRCUIT AND ALL OTHERS ON THE TOPIC OF PRIVATE SECTOR¹ IMPASSE BARGAINING

I. INTRODUCTION

The National Labor Relations Act (NLRA), enacted in 1935 and amended several times thereafter, governs American labor law.² Courts and the National Labor Relations Board (NLRB) have construed the NLRA to require that an employer bargain to a complete impasse on all mandatory issues of bargaining with an employee representative before unilaterally altering the terms and conditions of employment.³ An “impasse” is “a state of facts in which the parties, despite the best of faith,

1. Public and private sector collective bargaining are fundamentally different. “Public employers—federal, state, and local governments—are not covered by the [National Labor Relations] Act.” MICHAEL EVAN GOLD, AN INTRODUCTION TO LABOR LAW 5 (2d ed. 1998). This Note will focus upon bargaining covered by the National Labor Relations Act (“NLRA”): private sector bargaining.

2. Significant changes to the NLRA since its enactment in 1935 include the 1947 Taft-Hartley amendments and the 1959 Landrum-Griffin Act. The Taft-Hartley Act, enacted to remove the balance of bargaining power from labor’s favor, resulted in significant changes to the NLRA. For one, it provided employees with a means to change bargaining representatives. The additional findings incorporated by Congress into the Policy Declaration of the NLRA (Section 1 of the Act, codified as 29 U.S.C. § 151 (2000)), indicate that some union practices are detrimental to national commerce and the interest of the public. The amendment to Section 7 (codified as 29 U.S.C. § 157 (2000)) provides employees with the right to refrain from concerted activity. Amendments to the original Section 8, codified at 29 U.S.C. § 158(b) (2000), listed union unfair labor practices. Further, Section 9(e) was amended by the Taft-Hartley Act to allow employees to petition for a union decertification election. 29 U.S.C. § 159(e) (2000).

The Taft-Hartley Act is often viewed as representing conflicting statutory goals. JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY 1947-1974 272 (1995). The Act’s protection of individual rights—specifically, the right to refrain from collective bargaining added to Section 7—has been viewed as “statutory justification for both the promotion of a policy of individual bargaining and employer resistance to unionization and collective bargaining.” *Id.*; see also *infra* note 11 and accompanying text. This presents a dilemma in the balance of power between workers and management, as many decisions cannot be negotiated on an employee-by-employee basis. Hence, the choice may be viewed as one of inclusion in or exclusion from the bargaining process. *Id.*

Another consequence of the Taft-Hartley Act was to create a fundamental conflict in the government’s role: Taft-Hartley’s amendments made the government a disinterested supporter of a worker’s choice for or against unionization, but retained the Wagner Act’s notion “of the federal government as a promoter of collective bargaining.” *Id.*

3. See Section 8(a)(5) of the NLRA (29 U.S.C. § 158(a)(5) (2000)) (prohibiting an employer from refusing to bargain with the representatives of its employees), Section 8(d) of the NLRA (29 U.S.C. § 158(d) (2000)) (conferring upon employers and employee representatives the mutual obligation to collectively bargain in good faith on mandatory terms and conditions of employment); see also GOLD, *supra* note 1, at 41.

are simply deadlocked.”⁴ This stalemate occurs when the collective bargaining process fails. Some factors considered in determining whether parties have reached an impasse include the bargaining history between the employer and unions, the behavior of the parties in negotiations, and the topic of negotiations.⁵

The Supreme Court has issued several rulings on the topic of impasse bargaining; in all instances, it requires an employer to bargain to an impasse, absent certain circumstances, before unilaterally altering the terms and conditions of employment.⁶ The Fifth Circuit Court of Appeals has created an exception to the Supreme Court’s policy regarding impasse bargaining and the unilateral imposition of terms and conditions of employment by an employer. Since 1963, the Fifth Circuit has only required an employer to give a union notice and a chance for counterproposals before instituting unilateral changes in wages, hours, and other terms and conditions of employment that are mandatory subjects of bargaining. In a recent decision, the Fifth Circuit has reasserted its position by holding that the Supreme Court’s earlier rule is restricted to a narrow set of facts.⁷

Recently, the Seventh Circuit Court of Appeals attacked the long-standing philosophy of the Fifth Circuit. In *Duffy Tool & Stamping, L.L.C.*

4. 25 AM. JUR. 2D *Proof of Facts* § 241 (citing *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963)). An impasse is reached when the negotiating parties “have reached ‘that point of time in negotiations when [they] are warranted in assuming that further bargaining would be futile.’” *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001), *cert. denied* 534 U.S. 1130 (2002) (citing *Wycoff Steel, Inc.*, 303 N.L.R.B. 517, 523 (1991) (quoting *Patrick & Co.*, 248 N.L.R.B. 390, 393 (1980))). The employer and employee representatives reach a partial impasse when they are unable to agree on a few terms of the entire collective bargaining agreement. For an example of partial impasse, see *Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 755 (7th Cir. 2001) (failure of employer and employee representative to agree upon a subcontracting plan, without disagreement on any other mandatory issues of bargaining, termed a “partial impasse”). The parties reach a general impasse when the two sides cannot reach consensus on the totality of the agreement. See *Visiting Nurse Servs. of Western Mass., Inc. v. NLRB*, 177 F.3d 52, 57 (1st Cir. 1999).

5. In *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), *enforced sub nom.* *Am. Fed. of Television and Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the NLRB identified five factors to be considered in distinguishing an impasse from a bad-faith cease of bargaining: bargaining history, good faith of parties in negotiations, length of negotiations, importance of the issue(s) in dispute, and “the contemporaneous understanding of the parties as to the state of negotiations[.]” 163 N.L.R.B. at 478.

6. See generally *NLRB v. Katz*, 369 U.S. 736 (1962); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991). See also *infra* notes 9-18 and accompanying text.

7. *NLRB v. Pinkston-Hollar Const. Servs., Inc.*, 954 F.2d 306 (5th Cir. 1992). In *Pinkston-Hollar*, the Fifth Circuit Court of Appeals held that the Supreme Court’s decision in *Litton* was “limited to the question of arbitrability of post-contract expiration layoffs.” *Id.* at 313 n.6. The court held that because the *Litton* decision did not explicitly involve an employer giving a union notice of a proposed change and an opportunity to make counteroffers, it was inapplicable. *Id.*

v. NLRB,⁸ Judge Richard Posner's decision criticized the Fifth Circuit's approach. In the *Duffy* opinion, the Seventh Circuit listed several reasons why the Fifth Circuit's policy harms the bargaining process. In addition, several other circuits have joined the Seventh Circuit. The NLRB is also in agreement with these circuits and has objected to the position taken by the Fifth Circuit.

This Note examines the effects of the Fifth Circuit's policies on collective bargaining. Part II discusses the case history of the circuit split. Part III examines the mechanics of collective bargaining as applied to the impasse bargaining doctrine, and the Seventh Circuit's concerns in *Duffy*. Part IV presents arguments to resolve the split on impasse bargaining.

II. HISTORY

A. *The United States Supreme Court*

The United States Supreme Court first articulated the principle of impasse bargaining in *NLRB v. Katz*.⁹ In *Katz*, the Court found that an employer's imposition of unilateral terms prior to impasse is illegal,¹⁰ as such a practice violates Sections 8(a)(1)¹¹ and 8(a)(5)¹² of the NLRA.¹³ The Court noted that the NLRB had jurisdiction to impose and enforce the impasse bargaining rule under Sections 8(a)(5) and 8(b)(3) of the NLRA.¹⁴

8. 233 F.3d 995 (7th Cir. 2000).

9. 369 U.S. 736 (1962).

10. *Id.* at 747.

11. 29 U.S.C. § 158(a)(1) (2000). The section reads: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title[.]" Section 7, codified at 29 U.S.C. § 157 (2000), provides employees the right to join a labor organization, the right to participate in "concerted activities for the purpose of collective bargaining or other mutual aid and protection[.]" *Id.* A 1947 Taft-Hartley amendment to Section 7 provided employees with the countervailing right to refrain from joining in concerted activities. ARCHIBALD COX, DEREK C. BOK, ROBERT A. GORMAN & MATTHEW W. FINKIN, LABOR LAW 91 (13th ed. 2001). Section 7 was also amended to change government's role from an advocating unionization to neutral. *Id.*; see also *supra* note 2 and accompanying text.

12. Section 8(a)(5) of the NLRA is codified at 29 U.S.C. § 158(a)(5) (2000) and reads in relevant part: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees[.]" *Id.*

13. *Katz*, 369 U.S. at 747. The Court noted that unilateral action by an employer is tantamount to a refusal to bargain, and that the NLRB is permitted to stop those actions "which directly obstruct[] or inhibit[] the actual process of discussion, or which [reflect] a cast of mind against reaching agreement." *Id.* Further, the Court stated that unilateral action is seldom "justified by any reason of substance." *Id.* Such statements led the Court to conclude that the NLRB may regard unilateral action as a violation of Section 8(a)(5) without finding that the employer acted in bad faith. *Id.* at 747-48.

14. *Id.* Section 8(b)(3) (codified as 29 U.S.C. § 158(b)(3) (2000)) states in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees[.]"

Further, the Court noted that bad faith on the part of the employer need not be found for a violation of Section 8(a)(5).¹⁵ The Court also stated that, in some cases, unilateral imposition of terms and conditions of employment might be acceptable, but did not specify when the exception applies.¹⁶

The Court further developed its doctrine regarding impasse bargaining in *Litton Financial Printing Division, Inc. v. NLRB*.¹⁷ In *Litton*, the Court found that restraints on an employer's unilateral action may extend past the expiration of a collective bargaining contract.¹⁸

B. *The Fifth Circuit*

In a line of cases beginning with *NLRB v. Tex-Tan, Inc.*,¹⁹ the Fifth Circuit held that an employer may unilaterally change the terms and conditions prior to an impasse on all mandatory issues of bargaining.²⁰ In *Tex-Tan*, the union filed charges alleging a violation of Section 8(a)(5), complaining that the employer instituted unilateral changes in wage rates.²¹ The Fifth Circuit held that an employer may change the terms and conditions of employment so long as it gives fair notice and discusses such changes with the union.²² In addition to the holding, the Fifth Circuit stated that Section 8(a)(5) is not violated if a wage increase instituted by

The Court treated Section 8(b)(3) as the counterpart to Section 8(a)(5). *Katz*, 369 U.S. at 747. The Court noted that, under its decisions, Section 8(b)(3) of the NLRA does not permit the NLRB to "pass judgment on the legitimacy of any particular economic weapon used" during the course of genuine negotiations. *Id.* However, the Court did reserve the NLRB's right to quell behavior that is inimical to the process of negotiation and agreement. *Id.* In *Katz*, the Court extended its right of intervention under Section 8(b)(3) to bargaining issues implicating Section 8(a)(5). *Id.*

15. *Id.*

16. *Id.* at 747-48.

17. 501 U.S. 190 (1991).

18. The Court held that a mandatory bargaining clause did not expire with a collectively-bargained contract. *Id.* at 204-05. However, the Court restricted its holding, reasoning that arbitration is consensual between the employer and representative of employees under the NLRA, and is therefore inappropriate for governance under the impasse bargaining doctrine. *Id.* at 200-01.

19. 318 F.2d 472 (5th Cir. 1963).

20. *Id.* at 481.

21. *Id.* at 479. The employer made unilateral changes in the terms and conditions of employment shortly after the union was certified as the bargaining representative in 1959, froze wage changes after objections from the NLRB, and again instituted unilateral changes in piece-rate and time-based wages during March and April of 1960. *Id.*

22. In the words of the court:

Of course, before instituting wage changes of a kind which constitute a subject of mandatory bargaining, there is the statutory duty to first "meet . . . and confer in good faith . . ." [Section] 8(d). But it is a mistake to assume that where there has been such discussion and fair notice of the employer's intended actions, it is a violation of the law to institute such changes without securing the agreement of the Union.

Id. at 481.

an employer does not exceed the wage previously offered to the union.²³

Approximately a year after its decision in *Tex-Tan*, the Fifth Circuit again visited the topic of impasse bargaining. In *NLRB v. Citizens Hotel Co.*,²⁴ the union filed a Section 8(a)(5) charge against the employer, alleging a failure to bargain.²⁵ The court ruled in favor of the union, noting that the employer failed to consult the union prior to changing the terms and conditions of employment.²⁶

After its decision in *Citizens Hotel*, the Fifth Circuit reconsidered the issue of impasse bargaining several times. In *A.H. Belo Corp. v. NLRB*,²⁷ *Winn-Dixie Stores v. NLRB*,²⁸ and *Nabors Trailers, Inc. v. NLRB*,²⁹ the

23. *Id.* The Fifth Circuit found justification for this policy in *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949). In *Crompton-Highland Mills*, the Court reasoned that an employer's unilateral imposition of a wage rate not accepted or rejected by the union may not have an adverse effect on the collective bargaining proceedings, or may be welcomed by the employees' bargaining representative without adversely affecting the remainder of negotiations. *See Tex-Tan*, 318 F.2d at 481 (citing *Crompton-Highland Mills*, 337 U.S. at 224). To further support this contention, the Fifth Circuit stated: "Nothing prevented the employer at any time from changing for the future the wages he would pay. . . . The pendency of a negotiation for a collective contract would not destroy the employer's right in this regard." *Id.* (citing *NLRB v. Whittier Mills*, 111 F.2d 474, 478 (5th Cir. 1940)). The Fifth Circuit also found support for this contention in *NLRB v. Katz*, 369 U.S. 736 (1962). In *Katz*, the Supreme Court repeatedly stated that the employer instituted a new system of wage increases and changes in the sick leave plan, recognized that an employer may grant wage increases no higher than those previously offered to the union, and, in a footnote, referred to *NLRB v. Bradley Washfountain*, 192 F.2d 144, 150-52 (7th Cir. 1951), a case in which the Seventh Circuit held that a wage increase less than the union's demand could be enacted during bargaining. *Tex-Tan*, 318 F.2d at 481 (citing *Katz*, 369 U.S. at 745 n.12.)

The Fifth Circuit focused upon employers' rights to rationalize its holding. It began by noting that the law does not force agreement upon the employer and the employee bargaining representative. 318 F.2d at 482. The court then built upon this observation, noting that in situations of deadlock, the parties have significant latitude for unilateral action. *Id.* The court then opined that the operative fact was the existence of impasse, not its cause. *Id.* It further noted that a genuine deadlock that does not result from bad-faith bargaining should not render an employer helpless. *Id.*

24. 326 F.2d 501 (5th Cir. 1964).

25. The union filed a Section 8(a)(5) charge because the employer discontinued Christmas bonuses without first consulting the union. *Id.* at 504-05.

26. *Id.* at 505. In reaching its decision, the Fifth Circuit revisited and expanded upon the principles described in *Tex-Tan*. First, the court noted that a union does not have absolute veto power over changes instituted by the employer. *Id.* The court then reiterated its holding from *Tex-Tan*, stating that negotiations need not reach an impasse for an employer to unilaterally institute changes in the terms and conditions of employment, provided that the union has been consulted for counterproposals and counterarguments prior to the imposition of the change. *Id.*

27. 411 F.2d 959 (5th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970). This case again showed the Fifth Circuit's method of distinguishing *Katz* from its own policy: in *Katz*, the employer failed to provide notification prior to instituting unilateral changes. 411 F.2d at 971. With such notification, unilateral changes are acceptable. *Id.*

28. 567 F.2d 1343, 1349-50 (5th Cir. 1978) (holding that employer violated its Section 8(a)(5) duty to bargain by unilaterally granting increased insurance benefits and wages without first notifying the union and distinguishing this case from its earlier holdings in *Tex-Tan* and *A.H. Belo*.)

29. 910 F.2d 268 (5th Cir. 1990). *Nabors Trailers* affirmed "the vitality of the *Citizens Hotel* standard" and held that bargaining need not continue to an impasse, and that a union does not have

Fifth Circuit reaffirmed *Tex-Tan* and *Citizens Hotel* and allowed employers to institute unilateral changes in the terms and conditions of employment so long as the employer notified the union and gave union representatives the opportunity to present counterproposals and counterarguments. In *NLRB v. Pinkston-Hollar Construction Services*,³⁰ the Fifth Circuit read an exception into the Supreme Court's *Litton* holding, thereby distinguishing its policy from that of the Court.³¹

C. *The Seventh Circuit and Other Circuits in Accord*

1. *The Seventh Circuit*

The Seventh Circuit's view of impasse bargaining differs from that of the Fifth Circuit. Its policy regarding the unilateral imposition of terms and conditions by an employer can be traced back to its decision in *Inland Steel Co. v. NLRB*.³² In that case, which is seminal in the interpretation of Sections 8(a)(5) and 9(a),³³ the employer unilaterally established a pension plan with the provision that employees over the age of sixty-five would be involuntarily retired.³⁴ The union objected, claiming that a pension plan was historically a condition of employment and therefore a compulsory

absolute veto power over changes instituted by the employer. *Id.* at 273.

30. 954 F.2d 306 (5th Cir. 1992).

31. See *supra* note 7. In *Pinkston-Hollar*, the union filed unfair labor practice charges, alleging that the employer violated Sections 8(a)(1) and 8(a)(5) of the NLRA by unilaterally withdrawing from union benefit plans, enrolling instead in its own benefit plans after the expiration of the collective bargaining agreement. 954 F.2d at 308-09. The NLRB ruled against the employer. *Id.* at 309. The Fifth Circuit reversed, noting that the facts of this case and those in *Nabors Trailers* were similar. The employer and union met several times. After they failed to agree, the employer unilaterally instituted the desired changes and the union followed by filing an unfair labor practice charge. *Id.* at 312-13.

Interestingly, in supporting its contention that an employer may unilaterally institute terms and conditions of employment prior to impasse, the Fifth Circuit relied on a Ninth Circuit case. The court cited *NLRB v. Auto Fast Freight*, 793 F.2d 1126, 1129 (9th Cir. 1986), for a further (and quite narrow) exception to the impasse bargaining rule: in the case where union has delayed or avoided bargaining, and the employer has provided adequate notice of the proposals it intends to implement, the employer is permitted to unilaterally implement its proposals without bargaining to impasse. 954 F.2d at 311. Otherwise, the similarities between the positions adopted by the Fifth and Ninth Circuits end—in *Auto Fast Freight*, the Ninth Circuit held that an employer must bargain to total impasse, and may not make changes after the expiration of a collective bargaining agreement until impasse is reached. 793 F.2d at 1129.

32. *Inland Steel Co.*, 77 N.L.R.B. 1 (1948), *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

33. See Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 392-94 (1950), for a discussion of this case as well as a discussion of early policy regarding the enforcement of the NLRA, especially Sections 8(a)(5) and 9(a).

34. 170 F.2d at 250.

topic of bargaining.³⁵ After reviewing the Congressional history of the Wagner Act, the NLRB had earlier sided with the union.³⁶ The Seventh Circuit, relying upon the evidence considered by the NLRB, affirmed the NLRB's decision.³⁷

In *Duffy Tool & Stamping, L.L.C. v. NLRB*,³⁸ the Seventh Circuit articulated its policy regarding impasse bargaining. The union filed a complaint under Section 8(a)(5) after the employer made unilateral changes in the terms of employment.³⁹ The employer argued that it had the power to institute unilateral changes on terms and conditions of employment once negotiations reached impasse on any issue.⁴⁰ In his opinion affirming the NLRB's petition for enforcement,⁴¹ Judge Richard Posner sided with the NLRB and numerous other circuits,⁴² expanding the circuit split. In *Duffy*, the Seventh Circuit gave several reasons that an employer should not be permitted to impose a unilateral change on the terms and conditions of employment before the parties have reached a total impasse.⁴³ Specifically, Judge Posner stated two overarching concerns:

(1) [B]y removing issues from the bargaining agenda early in the bargaining process, it would make it less likely for the parties to find common ground; and

(2) by enabling the employer to paint the union as impotent, it would embolden him to hold out for a deal so unfavorable to the union as to preclude agreement.⁴⁴

35. *Id.*

36. 77 N.L.R.B. at 10. The Board specifically referred to comments by Senator Wagner, who played a major role in the promulgation of the NLRA:

Significantly, Senator Wagner, in addressing the 80th Congress with respect to the 1947 amendatory legislation, recently stated that the term "condition of employment" as used in the original Act was intended to have a broader meaning than "working conditions" and included such subjects as "pension plans, and insurance funds which properly belong in the employer-employee relationship"

77 N.L.R.B. at 7 (citing 93 CONG. REC. 3427).

The NLRB then found that the contractual provisions of pension plans can be administrated through collective bargaining. 77 N.L.R.B. at 10-13.

37. 170 F.2d at 251-54.

38. 233 F.3d 995 (7th Cir. 2000).

39. In *Duffy*, the union's complaint was predicated on the employer's unilateral institution of a "no-fault" attendance policy after declaring an impasse in negotiations. 233 F.3d at 997.

40. *Id.*

41. *Id.* at 1000.

42. *Id.* at 997-98.

43. *Id.* at 998.

44. *Id.*

The first concern addressed by the Seventh Circuit involved integrative bargaining.⁴⁵ Judge Posner contended that integrative bargaining was more productive than bargaining on a single issue.⁴⁶ The court noted that multi-issue bargaining was not a zero-sum proposition, as compromise may “fund . . . other concessions by both sides.”⁴⁷ The Seventh Circuit noted that significant danger existed for an employer in the use of antagonistic bargaining; an employer could undermine a union’s representational strength.⁴⁸

The second concern involved the union’s power. First, if an employer is permitted to undercut the union, it signals to the workers that the union is a “paper tiger.”⁴⁹ A union should not have to admit—and cannot afford to admit—that it is powerless.⁵⁰ However, if the employer may adopt policies inimical to the interests of employees, the union is effectively powerless.⁵¹

The Seventh Circuit next addressed the union’s power with respect to the employer’s making of nonnegotiable demands. More specifically, the court considered the infrequency with which nonnegotiable demands actually arise.⁵² The Seventh Circuit noted that nonnegotiable demands are rarely of substance and are primarily used as a bluffing tactic; at an appropriate price, such demands will be dropped.⁵³ The *Duffy* court

45. “Integrative bargaining” involves the resolution of several issues at once. *Id.*

46. *Id.* “[I]t is easier [by using integrative bargaining] to strike a deal that will make both parties feel like they are getting more from peace than from war.” *Id.*

47. *Id.* To illustrate this point, Judge Posner provided a hypothetical. If an employer and employee representative are negotiating, and the only topic at issue is wages, then bargaining is a “zero-sum game”—a dollar conceded by one party is gained by the other. *Id.* If other issues are added, perhaps one side will make concessions—“pay”—to receive desired concessions from the opposing party. *Id.* This continuous give-and-take, reasoned the Seventh Circuit, will bring the two sides closer together, favoring agreement over strife. *Id.* In its defense, the employer claimed that its unilateral imposition of terms did not remove the issue from the bargaining table. *Id.* The Seventh Circuit rejected this claim as fundamentally incorrect, opining that by renegotiating or rescinding, an employer will appear weak in the eyes of his workers, and may provide the union with additional support in an unfair labor practice proceeding before the NLRB. *Id.*

48. *Id.* Judge Posner presented the example of a unilateral decision where an employer has to expend significant costs, such as terminating a portion of the workforce and “hiring permanent replacements under contracts providing for generous severance benefits.” *Id.* Such a practice is used to show that the union is helpless to protect workers. An employer will not abandon a policy, such as this, that provides him with the upper hand in bargaining. *Id.*

49. *Id.*

50. *Id.* at 999.

51. In adopting such policies, the employer seeks to gain a favorable majority of employees in a strike vote or a union decertification election. *Id.* at 998.

52. *Id.* at 999.

53. *Id.* “Usually this is bluffing, since if the negotiation is truly multifaceted, there is generally a price at which the parties will surrender these demands. Anyone who has been involved in a negotiation knows this.” *Id.*

extended this logic to the employer's "no-fault" attendance policy, as it seemed highly unlikely to the Seventh Circuit that the employer was so entrenched in its attendance policy that a suitable concession by the union would not lead to its abandonment.⁵⁴ Based on the preceding concerns, the Seventh Circuit adopted the NLRB's position requiring an employer to bargain to a complete impasse prior to taking unilateral action on mandatory issues of bargaining.⁵⁵

2. Other Circuits

In *Duffy*, the Seventh Circuit favorably cited three decisions from other circuits.⁵⁶ The earliest case to which the Seventh Circuit referred was *NLRB v. Central Plumbing Co.*⁵⁷ In *Central Plumbing*, the Sixth Circuit upheld an NLRB enforcement order, finding that an employer's cessation of bargaining violated Section 8(a)(5) of the NLRA.⁵⁸ In so holding, the NLRB (and subsequently, the court) found that no impasse existed.⁵⁹

The Seventh Circuit also cited *Visiting Nurse Services of Western Massachusetts v. NLRB* with approval.⁶⁰ In *Visiting Nurse Services*, the employer made unilateral changes to wages and other conditions of employment during bargaining, without having reached an impasse.⁶¹ In ruling against the employer, and affirming a fifty-year old policy,⁶² the

54. *Id.*

55. *Id.*

56. *Id.* at 997-98.

57. 492 F.2d 1252 (6th Cir. 1974).

58. In this case, the employer withdrew from both negotiations and the collective bargaining unit after the union rejected management's final offer. *Id.* at 1253. In ruling on the union's unfair labor practice charge, the NLRB found that management's unilateral withdrawal from the collective bargaining relationship was a violation of Section 8(a)(5). *Id.* at 1253-54.

59. The NLRB and the Sixth Circuit both noted that rejection of a proposal does not create an impasse. 492 F.2d at 1254. The court also rejected the employer's defense of an illegal union security clause, reasoning that the illegal contract clause played no role in the employer's decision to withdraw from the bargaining unit. *Id.* at 1254 n.3. The court also took notice of the fact that even after the employer's withdrawal from the bargaining unit, negotiations between the employer and the union continued. *Id.* at 1254.

60. 177 F.3d 52 (1st Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000).

61. *Id.* at 56. In *Visiting Nurse Services*, the employer unilaterally instituted a two-percent wage increase and a bi-weekly pay system following rejection of both (a "package proposal") by the union. *Id.* at 54-55. Several months later, the employer again made two more "package proposals," including wage increases, holidays, and job classifications. *Id.* at 55. Although the union rejected both proposals, the employer eventually instituted nearly all of the terms from both package proposals. *Id.*

62. *Cox & Dunlop*, *supra* note 33, at 400 n.47 (citing *W.W. Cross and Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949)). In *W.W. Cross*, the union complained that the employer violated Section 8(a)(5) by unilaterally instituting and refusing to bargain about an employee insurance program. 174 F.2d at 877. The First Circuit upheld the NLRB's order requiring the employer to bargain over the disputed program, noting that the phrase "wages," as used in Section 9(a), refers to more than just salary

First Circuit noted that an employer is normally required to bargain until impasse on all issues, except in certain instances.⁶³ The court held that an impasse requires more than the mere rejection of a proposal.⁶⁴ With its holding, the First Circuit vehemently rejected the Fifth Circuit's decision in *Pinkston-Hollar*,⁶⁵ which had provided the substantive basis for the employer's position.⁶⁶ In requiring an employer to bargain to impasse, the First Circuit used rationale similar to that adopted by Judge Posner in *Duffy*,⁶⁷ promoting the virtues of integrative bargaining.⁶⁸

The Seventh Circuit also relied on the D.C. Circuit's decision in *Vincent Industrial Plastics, Inc. v. NLRB*.⁶⁹ In *Vincent Industrial Plastics*, the employer made numerous changes to the terms and conditions of employment.⁷⁰ The NLRB found that the employer violated Sections 8(a)(1) and 8(a)(5) of the NLRA by unilaterally imposing the disputed policies.⁷¹ The D.C. Circuit "easily upheld" the NLRB's ruling that the employer's unilateral imposition of terms and conditions of employment

remuneration; rather, it encompasses "direct and immediate economic benefits flowing from the employment relationship." *Id.* at 878. The First Circuit also stated that, in drafting Section 9(a), Congress did not intend it to be limited to topics on which bargaining had previously occurred. *Id.* The court then concluded that insurance plans fall within the meaning of "wages" under Section 9(a). *Id.* See also Cox & Dunlop, *supra* note 33, at 399-401 for further discussion of this case and other cases similar to *W.W. Cross* that interpreted Sections 8(a)(5) and 9.

63. 177 F.3d at 56. The court noted two instances in which unilateral imposition of terms and conditions of employment may be permitted: "economic exigencies" and "business emergencies." *Id.* The First Circuit expressly noted that the employer's duty to bargain to a complete impasse includes situations in which an existing agreement has expired and a new one has not yet been negotiated. *Id.*

64. *Id.* at 58.

65. The First Circuit gave several reasons for criticizing the employer's reliance on *Pinkston-Hollar*:

First, it is inconsistent with the approach taken by this Circuit. Second, the case is best understood as one where the court found that the union failed to bargain and to act with due diligence after being given the employer's proposal. But VNS does not does not argue here that the Union avoided or delayed bargaining and so *Pinkston-Hollar* is, even on its own terms, inapplicable.

Id. at 59 (internal citations omitted).

66. *Id.* at 57-58.

67. See *supra* notes 45-51 and accompanying text.

68. 177 F.3d at 59. In advocating multi-issue bargaining, the First Circuit employed an argument almost identical to the one presented by the Seventh Circuit: allowing an employer to remove individual issues from consideration diminishes the parties' ability to productively bargain and reach an integrated settlement through compromise. These circumstances then lead one to assume that the union is entirely powerless in bargaining. *Id.*

69. 209 F.3d 727 (D.C. Cir. 2000).

70. After five months of negotiations, the employer made four unilateral changes to the terms and conditions of employment. *Id.* at 731. These changes involved "attendance, work duties, working hours, and time-keeping." *Id.*

71. The NLRB found that the employer did not present a suitable economic exigency to justify its unilateral change of the attendance policy, and upheld the finding of the administrative law judge in regard to the other policy changes. *Id.* at 733.

constituted an unfair labor practice.⁷² Since its ruling in *Vincent Industrial Plastics*, the D.C. Circuit again examined and reinforced its policy concerning the issue of impasse bargaining.⁷³

D. The National Labor Relations Board

The NLRB has always maintained a position counter to that of the Fifth Circuit and in accord with the Seventh Circuit and its allies on the issue of impasse bargaining and an employer's unilateral imposition of terms and conditions of employment.⁷⁴ A frequently-cited NLRB decision about impasse bargaining is *Winn-Dixie Stores, Inc.*⁷⁵ In that case, the union alleged violations of Sections 8(a)(5) and 8(a)(1) of the NLRA, as the employer raised wages over the objections of the union.⁷⁶ The employer relied upon a Fifth Circuit case, *Winn-Dixie Stores v. NLRB*,⁷⁷ to justify its unilateral action after providing the union with notice and an opportunity

72. *Id.* at 734. The court cited *Litton* in applying the standard that an employer must bargain to a complete impasse on all issues. *Id.* The D.C. Circuit also noted that dilatory tactics by a union or economic exigencies provide the two exceptions to the impasse bargaining rule. *Id.* The court found that the employer failed to provide notice to the union before instituting unilateral changes in the terms and conditions of employment, and that that the union did not waive its right to bargain over the changes. *Id.* at 734-35. In addition, the D.C. Circuit indicated that the employer's justification for the unilateral changes—specifically, the possibility of absenteeism—was not so unforeseeable, nor beyond the control of the employer, nor so new as to support the employer's defense of "economic exigency." *Id.* at 735.

73. *See TruServ Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), *cert. denied* 534 U.S. 1130 (2002). In *TruServ*, the union filed unfair labor practice charges under Sections 8(a)(5) and 8(a)(1) of the NLRA, claiming that the employer unlawfully implemented mandatory terms and conditions of employment prior to reaching an impasse in bargaining, disciplined employees by unilaterally implemented regulations, and refused to abide by the grievance procedure. 254 F.3d at 1109. The employer implemented its "final offer," and enforced new work rules and regulations thereunder, after approximately six weeks of bargaining with the union. *Id.* at 1112. The NLRB found in favor of the union on all allegations. *Id.* at 1113. The D.C. Circuit granted the employer's petition for review of the NLRB decision and order on the impasse bargaining issue, but denied the employer's petition about the processing of grievances. *Id.* at 1109. The court examined whether the employer and union had reached an impasse. *Id.* at 1114-15. Contrary to the NLRB, the D.C. Circuit found that a legitimate impasse existed. The court determined that "the bargaining positions of the parties, as expressed by their experienced negotiators, indicate[d] that the parties were at impasse." *Id.* at 1118. As a result, the court found that the employer lawfully implemented its final offer. *Id.* at 1118 n.11. The court affirmed the NLRB's finding that the employer's failure to abide by the grievance procedure violated Sections 8(a)(1) and 8(a)(5) of the NLRA. *Id.* at 1119.

74. *See Duffy*, 233 F.3d at 997 ("The Board . . . has repeatedly rejected the Fifth Circuit's doctrine, and other circuits have sided with the Board . . .") (internal citations omitted).

75. 243 N.L.R.B. 972 (1979).

76. *Id.* at 973. The employer submitted the wage proposal to the union in April, 1974, but the parties never agreed to implement the increase. *Id.* at 972-73. In July, 1974, the employer informed the union that it intended to implement the increase. Over the union's objections and threats to file charges with the NLRB, the employer implemented the increase. *Id.*

77. 567 F.2d 1343 (5th Cir. 1978).

to present counterproposals.⁷⁸ In finding that the employer committed unfair labor practices in violation of Sections 8(a)(5) and 8(a)(1), the NLRB noted that the type of bargaining in which the employer engaged, and argued was advocated by the Fifth Circuit, “presupposes negotiations.”⁷⁹ The court held that the employer failed to negotiate by engaging in “pro forma” or “ritual” bargaining.⁸⁰

A second noteworthy NLRB decision on impasse bargaining is *Master Window Cleaning, Inc., d/b/a Bottom Line Enterprises*.⁸¹ In that case, the union cancelled a bargaining session; the employer then accused the union of bargaining in bad faith and subsequently called an impasse.⁸² After declaring an impasse, the employer unilaterally implemented new terms and conditions of employment.⁸³ The NLRB found that the employer’s behavior during bargaining violated Sections 8(a)(1) and 8(a)(5) because the parties were not at impasse and the employer did not have a valid economic reason for unilaterally implementing the changes.⁸⁴ In reaching its conclusion, the NLRB noted the exceptions to the impasse bargaining rule,⁸⁵ which the First⁸⁶ and D.C. Circuits later adopted.⁸⁷

78. In *Winn-Dixie Stores v. NLRB*, the Fifth Circuit relied upon *Tex-Tan* in refusing to enforce a NLRB order that held an employer’s unilateral imposition of a wage increase violated Sections 8(a)(5) and 8(a)(1) of the NLRA. 243 N.L.R.B. at 973-74.

79. *Winn-Dixie Stores*, 243 N.L.R.B. at 974. In referring to a law review article by Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1433 (1958), the NLRB presented a discussion that is a seeming precursor to Judge Posner’s opinion in *Duffy*. In its discussion, the NLRB describes the mechanics of bargaining and the effects of an employer who bargains, not with the intent of giving and taking, but rather with the intent of providing a final warning before acting unilaterally. *Winn-Dixie*, 243 N.L.R.B. at 974-75. In its discussion, the NLRB objected to “and cannot endorse” the policy advocated by the Fifth Circuit. *Id.* at 974. The NLRB observed that the employer would have free rein over the implementation of unilateral changes, regardless of the status of negotiations. *Id.* Such a strategy in bargaining prevents productive negotiations and eviscerates the role of the bargaining representative. *Id.*

80. *Id.* at 975. “Pro forma,” or “ritual,” bargaining is a type of negotiation in which a party has no intention of reaching an agreement; the party merely attends to fulfill a requirement, formality, or give the impression of cooperation. *Id.* The NLRB noted, during bargaining, the union “was not so much presented with an opportunity to bargain about the wage increase as it was afforded a chance to give approval to [the employer’s] decision to grant it.” *Id.* at 975. The NLRB concluded that the employer did not bargain in good faith. *Id.*

81. 302 N.L.R.B. 373, *enforced*, 15 F.3d 1087 (9th Cir. 1994).

82. *Bottom Line Enters.*, 302 N.L.R.B. at 373-74.

83. *Id.* at 373-74. The employer refused to contribute to employee pension plans and trust funds. *Id.*

84. *Id.* at 375. In finding that the two parties were not at impasse, the NLRB observed that the union and employer bargained on a regular basis, frequently discussing the disputed issues. *Id.* at 374.

85. *Id.* at 374. The exceptions include a union’s usage of dilatory tactics and an employer’s economic exigency.

86. See *Visiting Nurse Servs. of W. Mass., Inc. v. NLRB*, 177 F.3d 52, 57 (1st Cir. 1999). See also *supra* notes 60–61 and accompanying text.

87. See *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000).

Two other recent NLRB decisions on the topic of impasse bargaining include *Intermountain Rural Electric Association*⁸⁸ and *RBE Electronics of South Dakota, Inc.*⁸⁹ In *Intermountain*, the employer declared an impasse and unilaterally imposed terms and conditions of employment after the employer and union failed to agree to a new contract before the previous contract expired.⁹⁰ The employer claimed that the union waived its right to bargain on certain issues, and therefore implemented the terms of its last and final offer.⁹¹ The NLRB ruled in favor of the union, noting that the union did not waive its rights to bargain on certain issues⁹² and that an impasse did not exist at the time that the employer unilaterally implemented its proposals.⁹³

In *RBE Electronics*, the union charged that the employer violated Sections 8(a)(5) and 8(a)(1) of the NLRA by refusing to bargain over layoffs, recall of employees, and a reduction in working hours.⁹⁴ In identifying the standards to use in deciding the case, the NLRB referred to and expanded the doctrine of *Bottom Line Enterprises*, identifying situations where exceptions to the impasse bargaining doctrine might exist.⁹⁵ The NLRB remanded the case to an administrative law judge for a

88. 305 N.L.R.B. 783 (1991), *enforced*, 984 F.2d 1562 (10th Cir. 1993).

89. 320 N.L.R.B. 80 (1995).

90. *Intermountain*, 305 N.L.R.B. at 784.

91. *Id.*

92. *Id.* at 787. The NLRB found that the last-minute actions of the employer, not the union's behavior, prevented the union from bargaining over the insurance premiums. *Id.* at 786-87. The NLRB also concluded that the union did not waive its right to bargain regarding overtime pay, as the employer's unilateral imposition of terms and equivocal conduct towards bargaining precluded the union from utilizing its bargaining rights. *Id.* at 788.

93. *Id.* Utilizing the five factors listed in *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), the NLRB found that the employer's actions in bargaining were to intended to diminish the union's power, thereby undercutting its ability to negotiate with the employer. *Intermountain*, 305 N.L.R.B. at 788-89. Further, the behavior of the employer was found to adversely affect the conditions within the "bargaining arena," making it impossible to reach an agreement or a valid impasse. *Id.* at 789. *See supra* note 5.

94. *RBE Elecs.*, 320 N.L.R.B. at 81.

95. *Id.* The NLRB utilized *Bottom Line Enterprises* for precedential support both for its position on impasse bargaining and to identify the two exceptions to the impasse bargaining rule: a union's use of dilatory tactics and economic exigency. *Id.* Noting that the economic exigency exception was a derivation of the Supreme Court's decision in *Katz* and referring to the NLRB's decision in *Winn-Dixie*, the NLRB indicated that such an exception would be applicable only in "a dire financial emergency." *Id.* The NLRB observed that it has held that economic detriments such as "loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." *Id.* (footnotes omitted). Despite this observation, the NLRB marginally widened the exception, recognizing that during contract negotiations, situations may arise in which an employer needs to make a decision before the completion of bargaining. *Id.* Thus, when "an exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely . . .," the *Bottom Line Enterprises* rule is suspended and the employer may act unilaterally if it has provided adequate notice and an opportunity to bargain. *Id.* at 81-82. In describing its holding, the

decision, consistent with the modified *Bottom Line Enterprises* standard created in the NLRB's opinion, as to whether the employer violated Sections 8(a)(5) and 8(a)(1).⁹⁶

III. ANALYSIS

An analysis of the case law of impasse bargaining, and the effect of the Fifth Circuit's view on the bargaining process, requires an exploration of several factors. One important factor is the effect of the Fifth Circuit's position on the dispersal of bargaining power.⁹⁷ The Fifth Circuit's view must also be contrasted with the opinions of other courts and the NLRB; specifically, whether its view on impasse bargaining is as harmful to the bargaining process as the opposing authority suggests. The advantages of allowing an employer unilateral control over the terms and conditions of employment in the absence of an impasse must also be examined. Finally, the policy considerations of restricting an employer's use of economic weapons in the bargaining process require attention.

A. The Economic Consequences of the Unilateral Imposition of Terms and Conditions of Employment

1. "Crowding": The Economic Effects of Unionism on Other Industries and Other Sectors of Workers

Union activity affects other members of society. By refusing employers the ability to unilaterally impose terms and conditions of employment (most importantly wages), a "crowding" effect may occur.⁹⁸ Therefore,

NLRB stated that it attempted to balance the union's right to bargain with the employer's right to conduct business, but that the employer's right to use this exception is circumscribed, and that the employer must show that the exigency was caused by uncontrollable events. *Id.* at 82.

96. *Id.* at 83.

97. Bargaining power is defined as "the relative ability of the parties in a conflict situation to achieve their respective goals." Susan L. Dolin, *Lockouts in Evolutionary Perspective: The Changing Balance of Power in American Industrial Relations*, 12 VT. L. REV. 335, 340 (1987).

98. An econometric comparison of unionized and nonunionized sectors in Los Angeles and San Francisco provides more insight into this concept. Lawrence M. Kahn, *The Effect of Unions on the Earnings of Nonunion Workers*, 31 INDUS. & LAB. REL. R. 205 (1978). According to the theory, if unions negotiate higher wages from employers, then the quantity of union labor demanded will fall, and the larger labor supply to nonunion firms will force wages down in that sector. *Id.* at 205. This "crowding" effect of higher union wages also leads to the creation of "dual labor markets," where nonunion workers are forced into tenuous, lower-paying jobs. *Id.* at 205-06. Kahn identified the "crowding" effect as being a long run trend that could subvert unionism either by creating hostility among nonunion workers or by alienating nonunion employees from the cause of unionism. *Id.* at 216. Strangely enough, the NLRA and organized labor arguably seem to subvert their own purposes—

unionism might have a harmful effect on that which it seeks to protect: the wages and jobs of employees. Further, the “crowding” effect might bring about another problem: a lack of efficiency. In addition, forcing wages upward may have a stark effect on societal labor efficiency. Theorists have acknowledged that, to some extent, unionized workers are less productive than their potential.⁹⁹

The union “crowding” effect on wages can also impact the economy outside of the particular sector in which the unionized firm conducts business. The price increase by unionized firms is passed on to consumers, and, ultimately, other firms within and outside of the industry of the unionized firm must cut personnel because of increasing costs.¹⁰⁰ This

under Kahn’s theory, if increased union wages alienate nonunionized employees from the cause of unionism, then they shall choose to remain unrepresented, and individual employees will bargain directly with the employer.

99. The popular conception or stereotype that unions are inimical to productivity has some support. One commentator notes:

The proposition that unions enhance productivity . . . flies in the face of massive, if unsystematic, evidence pointing to the opposite conclusion. Featherbedding [requiring an employer to hire more workers than required] seems a more common attribute of unionized than of nonunionized work forces (at least in the private sector); many industries that are heavily unionized are notable for their low productivity . . .

Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1001 (1984).

Although Posner critiqued the productivity of unions, he subsequently came to the defense of unions in *Duffy* by criticizing the employer’s unilateral imposition of a term of employment. Ironically, in *Duffy*, the employer wished to adopt an attendance policy in an attempt to stop tardiness, a clear bane on productivity. 233 F.3d at 997.

Posner further concluded that unionism intends to, and succeeds in, “[raising] the price of labor above the competitive level, and [depressing] the supply of labor below the competitive level.” 51 U. CHI. L. REV. at 1001. *See infra* note 100.

Posner also questions other theories of union productivity. One such premise is that unions increase productivity by establishing grievance procedures that allow for the arbitration of workers’ complaints and provide additional job security—“not absolute security, for [workers] can be laid off if the firm’s demand for labor declines, but security against being fired other than for good cause (determined by means of the grievance machinery)” RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 357 (5th ed. 1998). Specifically, productivity is increased through the grievance procedure by helping employers to detect mistreatment of workers before job turnover becomes abnormal, and by providing some job security. *Id.* Posner discounts this theory with two observations. First, the theory fails to explain why employers do not adopt grievance machinery without the presence of a union. *Id.* More importantly, the theory does not explain the “decline of the unionized sector”; Posner suggests that the sole purpose for grievance procedures and the resultant job security is “to make it harder for the employer to get rid of union supporters.” *Id.*

Peter Levine also addresses the lack of productivity among union workers. Peter Levine, *The Legitimacy of Labor Unions*, 18 HOFSTRA LAB. & EMP. L.J. 529 (2001). In his article, Levine cites a survey conducted by the University of California at Berkeley, which revealed that union members in the United States are “less satisfied with their jobs, more eager to quit if they ever become rich, and [are] less convinced that their work is important, compared to non-unionized full-time workers.” *Id.* at 554 (internal citation omitted).

100. *Id.* at 555.

raises the possibility that strong unions would benefit to the detriment of weak unions.¹⁰¹

Some theorists argue that because employers are rational profit or utility maximizers, bargaining to impasse with a union may be unnecessary.¹⁰² To a large extent, an employer's performance depends on the productivity of its workers; if an employer is better off by granting a wage increase, it will do so.¹⁰³ This leads to a transaction that is Pareto efficient, which results in gains for society as a whole.¹⁰⁴ By allowing management to unilaterally change the terms and conditions of employment, and allowing employees to respond to the employer's action through changes in productivity (or through other means, such as changing employers), the labor market can operate free from the efficiency-hampering influence of unions.¹⁰⁵

2. *The Economic Darwinist Argument*

Conservative labor law theorists might raise an economic Social Darwinist argument when discussing the acceptability of unilateral action by management. Should weaker unions necessarily be protected from a

101. *Id.* (citing ALBERT REES, *THE ECONOMICS OF TRADE UNIONS* 89 (3d ed. 1989) (“Even if all workers were unionized, [i]t would still be possible for strong unions to make gains at the expense of weak ones.”)). Citing an argument proffered by Milton Friedman, Levine further argues that unions hurt those among the lower socioeconomic levels because “[unions] have . . . made the incomes of the working class more unequal by reducing the opportunities available to the most disadvantaged workers.” *Id.* (citing MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 124 (1962)). Because unions force wages upward, the demand for additional labor is diminished, and less skilled workers are foreclosed from higher-paying positions that require additional skills and training.

102. *See* Posner, *supra* note 99, at 1000.

103. *Id.* at 1001. Posner argues that since most employers are rational profit maximizers, granting benefits to employees that reduce the costs of production increases productivity, even if the benefits from the entire productivity gain are paid to the employees by means of the increased wages. *Id.* The employer is still better off, as its total costs are lower compared to its competitors, and is therefore able to increase output and increase profits. *Id.* Other employers would then follow suit, creating a system in which employee complaints serve to increase productivity and lead to gains for both the employer and employees. *Id.* This theory applies when employees trust the employer's policies and intentions; if the workers know that the employer wishes to be a contender in a competitive market, then they are more willing to leave decisions to management. Levine, *supra* note 99, at 548. A logical extension of this theory then seems to be that, if employees trust their manager, bargaining with a union to impasse is unnecessary, as labor and management will reach a mutually agreeable solution that will both benefit the employees, but leave the firm in a position to compete in its market.

104. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* § 2.3c (2d ed. 1999). A transaction is Pareto efficient when the total value of the gains outweigh the total value of the losses.

105. “[O]ne of the main purposes of any union is to prevent individual workers from competing in the labor market.” Levine, *supra* note 99, at 540. Free markets maximize the production of desired goods and allow individual choice; however, unions create a crippling inefficiency in labor markets by barring workers from choice in free markets. *Id.* at 541-42.

stronger employer? Might employees be better served by an employer who voluntarily caters to their needs? Might employees seek a more effective mode or entity of representation when the existing union or representative body must accede to the demands or unilateral declarations of an employer? Thus far, American labor law has shunned such practices.¹⁰⁶

In many circumstances, bargaining and union protest are unnecessary to counter the employer's unilateral change. So long as an employer's motives for a unilateral change are not coercive or detrimental to its employees (especially those changes undertaken in an attempt to undermine the union),¹⁰⁷ resistance from organized labor is unnecessary, and to some extent, counterproductive.¹⁰⁸

106. In his article on the balance of power between management and labor under the NLRA, James Zimarowski observes:

Placed in its practical context, a strong argument can be made that powerful employers and powerful unions can link mandatory and permissive bargaining issues, backed by costs of noncompliance, and thereby negate the impact of the [mandatory-permissive] dichotomy at least at the bargaining table. Weak unions and weak employers, it can be argued, cannot achieve satisfactory accommodation on mandatory items let alone permissive items The argument has a Darwinesque appeal but ignores the mediating effects of the collective bargaining process in easing the undercurrent of unredressed conflict. This argument ignores the position of weaker unions and weaker employers.

James B. Zimarowski, *A Primer on Power Balancing Under the National Labor Relations Act*, 23 U. MICH. J.L. REFORM 47, 73 n.74 (1989).

However, why undertake the process of collective bargaining when it may be doomed to failure? "[N]o employer ever sought to reserve complete unilateral control unless he expected the negotiations to fail; and if such a contract were signed there would have been no joint participation in the terms or conditions of the agreement." Cox, *supra* note 79, at 1425.

107. An example of coercive behavior occurs when an employer refuses to review union authorization cards signed by employees and then grants a wage increase in an attempt to persuade his employees that union membership and collective bargaining is unnecessary. *See, e.g.*, *Riverside Mfg. Co.*, 20 N.L.R.B. 394, 401 (1940), *enforced*, 119 F.2d 302 (5th Cir. 1941). According to the NLRB, in a case such as this

the blow to the Union's prestige is . . . severe, and the demonstration that so far as the [employer] is concerned collective bargaining is neither desirable nor necessary . . . whether the [employer] first ascertains the demands of the Union or, as here, forestalls proof of majority and, anticipating what the demands of the Union shall be, makes a unilateral concession.

Id. at 407.

108. "Unilateral decisions made in the exercise of authority based upon common consent expressed in a collective bargaining agreement command a degree of voluntary acceptance from the workers which is withheld from determinations based upon the exercise of alleged prerogatives." Cox & Dunlop, *supra* note 33, at 420-21. In other words, an employer's unilateral decision to change a term or condition of employment, assuming the decision is free from ulterior motives, will generally enjoy a certain degree of willing assent employees.

B. Regarding Issues of Noneconomic Efficiency and Pragmatism

1. How Consistently Is the Relevant Law Applied When Determining Violations of the Impasse Bargaining Rule?

The factors identified by the NLRB for determining if an impasse has occurred¹⁰⁹ are imprecise and thus are applied inconsistently by courts and the NLRB. Recent scholarship addresses this question and concludes that courts and the NLRB inconsistently apply what are known as the *Taft* factors.¹¹⁰ The “length of negotiations” factor seems particularly susceptible to unpredictable application. Impasse has occurred in one situation after one twenty-minute bargaining session, while in other situations it has not been found after eighteen bargaining sessions, indicating a significant amount of imprecision in the application of this factor.¹¹¹

The “importance of the issues”¹¹² factor has also been applied inconsistently. Some see the “importance of the issues” as a function of the economic necessity of an employer, and the issue is decided on whether the employer is economically justified in rejecting the duty to bargain “without regard to the existence of futility.”¹¹³ Might the prohibition of an employer from unilaterally imposing terms and conditions of employment greatly subvert the employer’s economic position?

A seminal question is whether a court can apply the *Taft* factors independent of common-sense judgments about the productivity of future negotiations.¹¹⁴ The answer seems to depend on judgments of desirability: the market determination of employer-employee relationships versus judicial or agency determinations creating labor relations policy.

109. See *supra* note 5 for a list of the five *Taft* factors.

110. Peter Guyton Earle, Note and Comment, *The Impasse Doctrine*, 64 CHI.-KENT L. REV. 407, 420-21 (1988).

111. *Id.* at 420 nn.104-05.

112. See *supra* note 5.

113. Earle, *supra* note 110, at 423.

114. Earle asks whether courts can “[apply] the *Taft* factors mechanically without regard to whether they rationally indicate the presence or absence of futility of further bargaining.” *Id.* at 426.

2. *What Was the Congressional Intent in Creating Section 8(a)(5)? How Much Governmental Regulation Is Useful? A Countervailing Concern: Flexibility for Managers*

Congress passed the Wagner Act to provide workers with significant leverage in bargaining with employers; it also adopted the Taft-Hartley amendments 1947 to level the playing field and redress some of the perceived abuses of organized labor.¹¹⁵ When deciding whether an employer may take unilateral action in a particular circumstance under Section 8(a)(5), the courts must strike a balance between the role and function of the manager versus the importance of employee rights. However, there are inherent problems when attempting to construe Section 8(a)(5) in a manner that protects labor, while simultaneously respecting management's rights.

Under the policies currently advocated by the Seventh Circuit, its allies, and the NLRB, if an employer acts unilaterally on a mandatory subject of bargaining contained in the parties' contract, it violates Section 8(d), thus indirectly violating Section 8(a)(5).¹¹⁶ If an employer acts unilaterally on a mandatory subject of bargaining not contained in the collective bargaining agreement, it commits a direct violation of Section 8(a)(5).¹¹⁷ Unilateral action on permissive topics of bargaining has developed into a complex subject, in that certain permissive topics favor management, while others favor labor.¹¹⁸ Management would act unilaterally to its own benefit, but can only act unilaterally in certain limited situations.¹¹⁹ Neither party has flexibility with mandatory subjects of bargaining, because the NLRA mandates discussion if either management or labor wishes to negotiate the term in question.¹²⁰ Employers and managers frequently claim that they need flexibility and autonomy in decision making. Managers must be free to make decisions that are in the best interest of the organization, and some forms of unilateral decision-making do not counter the purposes of the NLRA.¹²¹

115. See *supra* note 2 and accompanying text; see also note 11 and accompanying text.

116. Section 8(d) (29 U.S.C. § 158(d) (2000)) requires employee representatives and employers to bargain in good faith. See also *supra* notes 32 through 96 and accompanying text.

117. Keith N. Hylton, *An Economic Theory of the Duty to Bargain*, 83 GEO. L.J. 19, 27 (1994).

118. *Id.* at 27-28.

119. *Id.* Further, if management chooses to act unilaterally on a permissive topic that favors itself but is covered by a contract, management does not violate Sections 8(d) or 8(a)(5), but may be liable for a breach of Section 301 of the NLRA. *Id.* at 28-29.

120. See *id.* at 24-25.

121. "Experience shows that the reservation of specific management functions is consistent with the kind of collective bargaining intended by the NLRA." Cox, *supra* note 79, at 1425. Such

This dilemma leads one to ask an important question: at what point does the prohibition upon management's right to unilaterally impose terms and conditions impede management's economic efficiency? Protection of workers must be balanced with management's right to make a profit. Many theorists and economists emphasize that, to run a profitable business, managers must have some freedom in bargaining.¹²²

Further, problems of statutory interpretation plague application of the relevant laws by the courts and the NLRB. Pragmatism is lacking; legal principles are mechanically applied with no review of standards, practices, or needs of particular industries.¹²³ Some have even made the argument that statutory interpretation is too static to accommodate the inherently fluid nature of collective bargaining.¹²⁴

permissive action is certainly allowed on permissive subjects of bargaining that favor management. See Hylton, *supra* note 117, at 28.

122. Zimarowski, *supra* note 106 at 73 n.74 (1989). In making this argument, Zimarowski relies on the United States Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678-79 (1981). In addition to leaving management free to make a profit, more liberal enforcement of mandatory impasse bargaining allows management

some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct as an unfair labor practice. Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining.

Id. at 679. Indeed, decisions regarding mandatory subjects of bargaining have been variable, and, at times, even inconsistent through the years. *Id.* at 679 n.18.

123. "The statutory duty to bargain collectively should be left sufficiently flexible to permit drawing the line between management's exclusive functions and joint labor-management responsibilities at different points in different industries." Cox & Dunlop, *supra* note 33, at 427. A number of factors must be considered when determining whether an employer should be required to bargain; a superficial application of legal factors or inflexible adherence to precedent without inquiry into a case's particular facts fails to satisfy this need. *Id.* at 428. The failure to inquire into industry-specific needs troubled Cox and Dunlop, who reasoned that the lack of such an investigation was a consequence "of the initial assumption that an employer is required to bargain (in some sense of the term) about each and every subject covered by the words 'rates of pay, wages, hours of employment, or other conditions of employment.'" *Id.*

124. *Id.* at 431. Cox and Dunlop offer the premise that statutory interpretation is not suitable for collective bargaining:

Collective bargaining is too dynamic to permit drawing a statutory line between management's prerogatives and the areas of joint responsibility Arrangements established by collective bargaining in one contract are frequently changed by the next. Even within the union movement there is no consensus of opinion. Some unions appear constantly to seek a larger share in the governance of the industry while others believe that they should avoid responsibility for the conduct of the business. A line drawn by statutory interpretation would be unduly rigid not only because of its universality but also because of its permanence. Once made, decisions could be altered only by revision of the statute. The fluidity of private arrangements is much to be preferred.

Id. at 430-31 (footnotes omitted).

3. *Will Employers Resort to Other Means to Achieve the Ends They Desire?*

Scholars have noted that if an employer is denied from using one power, it will find other means to bring about comparable ends.¹²⁵ Individuals and organizations tend to take positions that maximize the exercise of power; namely, positioning foundations of power in the most beneficial, self-serving manner.¹²⁶ But does unilateral action by employers lead to more efficient results for society? As employers generally seek to maximize profit¹²⁷ (and presumably utility), they will seek other means to reach the ends they desire. An example: a union seeks to increase the wage scale for workers, but the employer refuses, citing decreased profits. Actually, the employer desired to decrease payroll expenditures through a slight wage cut. The parties then bargain to impasse regarding pay rates for employees. The employer then closes a plant, resulting in the desired savings.¹²⁸ The employer has bypassed the impasse bargaining requirement through alternate means—in this case, using a plant closure to achieve the same result as a payroll cut.

IV. FINDINGS

The Fifth Circuit's policy is not as harmful as indicated by the Seventh Circuit's decision in *Duffy*. In fact, the policy advocated by the Fifth Circuit actually enhances efficiency and free market operation.

The Fifth Circuit's policy allows for an efficient use of economic weapons. Such a policy might foster agreement: the specter of unilateral change by the employer or a strike by the union might lead to further sessions at the bargaining table in an effort to stave off the detrimental effects of the use of economic weapons. Further, unilateral demands by unions can ultimately have negative effects across society—on other

125. Zimarowski, *supra* note 106, at 70. "If a specific power exercise is denied, a party will shift to another power exercise, albeit perhaps a less timely and effective one, to achieve similar results and impacts." *Id.*

126. *Id.* "Power sources, whether from bargaining, managerial, or rationing transactions, are tactically mixed to produce impacts in furtherance of a party's interests." *Id.*

127. *See supra* note 103.

128. If an employer can demonstrate that bargaining would be a substantial burden and that its need for flexibility and freedom in its operations outweighs the interest served by union participation, the decision to close a plant is not covered by Section 8(d) of the NLRA. *See First Nat. Maint. Corp. v. NLRB*, 452 U.S. 666, 679-83 (1981). Hence, a plant closing under such circumstances does not violate Section 8(a)(5). *Id.*

sectors of workers, on prices paid by consumers, and on the efficiency of industry.¹²⁹

Requiring an employer to bargain to impasse under threat of Section 8(a)(5) sanctions harms market efficiency. Unions are given an inordinate amount of power, resulting in gross societal inefficiencies. Other workers may be injured by a union's insistence on higher wages. By allowing employers to institute unilateral changes on the terms and conditions of employment, workers display a level of confidence in their employer. If the policy adopted by the employer is disagreeable, workers have a number of options, including, but not limited to, quelling productivity and finding new employment.¹³⁰

Further, an employer's unilateral imposition of terms and conditions of employment does not indicate that a union is a "paper tiger."¹³¹ If a union has sufficient strength, it should be able to employ economic weapons to counter the employer's unilateral imposition of terms and conditions of employment. Strikes and other economic weapons are readily available to pressure the employer's policy decisions. If a union is unable to influence an employer, then perhaps its constituents should use provisions of the NLRA, such as decertification elections, to find a bargaining representative with more power.¹³² Viewing the issue from a rather Darwinist position, employees are not left without recourse, as they will find an appropriate method of representation.¹³³

The statutory scheme presently employed when adjudging unilateral action by employers is too variable and inconsistent to effectively guide

129. See *supra* notes 98-105 and accompanying text.

130. *Id.*

131. See *supra* note 49 and accompanying text.

132. The Taft-Hartley amendments to the NLRA support this contention. See *supra* notes 2 and 11.

133. It has been noted that most unions have not "achieved sufficient economic power to maintain unilateral control over wages, hours, and other terms and conditions of employment." Cox, *supra* note 79, at 1424. However, the question here does not involve complete unilateral control by one party or the other; rather, it addresses bargaining power and the most efficient means of achieving agreement.

Further, Professor Cox contends that an employer normally seeks and negotiates an employment contract with a union; the employer will not exert unilateral control unless it expects bargaining to fail. *Id.* at 1425. Seemingly inherent in this statement is the notion that the two parties are irreconcilably distant in their demands. In such a case, perhaps unilateral imposition of terms and conditions by an employer would serve to move bargaining away from an impasse and toward productive discussions. It seems reasonable to assume that an employer will not institute unreasonable terms; as an employer is usually a rational profit maximizer, it will seek to avoid an outcome that would cause itself economic harm by striking workers, negative publicity, mass layoffs, or other detriments. See *supra* note 103 and accompanying text. The employer, then, must institute reasonable terms that can serve as a springboard for later negotiations.

employers away from violations of Section 8(a)(5).¹³⁴ Principles, such as those from *Taft*, are applied seemingly by reflex, without considering the peculiar characteristics and needs of specific industries. This lack of flexibility ultimately impedes managers in their pursuit of efficiency and profitability.

Prohibiting an employer from instituting unilateral terms and conditions of employment will cause it to achieve its goals through another method.¹³⁵ Even if integrative bargaining is used, a party will not be satisfied with the resolution of all issues. Therefore, other methods will be employed to achieve the desired ends. Imposition of the impasse bargaining rule works an inefficiency on the market.

V. CONCLUSION

The Fifth Circuit's policy of permitting unilateral changes to terms and conditions of employment, after providing the employees' bargaining representative with notice and a chance to provide counterproposals, rather than requiring complete impasse, does not have the harmful effect suggested by the Seventh Circuit. Rather, it promotes efficiency and benefits the bargaining process.

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134. See *supra* notes 110-14 and accompanying text.

135. See *supra* notes 125-28 and accompanying text.

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