April 1988

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THE IMPASSE DOCTRINE

PETER GUYON EARLE

I. INTRODUCTION

The impasse doctrine in collective bargaining allows limited unilateral action by an employer when a good-faith deadlock in negotiations is reached between the employer and the union on mandatory subjects of bargaining.¹ The impasse doctrine is most frequently used by the employer as a defense against the union’s charge that the employer refused to bargain in good faith² in violation of section 8(a)(5) of the National Labor Relations Act (NLRA).³ The doctrine is a judicial invention used to reconcile the dual mandate of the NLRA. The NLRA simultaneously requires the National Labor Relations Board (NLRB or Board) to enforce a duty to bargain in good faith but prohibits the Board from compelling the parties to enter agreements or make concessions.⁴ The tension between these two legislative mandates has resulted in two distinct forms of impasse doctrine. The traditional view is that impasse is a tool to promote the bargaining process; the more recent view sees impasse as a terminal point of the bargaining process. The case law has not made this distinction explicit, but it is evident in both the manner and outcome of the Board’s treatment of the doctrine.

The traditional view of the impasse doctrine is that a principal objective of the NLRA is the protection of the collective bargaining pro-

¹. Huck Mfg. Co. v. NLRB, 693 F.2d 1176, 1186 (5th Cir. 1982). The National Labor Relations Act requires that an employer and the exclusive representative of the employees negotiate with each other regarding terms and conditions of employment within certain prescribed periods. Such negotiations must be a good faith effort to reach a collective bargaining agreement. Those matters that constitute terms and conditions of employment are generally referred to as mandatory subjects of bargaining. Unilateral action commonly refers to unilaterally imposed changes in terms and conditions of employment absent an agreement between the parties. E.g. First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666, 674-75 (1981).

². See, e.g., Huck, 693 F.2d at 1186; Gulf States Mfg. v. NLRB, 704 F.2d 1390 (5th Cir. 1983).

³. 29 U.S.C. § 158(a)(5); see also § 8(d) of the NLRA which provides:
[T]o 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, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .


⁴. NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1963).
cess. When negotiations reach a stalemate, the legislative mandate to enforce the duty to bargain is limited by the prohibition of compelled agreements. In this situation, the traditional view seeks to further the bargaining process by allowing the employer to act unilaterally and thereby increase the likelihood that the impasse will be broken by this use of economic force. It is only when the deadlock is such that further negotiations would be futile that the prohibition of compelled agreements and the requirement of collective bargaining collide. Thus, the traditional approach to impasse logically requires that the option of limited unilateral action by the employer be predicated upon objective evidence of futility.

In contrast, the more recent view of the impasse doctrine treats the bargaining process as a subjective limitation on the employer's entrepreneurial property rights, ostensibly only to the extent necessary to maintain industrial peace. Not only will an impasse be declared when further negotiations are determined to be futile, but also when, in the opinion of the Board, the "economic necessity" of the employer justifies unilateral action. Thus, use of the more recent view allows an impasse to exist in a wider variety of situations, thereby making it easier for the employer to resort safely to unilateral action. This effect has increased

5. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."). It is also instructive that as early as 1934, the United States Supreme Court noted that: "The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made." NLRB v. Sands Mfg., 306 U.S. 332, 342 (1939). See also Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964).
6. Huck, 693 F.2d at 1187.
Thus, a genuine impasse is akin to a hiatus in negotiations. In the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position. Therefore, it is clear that an impasse is but one thread in the complex tapestry of collective bargaining, rather than a bolt of a different hue. In short, a genuine impasse is not the end of collective bargaining.

8. NLRB v. Tex-Tan, Inc., 318 F.2d at 482. It is the fact of deadlock that is significant.
10. E.g., Dahl Fish Co. Seapac, 279 N.L.R.B. No. 150 slip op. at 2 n.3 (May 23, 1986) (The issue of wages is particularly susceptible to resolution under collective bargaining and the presence of changed economic circumstances does not diminish this approach. "To find otherwise would let a turn in economic circumstances permit an employer . . . [to] unilaterally implement such wage rates completely obviating the efficacy of collective bargaining."") Id. at 44; Eagle Express Co., 273 N.L.R.B. 501, 506-07 (1984).
employer discretion relative to the duty to bargain.\textsuperscript{11}

This recent view of the impasse doctrine improperly subordinates the duty to bargain to the economic needs of the employer. Furthermore, the resulting increase in employer discretion in exercising the duty to bargain contravenes the legislative intent underlying the NLRA and is equivalent to an impermissible administrative judicial amendment of the Act.

II. HISTORICAL BACKGROUND

The case law has not precisely defined the labor law concept of impasse.\textsuperscript{12} The dictionary defines an impasse as "a situation that has no solution or affords no escape."\textsuperscript{13} The cases following the traditional view use various definitions; however, most require that the parties have bargained in good faith and have reached a deadlock that would make any further bargaining futile.\textsuperscript{14} A number of key cases reflecting the more recent view of impasse make findings as to its existence, yet neglect to offer a definition of the doctrine.\textsuperscript{15} Those that do offer a definition tend to define impasse consistently with the traditional view, but they use the

\begin{enumerate}
\item\textsuperscript{11} Dahl, 279 N.L.R.B. No. 150 slip op. at 44.
\item\textsuperscript{13} WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 911 (2d. ed. 1979).
\item\textsuperscript{14} See NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1968) (impasse is "a state of facts in which the parties, despite the best of faith, are simply deadlocked"); Hi-Way Billboards, 206 N.L.R.B. 22, 23 (1973):
\begin{quote}
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. When such a deadlock is reached between the parties, the duty to bargain about the subject matter of the impasse merely becomes dormant until changed circumstances indicate that an agreement may be possible.
\end{quote}

(footnote omitted); see also Excavation-Constr., 248 N.L.R.B. 649, 650 (1980) ("A genuine impasse in negotiations exists when, despite the parties' best efforts to achieve an agreement, neither party is willing to move from its position. Until the collective bargaining process had been exhausted, no impasse can occur."); NLRB v. Independent Ass'n of Steel Fabricators, 582 F.2d 135, 147 (2d Cir. 1978), cert. denied, 440 U.S. 399, 405 (1968); Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967) (impasse exists after "good-faith negotiations have exhausted the prospects of concluding and agreement"); Dallas General Drivers v. NLRB, 355 F.2d 842, 845 (D.C. Cir. 1966) ("Where good faith bargaining has not resolved a key issue and where there are no definite plans for further efforts to break the deadlock, the Board is warranted . . . and perhaps sometimes even required . . . to make a determination that an impasse existed.").
\item\textsuperscript{15} Browning-Ferris Indus., 275 N.L.R.B. 71 (1985); Bell Transit Co., 271 N.L.R.B. 1272, 1273 (1984), enf't denied, Teamsters Local Union No. 175 v. NLRB, 788 F.2d 27 (D.C. Cir. 1986).
\end{enumerate}
doctrine very differently.\textsuperscript{16} Therefore, how the doctrine is defined is of limited value in understanding the more recent approach to the function and effect of the doctrine.

By 1943, the case law had established the general rule that the obligation to bargain collectively, within the meaning of the act, forbids unilateral action . . . with respect to . . . [mandatory subjects] . . . during the existence of a contract or the pendency of negotiations embracing those subjects, even where, as in some cases, such unilateral action is to the benefit of the employees . . . \textsuperscript{17}

Within two decades, as a result of the landmark case of \textit{NLRB v. Katz},\textsuperscript{18} the pre-impasse prohibition of unilateral action became an unequivocally accepted \textit{per se} doctrine.\textsuperscript{19} In \textit{Katz}, the employer implemented various unilateral actions while negotiating an initial contract with the union.\textsuperscript{20} The employer defended section 8(a)(5) charges on two grounds, claiming, first, that the unilateral changes had been implemented after an impasse had been reached and, second, that unilateral action alone, without a finding of subjective bad faith at the bargaining table, was insufficient to support a section 8(a)(5) violation.\textsuperscript{21} With regard to the first defense, the Court did not disturb the NLRB’s finding that no impasse had occurred prior to the unilateral actions.\textsuperscript{22} Regarding the second defense, the Court held that a general failure of subjective good faith was not required in order for the duty to bargain to be breached.\textsuperscript{23} The Court went on to assert “that an employer’s unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.”\textsuperscript{24}


\textsuperscript{17} Annotation, \textit{What amounts to “collective bargaining” within National Labor Relations Act}, 147 A.L.R. 7, 47 (1943). For a comprehensive list of early cases proscribing unilateral action by the employer, see id. at 48.

\textsuperscript{18} 369 U.S. 736 (1962).

\textsuperscript{19} Murphy, supra note 12, at 23.

\textsuperscript{20} 369 U.S. at 741. The employer was charged specifically with violating § 8(a)(5) by “unilaterally granting numerous merit increases in October 1956 and January 1957, unilaterally announcing a change in sick-leave policy in March 1957; and unilaterally instituting a new system of automatic wage increases during April 1957.” Negotiations had begun on August 30, 1956 and continued through May 13, 1957. \textit{Id.} at 739-41.

\textsuperscript{21} \textit{Id.} at 741-42.

\textsuperscript{22} \textit{Id.} “According to the Board, however, ‘the evidence is clear that the Respondent undertook its unilateral actions before negotiations were discontinued in May 1957, or before, as we find on the record, the existence of any possible impasse.’ There is ample support in the record considered as a whole for this finding of fact . . . .” (citation omitted).

\textsuperscript{23} \textit{Id.} at 743.

\textsuperscript{24} \textit{Id.} In closing, the United States Supreme Court also stated: “Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the
The discussion of impasse in *Katz* did not include either a definition of the doctrine or a specification of the criteria by which the presence or absence of impasse is to be determined. However, the Court implicitly affirmed the rule that a bona fide impasse reached after good faith negotiations is a valid defense to section 8(a)(5) charges stemming from post-impasse unilateral action.

III. DETERMINATION OF IMPASSE: THE TAFT FACTORS

In *Katz*, the United States Supreme Court characterized a state of impasse as “inherently inconsistent with a continued willingness to negotiate” and implied that identification of the existence of an impasse was essential to a determination of whether the duty to bargain continues to bar unilateral action. Five years after *Katz*, the Board confronted in *Taft Broadcasting* the task of developing a principled approach to the identification of a state of impasse.

In *Taft*, the Board first enunciated specific factors for determining the existence of a state of impasse. These factors include (1) the bargaining history, (2) the good faith of the parties in negotiations, (3) the length of negotiations, (4) the importance of the issues over which there is disagreement, and (5) the contemporaneous understanding of the parties as to the state of negotiations. These factors were designed to determine whether further bargaining would be futile. The five *Taft* factors have subsequently been cited in almost every case where a determination is made as to the existence of impasse.

*Taft* involved a successor employer who was bargaining for the first

affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.” *Id.* at 747.


26. 369 U.S. at 745 (“But even after an impasse is reached he [the employer] has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, or such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union.”). The implication here is that if the post-impasse unilateral action is comprehended within pre-impasse proposals there is no *per se* inconsistency with a sincere desire to conclude an agreement.

27. *Id.* at 741 n.7.


29. *Id.* at 478.

30. *Id.* An impasse was defined as existing “after good faith negotiations have exhausted the prospects of concluding an agreement.”

time with an incumbent union. After more than twenty-three bargaining sessions, the parties had not made perceptible progress on the employees' demands that the new contract allow for substantially greater flexibility in the assignment of employees and various other basic concessions. As a result, the employer decided unilaterally to implement its changes. The Board held that the parties had reached an impasse before the employer enacted unilateral changes and therefore dismissed the union's section 8(a)(5) suit. The Board emphasized the factors of good faith, length of negotiations, importance of the issues and contemporaneous understanding of the parties, but disregarded bargaining history, despite having listed it as a factor.

Courts using both the traditional and the more recent views of the impasse doctrine have continued to apply the five Taft factors, often in checklist fashion. However, both the manner and outcome of that application indicate divergent views of the importance and role of the duty to bargain within the congressionally established framework for labor-management relations. What follows is a brief survey of the traditional and more recent applications of each factor.

A. Bargaining History

"Bargaining history" has been treated as the least consequential of the Taft factors. As demonstrated by its treatment in Taft Broadcasting, this factor is most commonly simply listed in a routine recitation of the standards, after which a determination as to the existence of impasse is made based on application of the other four factors. Further, in Taft Broadcasting, the Board gave no indication of just how this factor was to be applied, nor of its significance in determining whether a state of impasse occurred. In subsequent cases, however, the Board has applied recent cases that dramatically expand the scope of impasse beyond futility do not approve of Taft. See Walter A. Zlogar, Inc., 278 N.L.R.B. 1089 (1986); Eagle Express Co., 273 N.L.R.B. 501 (1984).

32. 163 N.L.R.B. at 475. Beyond a passing reference to the fact, the Board did not focus on or discuss application of the "bargaining history" factor.

33. Id. at 475, 476, 478. The employer demanded complete interchangeability between categories of personnel and between broadcasting media. The old collective bargaining agreement imposed substantial limitations on the employer's ability to interchange personnel. Also, the employer demanded the right to use pre-recorded broadcasts without limitation. Other key issues included wages and use of supervisory personnel for broadcasting activity other than editorial broadcasting.

34. Id. at 477.

35. Id. at 478.

36. Id.

37. See supra note 31.

38. E.g., Dahl Fish Co. Seapac, 279 N.L.R.B. No. 150, slip op. at 37 (May 23, 1986); Coalite, Inc., 278 N.L.R.B. 293, 301-03 (1986); TKB Int'l Corp., 240 N.L.R.B. 1082, 1083 n.8 (1979).

39. 163 N.L.R.B. at 478.
this factor in two distinct ways.40

One of the most prevalent and potentially useful applications of "bargaining history" has been as an aid to the evaluation of other Taft factors, most notably the "good faith of the parties."41 In San Diego Van & Storage Co.,42 the bargaining history of the parties was used to document an "exemplary" relationship between the parties as evidence of the employer's good faith. Despite the fact that only one negotiating session had been held, a valid impasse was found to exist.43 This impasse excused the employer's unilateral change in operations which forced employees to choose between entering independent contractor agreements or losing their jobs.44 Similarly, in Times Herald Printing Co.,45 the bargaining history of the parties was used to defeat a union allegation of employer bad faith in bargaining. In that case, the union alleged that the employer's failure to put certain proposals in writing constituted evidence of bad faith, thereby precluding a bona fide impasse prior to the unilateral action.46 In finding a valid impasse, the Board noted that the parties' bargaining history indicated that normally only the original bargaining proposals of each party were submitted in writing. Therefore, the employer's conduct was consistent with past practice and accordingly not indicative of bad faith.47

Another prevalent application of bargaining history has been to use the length of time over which the union and employer have sustained a successful collective bargaining relationship as an indicator of the existence of an impasse.48 Where the parties have had a long collective bargaining relationship, the Board is likely to use that fact as being

40. A third somewhat aberrational application of bargaining history is evident where bargaining history is in effect used interchangeably with length of negotiations. See Richmond Recording Corp., 280 N.L.R.B. No. 77, slip op. at 40 (June 24, 1986); Deister Concentrator Co., 253 N.L.R.B. 358, 395-96 (1980).
41. See Salt River Valley Water Users' Ass'n, 204 N.L.R.B. 83, 87 (1973) ("There is no evidence that Respondent ... was motivated in any way by animus against the Union or engaged in bad-faith bargaining. To the contrary, the parties, with a long history of bargaining have maintained excellent relations."); Hartz-Kirkpatrick Constr. Co., 195 N.L.R.B. 863, 867 (1972) ("Here there is no claim that any of the parties had not bargained in good faith and the history of past bargaining which culminated in the earlier 1967 contract would believe any such suggestion.").
42. 236 N.L.R.B. 701 (1978).
43. Id. at 705.
44. Id. at 702, 703, 705.
45. 221 N.L.R.B. 225 (1975).
46. Id. at 228 n.7.
47. Id. The NLRB also noted that the parties had a sixty-year bargaining history and that this was the first time that they had been unable to reach an agreement. After noting this fact, the NLRB asserted that there was no evidence that the employer did not intend to reach an agreement. Id. at 229.
48. Murphy, supra note 12, at 8.
supportive of an impasse finding. On the other hand, where the parties are involved for the first time in the negotiation of an initial collective bargaining agreement, the Board will generally not consider that fact as supportive of an impasse finding.

In Seattle-First National Bank, the Board considered whether an impasse had been reached before the employer unilaterally implemented its “final” offer. In applying the Taft factors in checklist fashion, the Board noted that the parties had a bargaining relationship of at least ten years and had entered into two prior three-year contracts. The Board then concluded that such a bargaining history favored a finding of impasse. After considering the other factors, the Board decided that a valid impasse had indeed been reached prior to the unilateral action and dismissed the complaint in its entirety.

Similarly, in Alsey Refractories Co., the Board applied the Taft factors in checklist fashion in determining whether an impasse had been reached prior to a unilateral wage increase. The Board found that no valid impasse had been reached and noted that “the parties were engaged in their first experience in bargaining ... and their efforts to achieve a contract should be afforded the fullest opportunity.”

Logic would seem to credit the rule as expressed in Alsey Refractories Co. as it relates to initial bargaining experiences. However, a mechanical application of the inverse idea that an extensive bargaining history tends to support a finding of impasse would seem to lack substance and be of little value in aiding a determination of impasse. This application fails to aid the Board in gaining insight into the past practices.

49. Id. But cf. Excavation-Constr., 248 N.L.R.B. 649, 650, 654 (1980) (despite a bargaining history of eleven years no impasse was found).
51. Id. at 898. In Seattle-First National Bank, 241 N.L.R.B. 753 (1979), the NLRB had found that the employer violated § 8(a)(5) by failing to bargain in good faith and implementing portions of its final offer before reaching a valid impasse. The Ninth Circuit subsequently denied enforcement in Seattle-First Nat'l Bank v. NLRB, 638 F.2d 1221 (1981). The court found that bad faith bargaining could not be solely based on the employer's proposals, but rather must be based on a substantial showing that the employer's attitude was not consistent with its duty to seek an agreement. Id. at 1226. In remanding the court instructed that if there was no finding of bad faith, the NLRB was to determine if the parties had reached a bona fide impasse before the employer undertook unilateral action. Id. at 1227.
52. 267 N.L.R.B. at 898.
53. Id. at 898, 899. In Financial Institution Employees v. NLRB, 738 F.2d 1038 (9th Cir. 1984) the court denied the petition for review of the Board's finding of impasse.
55. Id. at 786-87.
56. Id. at 786. E.g., Saunders House, 265 N.L.R.B. 1632, 1634 (1982), enf't denied, 719 F.2d 683 (3d Cir. 1983), cert. denied, 466 U.S. 958 (1984) (where parties are negotiating an initial agreement, the bargaining history does not favor a finding of impasse where the Board found that the employer violated § 8(a)(5)).
of the parties.\textsuperscript{57}

\textbf{B. Good Faith}

Good faith in bargaining is a fundamental requirement of the NLRB as specified in section 8(d) and as enforced by section 8(a)(5) and section 8(b)(3).\textsuperscript{58} In fact, a lack of good faith in bargaining may be an independent violation of section 8(a)(5). Thus, the question of its existence may arise in numerous situations in which impasse is not an issue. However, this Note will discuss good faith in bargaining only in the context of the \textit{Taft} analysis as used to determine whether the parties have reached an impasse. In this sense, good faith, while not dispositive, is a prerequisite to a finding of a valid impasse.\textsuperscript{59} The existence of good faith in bargaining has to do with whether a party has the intent to settle differences and arrive at an agreement.\textsuperscript{60} Thus, a determination of whether a party is truly bargaining in good faith is often a subjective inquiry and, as one commentator recently noted, is one of the most difficult of all adjudications.\textsuperscript{61}

Certain conduct has been held to be indicative of a lack of good faith. The Board has listed such conduct as including "delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed upon provisions, and arbitrary scheduling of meetings."\textsuperscript{62}

The cases in which the presence or absence of good faith in bargaining had bearing on the existence of a valid impasse can be divided into two groups. The first includes those cases in which there exists some objective indicator of the presence or absence of good faith; i.e., overt conduct. The second consists of those cases where the inference as to the presence or absence of good faith is drawn from the reasonableness of the proposals or bargaining positions of the parties. The following discussion

\textsuperscript{57} In both Lou Stecher's Super Markets, 275 N.L.R.B. 475 (1985), and Bell Transit Co., 271 N.L.R.B. 1272 (1984), the Board, in accord with its more recent view of the impasse doctrine, mechanically credited an extensive bargaining history as supportive of an impasse finding without any regard for the content of that extensive bargaining history.

\textsuperscript{58} See \textit{supra} note 14 and accompanying text.

\textsuperscript{59} \textit{E.g.}, NLRB v. Big Three Indus., 497 F.2d 43 (5th Cir. 1974).


\textsuperscript{61} DiGiovanni, \textit{Surface v. Hard Bargaining: Tilting Toward Nonintervention}, 2 \textit{LAB. LAW.} 771 (1986). See also Abingdon Nursing Center, 197 N.L.R.B. 781, 787 (1972) (question of whether employer is bargaining with a sincere desire to arrive at an agreement is "oft times a conundrum which has plagued the Board and Courts [sic] in the past").

of the case law reveals that recent Board treatment of this factor in each of the two groups has served to increase employer discretion as to the duty to bargain by making it easier for employers to declare impasse.

Within the first group, the more overt and readily observable actions of the parties aimed at avoiding bargaining continue to be consistently viewed by the Board as indicative of impasse. Thus, delaying tactics by the union were cited as justification for unilateral action before impasse in *M & M Building & Electrical Contractors*. In affirming the administrative law judge's finding that such unilateral action did not violate section 8(a)(5), Board members Fanning and Zimmerman nevertheless noted that, before imposing such unilateral action, an employer generally should be required first to demonstrate its diligence and good faith by presenting the union with a detailed contract proposal and then allowing the union a reasonable time to evaluate the proposal.

In *Crane Co.*, the Board held that delaying tactics by an employer take on special significance when they occur toward the end of a period of limitations: "Slowness in responding to a bargaining demand, in supplying information, or in agreeing to a date for negotiations can mean one thing when a certification is fresh and quite another thing when the certification is growing stale." Thus, the context of the delaying tactic is of crucial significance to the issue of good faith.

The divergence between the two views of impasse relative to overt evidence of bad faith bargaining becomes most evident in cases involving continuing unremedied unfair labor practices. Generally, under the traditional view, the good faith bargaining requirement will preclude a valid impasse where the employer has committed a continuing unremedied unfair labor practice. Nevertheless, in *NLRB v. Cauthorne* the District of Columbia Circuit considered the scope of make-whole remedies available in a case where an impasse may have occurred in bargaining that followed more than six months after an unlawful and unremedied unilateral action. The court stated that while an unlawful

63. 262 N.L.R.B. 1472 (1982).
65. 244 N.L.R.B. 103 (1979).
66. *Id.* at 110. In *Crane*, the delaying tactics included delays in scheduling meetings, delays in furnishing information use of a negotiator without authority. Such tactics were noted to be "strong evidence of bad faith in meeting one's obligation to bargain." *Id.* at 110-11.
68. 691 F.2d 1023 (D.C. Cir. 1982).
69. *Id.* at 1024. Upon expiration of a collective bargaining agreement, the employer indicated that he would not sign another contract. Then, after several unproductive meetings, the employer terminated payments to the union's pension fund. More than six months later, the parties had one unproductive meeting and thereafter exchanged proposals for a new contract by mail. In finding a
unilateral change by the employer constituted "some evidence concerning the good faith of his subsequent overtures, [it] is not dispositive."\textsuperscript{70} Thus, the court explicitly rejected any presumption that an employer's unfair labor practice would automatically preclude the possibility of meaningful negotiations and prevent the parties from reaching a valid impasse.\textsuperscript{71} In addition, the court implicitly held that where a valid impasse is reached after a unilateral change, it will mark the end of the period for which back pay may be awarded.\textsuperscript{72}

In \textit{Dependable Building Maintenance Co.},\textsuperscript{73} the NLRB, in accord with the more recent view, relied on \textit{Cauthorne} in rejecting the argument that no impasse could exist where the employer's unremedied unfair labor practices "hung over the bargaining."\textsuperscript{74} In that case, a pre-impasse unilateral action by the employer, which was found to violate section 8(a)(5), was followed by one meeting between the parties.\textsuperscript{75} Then two and one-half months after the continuing unfair labor practice had been committed, what was declared to be a valid impasse occurred because the union had failed to "make any significant economic proposals which went to the heart of the dispute."\textsuperscript{76}

Similarly, in \textit{Eagle Express Co.},\textsuperscript{77} the Board first held that the employer's initial unilateral reduction of wages violated section 8(a)(5).\textsuperscript{78} Then, three months before the unlawful unilateral action, the parties met four times. During these four meetings, the employer demanded that the new contract include exactly the same wages it had earlier unilaterally established.\textsuperscript{79} In a display of questionable logic, the Board held that the parties reached a valid impasse and therefore the employer was free to "implement" the very wage reduction he had already unlawfully imple-

\textsuperscript{70.} \textit{Id.} at 1026 n.5. \textit{But see} NLRB v. Laredo Coca Cola Bottling Co., 613 F.2d 1338, 1343 n.10 (5th Cir.), \textit{cert. denied}, 449 U.S. 889 (1980) ("[E]mployer's offer to discuss the possibility of returning to prior job terms previously altered, unilaterally, does not mitigate the statutory violation created by that previous unilateral change.").

\textsuperscript{71.} 691 F.2d at 1025.

\textsuperscript{72.} \textit{Id.}

\textsuperscript{73.} 276 N.L.R.B. 27 (1985).

\textsuperscript{74.} \textit{Id.} at 29.

\textsuperscript{75.} \textit{Id.} at 29-30.

\textsuperscript{76.} \textit{Id.} at 30. The A.L.J. characterized the union's bargaining conduct as "rigid" for failing to make "concessions which would have avoided an impasse." \textit{Id.}


\textsuperscript{78.} \textit{Id.} at 501 n.3.

\textsuperscript{79.} \textit{Id.} at 506.
A close reading of the case further reveals that a major factor in the finding of impasse was the bargaining position of the union in having rejected a contract which contained wage provisions exactly the same as those that had already unlawfully been put into effect. In other words, the union was, ironically, viewed by the Board as having in effect engaged in surface bargaining over the continuation of an unremedied unfair labor practice.

Under the more recent view of the impasse doctrine, the position of the Board on the issue of surface bargaining as an indicator of bad faith has undergone substantial revision in favor of the interests of management. The issue of surface bargaining arises when, absent other overt indicators of bad faith, the only source of inference as to the subjective intent of the parties is the reasonableness of the proposals they advance.

In the often cited case of NLRB v. Reed & Prince Manufacturing Co., the court noted that "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by the employer." A number of cases since Reed & Prince have relied upon the reasonableness of the employer's proposals in finding a lack of good faith. However, in Seattle-First National Bank v. NLRB, the court, while sanctioning consideration of the content of bargaining proposals, held that inferences drawn solely from the content of those proposals are insufficient to support a finding of bad faith bargaining. Caution by the Board and the courts in considering inferences of bad faith drawn from the bargaining proposals of the parties is based on the admonition of section 8(d), which precludes the Board from compelling agreements or concessions or otherwise sitting in judgment upon the substantive terms

80. Id.
81. Id. at 506 n.2.
82. NLRB v. Wright Motors, Inc., 603 F.2d 604, 608 (7th Cir. 1979).
84. 205 F.2d at 134.
85. A-1 King Size Sandwiches, Inc., 265 N.L.R.B. 850, 858 (1982) (unusually harsh and unreasonable proposals may support a finding of bad faith bargaining); cf. Glenmar Clinestate, Inc., 264 N.L.R.B. 236 (1982) ("[U]nder normal circumstances, the magnitude of the wage decrease proposed . . . would be strong evidence of bad-faith bargaining."); K & K Transp. Corp., 254 N.L.R.B. 722, 736 (1981) ("[T]he nature of an employer's proposals are material factors in determining the employer's motivation. Thus, an intransigent position as to proposals which are predictably unacceptable to the Union may indicate a predetermination not to reach agreement.").
86. 638 F.2d 1221, 1226 (1981).
of proposals.\textsuperscript{87} A particularly illustrative example of the application of the good faith bargaining requirement in accord with the more recent view of the impasse doctrine is \textit{Browning-Ferris Industries}.\textsuperscript{88} In that case, the Board found that the employer violated section 8(a)(1) by soliciting employees to decertify the union in anticipation of the expiring contract's window period. The violative actions included interrogating the employees about their union sympathies and creating an impression among the employees that their support for the union was futile.\textsuperscript{89} The Board adopted the A.L.J.'s conclusion that the employer "was motivated to and did attempt to displace the Union."\textsuperscript{90} Then, with two months until the expiration of the contract, the union requested negotiations. However, the employer did not meet with the union until the last twenty days.\textsuperscript{91} During the five bargaining sessions that ensued, the employer insisted on a "draconian" package that included increasing the work week and substantially reducing wages.\textsuperscript{92} The union, which had begun by demanding a wage increase and retention of the original work week, made concessions at each successive bargaining session, until at the last meeting it dropped demands for a wage increase and agreed to a wage plan calculated in a manner proposed by the employer.\textsuperscript{93} Further, at each of the last four meetings, the union requested that the employer agree to extend the expiring contract in case they were unable to reach agreement in time.\textsuperscript{94} At the last meeting, the employer was credited with responding to the union that if they did not have a contract by the expiration of the existing contract, later that day, then the employees would be out on the streets, and no one was going to have a job.\textsuperscript{95} The Board held that, notwithstanding the unremedied unfair labor practices, the employer had bargained in good faith and that a valid impasse had been reached at the expiration of the old contract, thereby having freed the employer to implement its "draconian" package as they had planned.

\textsuperscript{87} NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952). \textit{See also supra} note 4 and accompanying text.
\textsuperscript{88} 275 N.L.R.B. 71 (1985).
\textsuperscript{89} \textit{Id.} at 74. The Board further adopted the A.L.J.'s conclusion that "[g]etting rid of both those wage scales and their cause—the Union—was at the top of his [the employer's] list." \textit{Id.}
\textsuperscript{91} 275 N.L.R.B. at 80. The A.L.J. found that the union requested negotiations and was told that the employer was not ready throughout the month of February, yet in the same paragraph he concludes that "only speculation can lay the delay" at the employer's door.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.} at 75-78. Not only was the amount of wages in dispute, but also the method by which they were to be calculated.
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.} at 81. The Board approved the A.L.J.'s finding: "Indeed the 'in the streets' excited utterance let the cat out of the bag, for it shows that [the employer] knew that by its holding fast a strike would ensue that would allow the company to hire new drivers at a lower scale." \textit{Id.} at 82.
nian” package. In a footnote to the opinion, the Board Chairman noted that he felt it was inappropriate for the Board to consider the reasonableness of the bargaining proposals. At least one commentator has concluded that under this view of the good faith bargaining requirement, the Board “has severely narrowed the concept of surface bargaining and removed any remaining practical vitality” that the doctrine may have had.

C. Length of Negotiations

The length of negotiations is clearly the most empirical of the five Taft factors. Information as to the number of meetings between the parties, the length of those meetings and the amount of time that passes between the initiation of negotiations and their end is almost always noted by the Board in one form or another when considering the question of a bargaining impasse. The general rule has been that the more meetings between the parties, the better the chance that an impasse will be found. In this regard, the length and duration of the negotiations is an indicator of whether or not the bargaining has been sufficiently exhaustive to justify a finding of impasse. In order for the negotiations to be sufficiently exhaustive, there should be opportunity for continuous give and take even when the initial positions are far apart.

The Board, however, has held that this factor is not controlling. The case law clearly bears this out, as evidenced by the seemingly ran-

96. Id. at 80-82.
97. Id. at 71 n.2. Chairman Dotson has also asserted this position in the following cases: Walter A. Zlogar, Inc., 278 N.L.R.B. 1089, 1089 n.1 (1986); Hedaya Bros., Inc., 277 N.L.R.B. 942, 945 n.19 (1985); Allbritton Communications, Inc., 271 N.L.R.B. 201, 205, n.13 (1984), aff’d, 766 F.2d 812 (3d. Cir. 1985), cert. denied, 474 U.S. 1081 (1986). Chairman Dotson relied on Struthers Wells Corp. v. NLRB, 721 F.2d 465, 470 (3d Cir. 1983) for this position. In that case, the court held that by finding bad faith in lawful proposals the Board improperly injected itself into the bargaining process in violation of § 8(d). But in that case the court held the proposals to be not “beyond the bounds of reasonable bargaining,” thus implying some consideration of their content. Id.
99. See, e.g., Joey’s Stables, 279 N.L.R.B. No. 97, slip op. at 2 (April 30, 1986) (five meetings occurring between January and May of 1984); Saunders House, 265 N.L.R.B. 1632 (1982) (noted that a total of 17 meetings occurred over a seven-month period); Inta-Roto, Inc., 252 N.L.R.B. 764, 768 (1980) (noted that only four meetings occurred during an eleven-day period lasting a total of no more than four hours of face to face discussion); Alsey Refractories Co., 215 N.L.R.B. 785, 786 (1974) (noted that only four meetings had occurred, only lasting 20 minutes during a six-month period).
100. Richmond Recording Corp., 280 N.L.R.B. No. 77, slip op. at 33 (June 24, 1986).
102. Carpenter Sprinkler Corp. v. NLRB, 605 F.2d 60, 65 (2d Cir. 1979).
103. Coalite, Inc., 278 N.L.R.B. 293 (1986); Richmond Recording Corp., 280 N.L.R.B. No. 77, slip op. at 33.
dom assortment of findings as to the existence of impasse and cor-
responding lengths of negotiations. For example, impasse has been
found after only one negotiating session, while no impasse has been
found after as many as eighteen sessions. Under the traditional view,
the disparity in the application of this factor can be explained by deter-
mining whether all the issues of importance were actually discussed by
the parties. Thus, in Saunders House, the Board found no impasse
after seventeen bargaining sessions over a six-month period. In part,
the finding of no impasse rested on the fact that, while there were many
negotiating sessions, they were not exhaustive because the discussion was
limited on the "crucial question of wages." Thus, in order for the
length of negotiations to be indicative of impasse, this factor should be
reflective of sufficient opportunity for exhaustive bargaining over the is-

D. The Importance of the Issues as to Which There is a Disagreement

The fourth Taft factor is "the importance of the issue or issues as to
which there is disagreement." As a threshold matter, this factor re-
quires that the issues over which the parties disagree be important issues
in order for a resulting deadlock to constitute a valid impasse. Indeed,
in Taft the Board held in effect that a deadlock on one critical issue can
be of sufficient magnitude to cause a valid impasse. This is true even if
there is agreement or movement toward agreement on the other issues

104. See Hamady Bros. Food Mkts., 275 N.L.R.B. 1335, 1337 (1985) (impasse after 5 meetings);
    Bell Transit Co., 271 N.L.R.B. 1272, 1273 (1984) (impasse after 3 meetings); Good GMC, Inc., 267
    (impasse after 2 meetings); Crest Beverage Co., 232 N.L.R.B. 116, 119 (1977), modified, 575 F.2d
    661 (8th Cir. 1978), cert. denied, 437 U.S. 1069 (1979) (no impasse after 4 meetings); Atlas Tack Co.,
    226 N.L.R.B. 222, 227 (1976) (no impasse after 15 meetings); Akron Novelty Mfg. Co., 224
    N.L.R.B. 998, 1000 (1976) (no impasse after 8 meetings); Taylor-Winfield Corp., 225 N.L.R.B. 457,
    461 (1976) (impasse after 18 meetings).

105. See Dixon Distrib. Co., 211 N.L.R.B. 241, 244 (1974) (impasse found after one negotiating
    session 20 minutes long); see also San Diego Van & Storage Co., 236 N.L.R.B. 701, 705 (1978)
    (although an impasse was found after only three meetings, the A.L.J. also noted that the union's
    inaction upon adequate notice could have "easily" justified the employer's reliance on the doctrine of
    waiver).

108. Id. at 1634.
109. Id.
111. 163 N.L.R.B. 475, 478 (1967).
112. See Dallas Gen. Drivers v. NLRB, 355 F.2d 842, 845 (D.C. Cir. 1966) (definition of im-
    passe requires deadlock on a key issue). See also Taylor-Winfield Corp., 225 N.L.R.B. 457, 461
because the deadlock may loom so large as to preclude any hope of arriv-
ing at a collective bargaining agreement. 113 Therefore, under the tradi-
tional view, the “importance of the issues” may be significant to
determine whether a sufficient degree of latitude exists for continued bar-
gaining. If a deadlock has been reached on some issues but not on
others, then the possibility may exist that concessions or trade-offs on
these other issues could result in renewed movement on the deadlocked
issue. 114 In affirming Taft Broadcasting, the District of Columbia Circuit
stated that “even parties who seem to be in implacable conflict may, by
meeting and discussion, forge first small links and then strong bonds of
agreement.” 115

In Saunders House v. NLRB, 116 the Third Circuit affirmed the view
that the “importance of the issues” was a crucial factor in determining
the degree of bargaining latitude that existed. 117 In that case, the court
asserted that the Board’s finding of no impasse was flawed for failure to
take into account the importance of the issues over which there was disa-
greement. 118 The court found that the issues of wages, union security
and a dues checkoff provision were of such importance that the disagree-
ment over them crippled prospects of any agreement despite the finding
of the Board that the other factors indicated no impasse. 119

The traditional approach to the use of the “importance of the is-
sues” factor is entirely faithful to an impasse doctrine whose purpose it is
to promote the duty to bargain. For, it is often by accurately determin-
ing the degree of bargaining latitude which may exist in negotiations that
the Board can determine whether further bargaining would be futile. In
NLRB v. Crompton-Highland Mills Inc., 120 the Supreme Court noted
that, had the employer continued negotiating rather than unilaterally in-
creasing wages, it would have presented “infinite opportunities for bar-

113. 163 N.L.R.B. at 478. ("[A] deadlock is still a deadlock whether produced by one or a
number of significant and unresolved differences in positions."). Accord NLRB v. Tomco Communica-
tions, Inc., 567 F.2d 871, 881 (9th Cir. 1978) (court found an impasse because a single issue
loomed so large as to “cripple the prospects of any agreement.” The court noted that disagreement
on wages was central and irreconcilable so that “further discussion of grievance procedures would
have served no useful purpose.”). See also Seattle-First Nat’l Bank, 267 N.L.R.B. 897 (1983).

114. See NLRB v. Webb Furniture Corp., 366 F.2d 314, 316 (4th Cir. 1966); Patrick & Co., 248
N.L.R.B. 390, 393 (1980).

1968).

116. 719 F.2d 683 (3d Cir. 1983).

117. Id. at 687.

118. Id. at 688; see infra notes 124-30 and accompanying text.

119. 719 F.2d at 688-89. Cf. NLRB v. Yamma Woodcraft, Inc., 580 F.2d 942,945 (9th Cir.
1978).

120. 337 U.S. 217 (1949).
The Court added that, when faced with such bargaining latitude, "it is difficult to infer an intent to cut off the opportunity for bargaining and yet be consistent with the purposes of the National Labor Relations Act." 122

However, under the more recent view of the impasse doctrine, the Board has strayed from this approach and has applied the "importance of the issue" factor in a totally different way. The "importance of the issues" has in some cases been equated with the economic necessity of the employer. 123 In these cases, this Taft factor is not applied to determine available latitude for further bargaining in the context of promoting the collective bargaining process. Rather it is applied to determine whether the employer is justified by economic necessity in foregoing his duty to bargain without regard to the existence of futility.

In Bell Transit, 124 the Board relied heavily on what it called the "supreme importance of the wage issue" in finding a valid impasse. 125 The employer was a labor broker who provided trucking services to Union Carbide, its sole customer. 126 In exchange for these services, Union Carbide paid the employer a management fee and reimbursed it for its labor costs. 127 Motivated by pressure from its sole customer to reduce labor costs, the employer timely withdrew from a multi-employer bargaining unit and initiated direct negotiations with the union. 128 After just three bargaining sessions and while a tentative agreement was pending before the union's Eastern Conference, the employer unilaterally reduced wages. 129

Citing the parties' bargaining history of twenty-six years for support, the Board based its findings of impasse on the "importance of the issue" factor. 130 In applying this factor, the Board made no effort to determine whether, because of the importance of wages, disagreement by the parties on that issue provided so little bargaining latitude as to make

121. Id. at 224.
122. Id.
125. Id. at 1273.
126. Id. at 1272.
127. Id.
128. Id.
129. Id.
130. Id. at 1273. In dismissing the other Taft factors, the Board noted that there was no dispute as to good faith in negotiations, and that despite the limited number of bargaining sessions, no "rigid formula" exists for the length of negotiations factor. Id. at 1273 n.10. Finally the Board concocted a bizarre justification for the final factor of contemporaneous understandings of the parties. See infra note 153 and accompanying text.
further bargaining futile. Rather, the Board chose to characterize the issue as "compelling pressure," "overriding," and "supreme," and simply concluded that the employer's continued corporate existence depended on achieving reduced wages.\textsuperscript{131} The Board's use of this factor serves in effect to release the employer from the duty to bargain if the employer can provide sufficient evidence of business necessity.\textsuperscript{132} The District of Columbia Circuit on review conceded that the issue of wages was important, but held that there was no indication that the centrality of this issue meant that there was no bargaining latitude.\textsuperscript{133} In a strongly worded opinion, the court reversed the Board.\textsuperscript{134}

\textbf{E. The Contemporaneous Understanding of the Parties as to the State of Negotiations}

The fifth \textit{Taft} factor is "the contemporaneous understanding of the parties as to the state of negotiations."\textsuperscript{135} In \textit{Taft Broadcasting}, the Board applied this factor by focusing its attention on the final two sessions between the parties prior to the employer's unilateral action.\textsuperscript{136} As a result, the Board concluded that each party "believed that . . . they were further apart than when they had begun negotiations."\textsuperscript{137} This conclusion as to the subjective belief of the parties was supported by the objective evidence of the words and expressions used by them in negotiations and by the direct testimony of the employer as to its beliefs at the time.\textsuperscript{138} Thus, the Board concluded that the parties' understandings of the state of negotiations at the time of the two meetings supported a finding that a state of impasse existed.\textsuperscript{139}

In \textit{Inta-Roto, Inc.},\textsuperscript{140} the Board noted that the "contemporaneous understanding" aspect of the \textit{Taft} analysis was the most difficult to re-

\textsuperscript{131} \textit{Id.} at 1273.
\textsuperscript{132} See \textit{NLRB v. Bildisco \& Bildisco}, 465 U.S. 513, 534 (1983) (the policy of the NLRA, in particular § 8(d), is "to protect the process of labor negotiations, not impose particular results on the parties."). Cf. \textit{NLRB v. Manley Truck Line, Inc.}, 779 F.2d 1327, 1331 (7th Cir. 1985) ("The language of § 8(d) neither expressly conditions its enforcement upon the continuing economic survival of the employer's business, nor invites such a condition."). \textit{See also} \textit{NLRB v. Laredo Coca Cola Bottling Co.}, 613 F.2d 1338, 1343 (5th Cir. 1980).
\textsuperscript{133} Teamster Local Union No. 175 v. \textit{NLRB}, 788 F.2d 27, 31 (D.C. Cir. 1986).
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} 163 N.L.R.B. 475, 478 (1967).
\textsuperscript{136} \textit{Id.} at 476, 478. \textit{See also} \textit{Atlas Tack Corp.}, 226 N.L.R.B. 222, 227 (1976), where the A.L.J.'s determination that no impasse existed was predicated on an examination of the circumstances of October 22, the date of the bargaining session during which an impasse was alleged to have arisen.
\textsuperscript{137} 163 N.L.R.B. at 478.
\textsuperscript{138} \textit{Id.} at 476-77.
\textsuperscript{139} \textit{Id.} at 478.
\textsuperscript{140} 252 N.L.R.B. 764 (1980).
solve because it involves an objective finding as to the state of facts at the time of the putative impasse as well as "a subjective attempt to discover what was going on in the minds of the negotiators as they left the bargaining table." 141 The standard proposed in *Inta-Roto* was that the contemporaneous understandings of the parties should be compared to the objective state of facts in order to determine if there existed "objective evidence to warrant a belief that an impasse had been reached." 142 Further, the contemporaneous understanding of the parties was equated with their "subjective feelings," and the salient question posed in this regard was whether there remained a "'ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions.'" 143

Often the language used by the parties is sufficient in itself for the Board to reach a conclusion as to this factor. For example, in *Seattle-First National Bank*, 144 the Board noted that the contemporaneous understandings of the parties supported an impasse finding because the union had asserted that the employer's proposals "were so onerous that the Union 'could clearly never accept them.'" 145 However, mere use of the word "impasse" by the parties during negotiations is usually insufficient to establish a contemporaneous understanding that the state of negotiations had reached the point of futility. 146

The *Bell Transit* 147 case is once again instructive as an example of the extent to which the reasoning in cases following the more recent view

141. *Id.* at 768.
142. *Id.* A number of cases have stated this standard as the means by which the "contemporaneous understandings of the parties" factor is to be applied. See SGS Control Servs., Inc., 275 N.L.R.B. 984, 987 (1985) ("I find that at no time material herein was Respondent justified in assuming that further bargaining would have been futile, a standard the Board has cited in conjunction with the Taft Broadcasting factors."); Saunders House, 265 N.L.R.B. 1632, 1634 (1982) ("The final factor here, the contemporaneous understanding of the parties, is conclusive. It is well settled that for impasse to be found the parties must have reached 'that point of time in negotiations when the parties are warranted in assuming that further bargaining would be futile.'") (quoting Patrick & Co., 248 N.L.R.B. 390, 393 (1980)); Alsey Refractories Co., 215 N.L.R.B. 785, 785 n.1 (1974) (Board stated its belief that the correct standard was whether the parties were warranted in assuming that further bargaining would have been futile).
143. 252 N.L.R.B. at 768 (quoting NLRB v. Webb Furniture Corp., 366 F.2d 314, 316 (4th Cir. 1966)).
144. 267 N.L.R.B. 897 (1983).
145. *Id.* at 898 (footnote omitted) (quoting Seattle-First Nat'l Bank, 241 N.L.R.B. 753, 755 (1979)).
146. T. Marshall Corp., 279 N.L.R.B. No. 166, slip op. at 4 (May 27, 1986) ("The record in this proceeding does not establish that an impasse existed. The fact that Respondent's witness stated that the May 1981 proposal constituted an 'impasse offer' is not sufficient to establish the existence of impasse."); Saunders House, 265 N.L.R.B. 1632, 1633 (1982) ("The union negotiator presented a series of union proposals intending to end what he described as an 'impasse.'" (footnote omitted)). As to the use of the word impasse, the Board stated: "We are unconvinced given the bargaining posture of the union that the term was used with legal precision." *Id.* at 1633 n.3.
147. See *supra* notes 124-34 and accompanying text.
will justify an impasse finding based on economic necessity by explaining away factors designed to make a determination of bargaining futility. In Bell Transit, the Board affirmed adherence to the Taft factors and had based its impasse finding principally on the factor of the "importance of the issues." However, in order to reach this result the Board apparently felt compelled to reconcile the "contemporaneous understandings of the parties" factor with the fact that the employer and union had reached a tentative agreement at the time the impasse was alleged to have occurred. Thus, the Board held that "[a]n impasse may exist simultaneously with a tentative agreement." The theory was that if the tentative agreement were ratified, then the impasse would break. On the other hand, if the tentative agreement were rejected, then the impasse would endure. The District of Columbia Circuit reversed and remanded the Board's decision. The court characterized the Board's treatment of this factor as "irrational," "incomprehensible," and "inconsistent with prevailing law."

It would be an understatement to say that the Board's use of the "contemporaneous understanding" factor in Bell Transit strayed from the factor's intended use for determining whether the parties are warranted in their belief that further bargaining would be futile. However, the case's treatment of this factor, although exaggerated does provide an example of an effort to construe the impasse doctrine so as to increase the employer's discretion in bargaining. This increase can only be accomplished by applying the Taft factors mechanically without regard to whether they rationally indicate the presence or absence of futility of further bargaining.

IV. SUMMARY

The traditional view of the impasse doctrine is vulnerable to criticism regarding the degree of its effectiveness in promoting the duty to bargain in the face of a deadlock. However, the recent view of the doctrine is more properly criticized as an ideological assault on the very duty to bargain itself. Analysis of the traditional application of the Taft factors demonstrates that the impasse doctrine is a less than perfect but still

148. 271 N.L.R.B. at 1273.
149. Id.
150. Id. at 1273 n.9.
151. Id.
152. Teamsters Local Union No. 175 v. NLRB, 788 F.2d at 28, 30 (1986). Accord Excavation-Constr., 248 N.L.R.B. 649, 650 (1980) (employer's assumption that a pending ratification vote was an empty gesture was rejected because "[s]uch assumptions are not an adequate substitute for collective bargaining").
necessary judicial response to the fact that the legislative mandate to enforce the duty to bargain is limited by the prohibition of compelled agreements. Thus, under the traditional view of the impasse doctrine, each of the five Taft factors is construed as an indicator of whether further bargaining will be futile. Bargaining history is either applied as an indicator favoring no impasse when the parties are engaged in an initial bargaining experience,\textsuperscript{153} or alternatively as an aid to gaining insight into the past practices of the parties when the bargaining experiences are more extensive.\textsuperscript{154} The good faith of the parties factor is treated as a prerequisite to a bona fide impasse. Thus, impasse is usually precluded where the employer has committed a continuing unremedied unfair labor practice.\textsuperscript{155} Further, under the traditional view, the unreasonableness of the bargaining positions taken by the parties may itself serve as an indicator of bad faith.\textsuperscript{156} The length of negotiations test is applied to determine whether sufficient opportunity for exhaustive bargaining has occurred.\textsuperscript{157} The importance of the issues factor is applied as an indicator of the degree of the bargaining latitude that existed during negotiations.\textsuperscript{158} Finally, the contemporaneous understandings of the parties factor evaluates the objective evidence existing at the time of the putative impasse for possible corroboration of the asserted subjective beliefs of the parties as to the state of the negotiations.\textsuperscript{159}

In contrast to the traditional view, the more recent view of the impasse doctrine amounts to an attack on the strength of the duty to bargain. Once it is established that a particular matter is a mandatory subject of bargaining, the duty to bargain about that matter would be terminated whenever the employer can make out a case of compelling economic necessity. In order to accomplish this objective, advocates of the more recent view have twisted the impasse doctrine in order to apply it regardless of whether futility of further negotiations is in fact indicated. Thus, under the more recent view of the impasse doctrine, the Taft factors are often applied mechanically or used to conclude that the economic necessity of the employer justifies a declaration of a state of impasse. For example, the bargaining history factor has been applied to favor finding a state of impasse simply upon the observation that the

\textsuperscript{153} See supra text accompanying notes 55-56.
\textsuperscript{154} See supra text accompanying note 46.
\textsuperscript{155} See supra text accompanying note 67.
\textsuperscript{156} See supra text accompanying note 82.
\textsuperscript{157} See supra text accompanying notes 101-10.
\textsuperscript{158} See supra text accompanying notes 113-14.
\textsuperscript{159} See supra text accompanying notes 141-44.
parties have had extensive prior bargaining experiences.\textsuperscript{160} Similarly, the good faith of the parties factor has been held unaffected by the existence of continuing unremedied unfair labor practices prior to the unilateral action.\textsuperscript{161} Further, the unreasonableness of the bargaining proposals has been considered an invalid indicator of bad faith.\textsuperscript{162} In addition, the length of negotiations factor has been declared noncontrolling.\textsuperscript{163} Moreover, the importance of the issues factor has been equated with the economic necessity of the employer.\textsuperscript{164} Finally, the contemporaneous understandings of the parties factor has been construed to justify the determination of an impasse during the pendency of a tentative agreement.\textsuperscript{165}

Accordingly, it can be concluded that under the recent view of the impasse doctrine the duty to bargain is construed as a relatively fluid limitation on the employer's prerogative to undertake unilateral action. It is fluid in the sense that the employer's economic standing may be determinative of his duty to bargain. Under this interpretation, the duty to bargain is improperly subordinated to the economic necessity of the employer.\textsuperscript{166} Essentially, when "impasse" is triggered by the importance of the issue, justified solely by the economic necessity of the employer, the duty to bargain is terminated. As a result, the more recent view of the impasse doctrine contemplates a duty to bargain that is strikingly weaker than that contemplated by the traditional view.

The traditional view of impasse is predicated on the premise that the duty to bargain collectively is the framework selected by Congress for the resolution of industrial disputes.\textsuperscript{167} The impasse doctrine is a tool designed to promote the duty to bargain, not to terminate it.\textsuperscript{168}

Thus, it is proper that impasse be invoked only when further negotiations really would be futile. Allowance for limited unilateral action at that point can, in fact, serve the bargaining process in that the condition giving rise to the stalemate may change and the impasse break. In contrast, the role of collective bargaining in the resolution of industrial disputes is decreased by allowing unilateral action based on the economic necessity of the employer without regard to the futility of further negotia-

\textsuperscript{160} See supra text accompanying notes 51, 52, 56.
\textsuperscript{161} See supra text accompanying notes 74-81.
\textsuperscript{162} See supra text accompanying notes 88-98.
\textsuperscript{163} See supra text accompanying note 102.
\textsuperscript{164} See supra text accompanying notes 123-24.
\textsuperscript{165} See supra text accompanying note 152.
\textsuperscript{166} See supra text accompanying note 132.
\textsuperscript{168} See supra note 6.
tions. Under the recent view, the right to collective bargaining with one's employer is reduced to a privilege of good times.