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The Impact of the Borg-Warner Case on Collective Bargaining

In its 1958 decision in NLRB v. Wooster Div. of Borg-Warner Corp., the United States Supreme Court stated for the first time the rule that "it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without." The Court thus created a new "voluntary" category of bargaining subjects. The author of this Note examines the origin of this rule and the effect that it may have upon collective bargaining.

I. INTRODUCTION

One of the stated objectives of the National Labor Relations Act is to encourage "the practice and procedure of collective bargaining." The act provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, and defines collective bargaining as:

"The performance of the mutual obligation of the employer and the representative of the employees to meet ... and confer in good faith with respect to wages, hours, and other terms and conditions of employment ... but such obligation does not compel either party to agree to a proposal or require the making of a concession. ..."

These provisions were the focal point of the Supreme Court decision in NLRB v. Wooster Div. of Borg-Warner Corp.

In Borg-Warner the employer had insisted to the point of impasse, in the face of union refusal, that the collective bargaining contract contain a "ballot clause" which would have allowed the employees to cast a secret, pre-strike, advisory vote on whether the union should go on strike or accept the employer's last offer. The

4. 856 U.S. 842 (1958) [hereinafter referred to as Borg-Warner].
5. Borg-Warner also dealt with the employer's insistence upon a "recognition" clause which excluded, as a party to the collective bargaining contract, the international union that had been certified as the exclusive bargaining agent for the employees by the NLRB. This Note will not examine the recognition clause since the employer's insistence upon it was undoubtedly an unfair labor practice. See 356 U.S. at 362 (dissenting opinion). See also, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44-45 (1937); NLRB v. Deena Artware, Inc., 198 F.2d 645 (6th Cir. 1952), cert. denied, 345 U.S. 906 (1953); NLRB v. Louisville Ref. Co., 102 F.2d 678 (6th Cir.), cert. denied, 308 U.S. 583 (1939).
question was whether or not the employer's insistence on the ballot clause constituted an unfair labor practice. The National Labor Relations Board determined, two members dissenting, that the ballot clause was not a subject which the statute required bargaining about, and that by insisting upon it the employer had failed, in violation of the act, to bargain with the union. The court of appeals refused to enforce the Board's order concerning the ballot clause. On certiorari, the Supreme Court accepted the Board's position and stated the applicable rule as: "[I]t is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without . . . ." The Court then held that the ballot clause is not a subject within the statutory definition of collective bargaining. Therefore, the Court reasoned, the employer's insistence on the strike ballot constituted a refusal to bargain about those subjects that are within the scope of mandatory bargaining, which was an unfair labor practice.

The purpose of this Note is to discuss (1) the origin of the rule that "it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without," and (2) the effects this rule may have upon the collective bargaining relationship.

II. The Borg-Warner Rule: Its Origin

The Court in Borg-Warner stated the above rule as if it were one of long standing about which there would be no argument. However, Borg-Warner is the first Supreme Court statement of the rule; it evoked a strong dissent; and just two months before Borg-Warner,

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6. 113 N.L.R.B. 1288 (1955). The dissenters were Farmer, who was then chairman, and Leedom, who is now chairman.
8. 356 U.S. at 349.
9. Four Justices dissented from the opinion. Mr. Justice Harlan wrote the dissenting opinion joined by Justices Clark and Whittaker. Mr. Justice Frankfurter inserted a separate opinion which stated in part:

He [Mr. Justice Frankfurter] agrees with the views of Mr. Justice Harlan regarding the 'ballot' clause. The subject matter of that clause is not so clearly outside the reasonable range of industrial bargaining as to establish a refusal to bargain in good faith, and is not prohibited simply because not deemed to be within the rather vague scope of the obligatory provisions of § 8(d).

Id. at 351.

10. The Court prefaced its statement of the rule with the word "since" and did not cite any authority to support the rule.
11. See note 9, supra. Mr. Justice Harlan stated in dissent that the rule the Court used does not conform with the legislative history of the Labor Management Relations Act, nor the earlier case of NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). At the same time he questioned, but accepted, the Court's con-
Warner, two members of the NLRB stated that the Board had no authority to use the rule.\textsuperscript{12} Further, the legislative history of the Labor Management Relations Act does not support the rule and at least one Supreme Court decision seems to preclude its use. On the other hand, the rule does have support in several lower court decisions, and an argument can be made that necessities of labor-management relations and the general policy of the act provide the foundation for adoption of the rule.

\textit{Lower court decisions that support the rule}

At least two lower court cases support the rule as it was applied in \textit{Borg-Warner}. In the first case, \textit{NLRB v. Dalton Tel. Co.},\textsuperscript{13} the court held that the employer had committed an unfair labor practice by imposing the requirement that the union register under a state statute so as to be amenable to suit in the state courts as a condition precedent to signing the collective bargaining contract. The court stated:

\begin{quote}
 Respondent cannot legally make its agreement depend upon an improper condition. . . . There are certain things about which the parties may bargain or negotiate, but which cannot be insisted upon as a condition precedent to the making of a contract.\textsuperscript{14}
\end{quote}

However, the court did not cite any authority for this principle.\textsuperscript{15}

The second case that directly supports the rule is \textit{NLRB v. Darlington Veneer Co.},\textsuperscript{16} where the employer insisted upon a provision.
for the automatic nullification of the collective bargaining contract should checkoff authorizations fall below fifty per cent of the employees, and a provision requiring ratification of the collective bargaining contract by the employees. The court stated that the company was attempting to bargain about matters outside the scope of wages, hours or conditions of employment; that the insistence upon these terms was so unreasonable as to justify a finding of a failure to bargain in good faith; and that "it is well settled that an employer may not insist upon including as a condition of the contract terms having no relation to the statutory duty to bargain." As authority for the last statement the court cited a group of cases which are not directly in point. For example, the court cited NLRB v. Pecheur Lozenge Co. In Pecheur, the employer refused to bargain unless the union abandoned its strike. The court, while holding the employer's action to be a violation of the duty to bargain collectively, stated:

[An employer may not condition his statutory obligation to bargain collectively upon an abandonment of a strike. This is but one phase of the fundamental rule that generally an employer may not lawfully demand, as a condition precedent to the performance of his statutory duty, an abandonment by employees of protected, concerted activities or a surrender of rights bestowed by the Act.]

The condition demanded by the employer in Pecheur would have resulted in an abridgment of the employees' right to strike. It is absolutely necessary, if the right to strike is to be protected, that an insistence upon an abandonment of a strike as a condition precedent to bargaining be considered an unfair labor practice. However, when a shift is made from a subject that is unlawful as in

213 F.2d 374 (7th Cir. 1954). In Allis-Chalmers, the court stated the rule as it was stated by the Supreme Court in Borg-Warner. However, the court did not apply the rule in Allis-Chalmers since it held that a strike ballot and a contract ratification clause could be bargained about to the point of impasse. When Borg-Warner was at the court of appeals, NLRB v. Wooster Div. of Borg-Warner Corp., 236 F.2d 898 (6th Cir. 1956), the court noted the statement of the rule in Allis-Chalmers to the effect that: "We are in accord with that ruling, without attempting to pass upon the correctness of the Court's statement with respect to a situation where a proposed clause is not within the statutory subjects of bargaining." Id. at 903.

17. Good faith is the basis for the Supreme Court's decision in NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). See discussion below in text at notes 30-43 infra. Thus the Darlington case does not rest entirely upon the Borg-Warner rule.

18. 228 F.2d at 89.

19. 209 F.2d 393 (2d Cir. 1953).

20. Id. at 403.

21. The term "unlawful" refers both to subjects that are unlawful because they violate express provisions of the NLRA and to subjects which, while not specifically proscribed, are unlawful because they are contrary to the policy of the act. The Pecheur case involves the latter type.
Pecheur, to a subject that is lawful as in Borg-Warner, the two cases are clearly distinguishable and the rule stated in Pecheur is no longer applicable. Therefore, it is clear that the Pecheur case is not authority for the rule as applied in Borg-Warner. The other cases cited in Darlington are similar in nature to Pecheur, and provide no better basis for the rule.

The legislative history of the Labor Management Relations Act, and the American Insurance Case

The legislative history of the Labor Management Relations Act clearly demonstrates that the NLRB was not intended to control the substantive terms of collective bargaining contracts. The act as it was passed in the House, contained a section which specified and limited the topics about which the parties would be allowed to bargain collectively. Concerning the provision, the House Report contained the following statement:

22. In Borg-Warner, the Court stated: “This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement.” 356 U.S. at 349. (Emphasis added.)

23. Arguably the Court’s discussion of the effect of the strike ballot indicates that the Court believes the strike ballot subverts the policy of the act. This interpretation leads to the result that subjects which subvert the policy of the act can still be lawful subjects. Also, this interpretation of the Court’s discussion would have to be reconciled with the fact that Congress specifically provided for a strike ballot in two situations. Labor Management Relations Act §§ 203(c), 209(b), 61 Stat. 154, 156 (1947), 29 U.S.C. §§ 173(c), 179(b) (1952). For a further discussion see notes 57-63 infra and accompanying text.

24. NLRB v. Dalton TeL Co., 187 F.2d 811 (5th Cir. 1951); see discussion at notes 13-15 supra. NLRB v. Aldora Mills, 180 F.2d 580 (5th Cir. 1950), enforcing mem. 79 N.L.R.B. 1 (1948); employer refused to sign a contract until the certified bargaining representative chartered a local organization. NLRB v. Corsicana Cotton Mills, 178 F.2d 344 (5th Cir. 1949); employer insisted that non-union employees be permitted to vote upon the provisions of the contract negotiated by the union, American Laundry Mach. Co. v. NLRB, 174 F.2d 124 (6th Cir. 1949), 76 N.L.R.B. 981 (1948); employer refused to bargain unless the union withdrew unfair labor practice charges that had been filed with the Board and discontinued a strike. NLRB v. George P. Filling & Son Co., 119 F.2d 32 (3d Cir. 1941); employer insisted that the union organize the rest of that industry; held to be a violation of the employees’ right to bargain collectively through a representative of their own choosing. Hartsell Mills Co. v. NLRB, 111 F.2d 291 (4th Cir. 1940); employer refused to sign a written contract and made withdrawal of unfair labor practice charges a condition precedent to collective bargaining.

25. Such terms shall not be construed as requiring that either party . . . discuss any subject matter other than the following: (i) wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

The present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make.26

When the bill went to the Senate, it was amended to eliminate the section specifying the bargainable topics. The House Conference Report commented:

The Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties.27

Thus the legislative intent is clear that the Board should not be allowed to pass upon the merits of the substantive positions taken by the parties in the process of collective bargaining.28 Yet, in effect, that is exactly what the Borg-Warner rule will allow the Board to do through the guise of determining whether a particular provision is a mandatory subject of collective bargaining.29

In 1952, the Supreme Court decided NLRB v. American Nat'l Ins. Co.,30 which seemingly affirmed the interpretation of the legislative history given above. American Insurance involved an employer that insisted to the point of impasse upon a management functions clause which provided that the employer would be able to unilaterally control many subjects that are usually determined by collective bargaining.31 The Court held that this was not an unfair labor practice, and in the course of the opinion stated:

Conceding that there is nothing unlawful in including a management functions clause in a labor agreement, the Board would permit an employer to 'propose' such a clause. But the Board would forbid bargaining for any such clause when the Union declines to accept the proposal. . . .

28. The legislative history is not entirely unequivocal in that the act was partly directed at the Board practice of requiring the employer to make a concession in order to establish his good faith. But see the dissenting opinion in Borg-Warner, 356 U.S. at 354–57.
29. An example is Borg-Warner itself. The employer was held to have committed an unfair labor practice because he took the position that the collective bargaining contract should contain a strike ballot clause.
30. 343 U.S. 395 (1952).
31. The management functions clause involved in American Insurance provided: The right to select, hire, to promote, demote, discharge, discipline for cause, to maintain discipline and efficiency of employees, and to determine schedules of work is the sole prerogative of the Company and the Company's decision with respect to such matters shall never be the subject of arbitration.
The Board was not empowered so to disrupt collective bargaining practices. . . .

Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board.32

The Court in American Insurance apparently considered the management functions clause to be within the statutory definition of collective bargaining.33 To the Board's proposal that bargaining for the management functions clause was a "per se" violation of the act,34 the Court replied: that the management functions clause was not an illegal contract term;35 that the management functions clause was commonly found in collective bargaining contracts; that the management functions clause is a condition of employment to be settled by bargaining;36 that fears that the management functions clause will lead to an evasion of an employer's duty to bargain collectively "do not justify condemning all bargaining for management functions clauses";37 and that:

The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions altogether.38

The Court did not discuss the effect that the management functions clause would have upon collective bargaining as was done with the strike ballot in Borg-Warner. It is interesting to note how well the line of reasoning used in American Insurance could have been used

32. 343 U.S. at 408-09.
33. See 343 U.S. at 409. The Court also stated that the management functions clause covers terms and conditions of employment. See id. at 407.
34. Note that the Board's proposal in American Insurance was based on the rule that was accepted by the Court in Borg-Warner.
35. In a footnote the Court stated that such cases as NLRB v. National Maritime Union, 175 F.2d 686 (2d Cir. 1949), are not applicable. The National Maritime case is similar in nature to the cases relied on in the Dalton case. See note 24 supra.
36. While the Court in American Insurance may have considered the management functions clause to be a term and condition of employment, 343 U.S. at 409, the Court may not have relied upon that as a basis for its decision.
37. 343 U.S. at 409. The Court evidently used the term "bargaining" to mean insisting upon a proposal in the face of the union's rejection of it: "... the Board would permit an employer to 'propose' such a clause. But the Board would forbid bargaining for any such clause when the Union declines to accept the proposal. ..." 343 U.S. at 408. The meaning of "bargain" is not the same in Borg-Warner where, the Court, while referring to voluntary subjects that cannot be insisted upon, stated: "... each party is free to bargain or not to bargain, and to agree or not to agree." 356 U.S. at 349.
38. 343 U.S. at 409.
in *Borg-Warner* to uphold the strike ballot as a term or condition of employment. The only real difference between the two cases, except for the difference in clauses themselves, is that in *American Insurance* the employer was proposing the management functions clause as a counterproposal to a union demand for unlimited arbitration, while in *Borg-Warner* the employer insisted upon the strike ballot as a condition precedent to signing the collective bargaining contract. This fact should not make any difference since one of the stated purposes of the LMRA was to eliminate the counterproposal test the Board had previously used as a test of good faith. Therefore, it would seem that the Court's position on the problem presented in the two cases has shifted, since it probably could have

39. The Board had attempted to apply the same rule in both cases. The strike ballot is not an illegal contract term; the strike ballot is commonly found in collective bargaining contracts; the strike ballot is a condition of employment to be settled by bargaining; all strike ballots should not be put outside the scope of collective bargaining because of fears that a strike ballot will lead to an evasion of an employer's duty to bargain collectively; and the duty to bargain is to be enforced by the application of the good faith standard.

40. The dissent in *American Insurance*, written by Mr. Justice Minton with Mr. Justice Black and Mr. Justice Douglas joining, disagrees with the majority on this point:

> No one suggests that an employer is guilty of an unfair labor practice when it proposes that it be given unilateral control over certain working conditions and the union accepts the proposal in return for various other benefits. But where, as here, the employer tells the union that the only way to obtain a contract as to wages is to agree not to bargain about certain other working conditions, the employer has refused to bargain about those other working conditions. There is more than a semantic difference between a proposal that the union waive certain rights and a demand that the union give up those rights as a condition precedent to enjoying other rights.

343 U.S. at 411-12. The dissent may just be disagreeing with the way the majority read the record. However, it is worthy of note that Mr. Justice Black and Mr. Justice Douglas are in the majority in *Borg-Warner*, and that the "condition precedent" language appears in the opinion: "... it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement." 356 U.S. at 349. So long as this language is applied to subjects that are not terms and conditions of employment, no confusion is created. But if the assumption is made that the management functions clause is a term and condition of employment, then we have at least two members of the Court that would apply the "condition precedent" test to such provisions. The result of such an application would be the necessity of distinguishing between a counterproposal and a condition precedent.

41. Another possible distinction is that the company in *American Insurance* by bargaining for the management functions clause which reserved terms and conditions of employment to management was in effect bargaining about the terms and conditions of employment included. On the other hand, it may be said that the company in *Borg-Warner* was bargaining only about a *procedural* provision, a procedural provision not coming within the statutory definition of collective bargaining. But how can the strike ballot be differentiated, for example, from the grievance procedure which is a procedural term?

42. Section 8(d) of the act provides: "but such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession." Labor Management Relations Act § 8(d), 61 Stat. 142 (1947),
dispersed of Borg-Warner by merely citing American Insurance as controlling.43

However, the management functions clause was considered to be a term and condition of employment. American Insurance can be narrowly interpreted to mean that the Board cannot control the terms of the collective bargaining agreement as long as the subjects are terms and conditions of employment. But the language of American Insurance is much broader, and Borg-Warner reaches a result that is directly contrary to that clear language.

III. The Borg-Warner Rule: Its Effect on the Practice of Collective Bargaining

The first effect of the rule was to create an additional category of bargaining subjects. Prior to Borg-Warner there were two kinds of bargaining subjects: (1) illegal subjects — those expressly prohibited by the NLRA or any others that the courts found unlawful because they were contrary to the purposes of the act — which cannot be included in a collective bargaining contract;44 and (2) mandatory subjects — those that come within the definition "wages, hours, and other terms and conditions of employment" — which must be bargained about in good faith, although neither party has to accept them.45 Borg-Warner created a third category: voluntary subjects — those that may be proposed and are lawful if the other party agrees to their inclusion in the collective bargaining contract — which cannot be insisted upon to the point of impasse.46

A second effect, one which necessarily follows from the categori-
zation discussed above, is that each addition of a subject to the voluntary category means there is one less subject in the mandatory bargaining category. Heretofore, the area of collective bargaining has been expanding. Subjects that were once thought to be within the exclusive control of management are now admitted to be subjects of mandatory collective bargaining. However, under the Borg-Warner rule, once the Board decides that a particular provision is not within the statutory language defining collective bargaining, that provision will be excluded from the scope of mandatory collective bargaining until the Board changes its mind or is overruled. Assuming that the scope of collective bargaining should be sufficiently flexible to satisfy the needs of the various particular collective bargaining situations, this restricting process is unfortunate. A subject that is not a term or condition of employment in one industry, may, because of different circumstances, be a term or condition of employment in another industry. After Borg-Warner, it is doubtful that a party would chance insisting on a strike ballot provision, no matter how appealing the facts may be toward the conclusion that it is a term or condition of employment in their particular situation.

47. See, e.g., Morton, Limitations Upon the Scope of Collective Bargaining, 7 Lab. L.J. 603 (1956); Note, 50 Nw. U.L. Rev. 279 (1955). Of course, new subjects may still be added to those already found to be mandatory, and more very probably will be so added.

48. Probably the outstanding example of this situation involves company housing. See, e.g., NLRB v. Lehigh Portland Cement Co., 205 F.2d 821 (4th Cir. 1953); NLRB v. Hart Cotton Mills, Inc., 190 F.2d 964 (4th Cir. 1951).

In our opinion, the Company's contention that company houses are not a proper subject of negotiation with a union representing the employees cannot be sustained as a general proposition. In many mills such houses are a necessary part of the enterprise and in this instance they were maintained by the employer and rented at such rates to the employees as to represent a substantial part of their remuneration. It follows that the subject is one in which the employees have so great an interest in connection with their work that it should be a subject of bargaining between the employer and the representatives of the men.

NLRB v. Dalton Tel. Co., 187 F.2d 811 (5th Cir. 1951) (requirement that union register under state statute so as to make it an entity amenable to suit in the state courts).

49. This type of fear was expressed by the Court in American Insurance. See note 48 supra.
tainly, the Court gave no indication in its opinion that a strike ballot would be mandatory in some circumstances and voluntary in others; in fact, its language was clearly all inclusive. Thus, the scope of collective bargaining has already been restricted by the exclusion of the strike ballot from the area of mandatory collective bargaining.

Third, the Borg-Warner rule will tend to subvert one of the basic theories of the NLRA, the theory that by sitting down to a bargaining table in an atmosphere of good faith bargaining, the parties will be able to arrive at a solution that is agreeable to both parties without resort to the various methods of industrial warfare. The Borg-Warner rule tends to remove some of the incentive to discuss fully all the terms that might be raised by a party. Any voluntary subjects that are raised by one party may be summarily dismissed by the opposing party on the basis that it is not a subject that its proponent may insist on. Heretofore, the parties had to be careful as to the good faith evidenced by the bargaining position they took as to all provisions that were not clearly unlawful. In other words, a party would not ordinarily flatly refuse to discuss a particular provision, because doing so would tend to give his bargaining position an air of bad faith. Now, if a subject is considered voluntary, the good faith requirement may well be inapplicable to that subject.

Therefore, the theory of the NLRA was put into practical effect.

50. The Court stated without equivocation that the ballot clause is not a "...subject within the phrase 'wages, hours, and other terms and conditions of employment' which defines mandatory bargaining." 359 U.S. at 349.

51. "[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." Labor Management Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1952). "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." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937). For an example of the actual functioning of the theory, see Shell Oil Co., 93 N.L.R.B. 161 (1951) (union agreed to restrict the membership of the grievance committee to include only employees).

52. This result seems to have been envisioned by the Court in Borg-Warner when it stated: "The duty [to bargain] is limited to those subjects, and within that area neither party is legally obligated to yield. ... As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." 359 U.S. at 349. The second sentence would seem to lead to the conclusion that the opponent of a suggested provision that is not within the statutory definition of collective bargaining need not even discuss it.

53. There is a possibility that under certain circumstances a party may be able to summarily refuse to bargain about a subject even if it is a mandatory subject of collective bargaining. See Cox, The Duty To Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1412 (1958).

54. See, e.g., NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953); Wheatland Elec. Co-op. v. NLRB, 208 F.2d 878 (10th Cir. 1953); Majure v. NLRB, 198 F.2d 735 (5th Cir. 1952); NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943).

55. See notes 70-71 infra and accompanying text.
in that the parties discussed all of the lawful provisions that were raised, so that the opposing party might either see the reasonableness of a proposal or that he could use the proposal as a quid pro quo for one of his own.

A fourth effect of the Borg-Warner rule is that until a certain subject has been placed in the voluntary category, by Board or court decision, a party to a collective bargaining relationship will not know until too late whether a certain subject matter will fall within that category. For example, the Borg-Warner management learned that it had committed an unfair labor practice, even though it had bargained about the strike ballot in good faith. What guide does Borg-Warner give as to when a certain subject will be found to be voluntary? The Court, in holding the strike ballot to be voluntary, stated:

[T]he issue here is whether . . . the 'ballot' . . . clause is a subject within the phrase 'wages, hours, and other terms and conditions of employment' which defines mandatory bargaining. [It] . . . is not within that definition. It relates only to the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer. It settles no term or condition of employment — it merely calls for an advisory vote of the employees. It is not a partial 'no-strike' clause. A 'no-strike' clause prohibits the employees from striking during the life of the contract. It regulates the relations between the employer and the employees. . . . The 'ballot' clause, on the other hand, deals only with relations between the employees and their unions. It substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative. Cf. Medo Photo Corp. v. Labor Board, 321 U.S. 678.56

Probably the key guide is whether or not the provision in question "substantially modifies the collective-bargaining system provided for in the statute." However, this guide will be almost impossible to apply, except in an extremely clear case. For example, it is difficult to grasp why the strike ballot modifies the collective bargaining system provided for in the statute any more substantially than does the no-strike clause or the management functions clause.57 Perhaps the Court's distinction, to be of value, cannot be divorced from the clause of the Court's opinion, " . . . by weakening the independence of the 'representative' chosen by the employees."58

56. 356 U.S. at 349-50.
57. Both the no-strike clause and the management functions clause are mandatory subjects of collective bargaining. See note 58 infra.
58. The implication of the Court's statement is that the representative chosen by the employees is supposed to be independent of the employees it represents. But this does not necessarily conform with the legislative history of the NLRA. Rather, one of the purposes of the act was to assure that employees could join
Certainly that is so for the strike ballot in *Borg-Warner*. However, this would make the guide of limited application. The remainder of the Court’s statement provides other criteria and distinguishing features that may be useful in determining whether a provision is mandatory or voluntary, although the Court certainly did not assert each to be an individual test. Perhaps, as in *Borg-Warner*, all of them must be met. The criteria are that a provision may be voluntary if it relates only to the procedure to be followed by the employees among themselves; if it does not settle a term or independent unions instead of the company dominated unions that had become prevalent. See, e.g., 78 Cong. Rec. 3443, 3679, 12041 (1934) (remarks of Senator Wagner). The strike ballot would in no way affect the independence of the union from the company; it would merely make the union more dependent upon the desires of the union members. On the other hand, the strike ballot would weaken the independence of the union from the employees it represents. However, that result may be beneficial; perhaps much of the current trouble with corrupt and irresponsible unions is a result of the unions being too independent of the men they represent.

Also, there is little question that the strike ballot would weaken the independence of the union to direct and control the employees without consideration of the employer’s needs. However, limiting of this type of union independence is one of the employer’s purposes when he sits down with the union representatives to bargain collectively. If weakening this type of independence was the test for deciding whether a particular provision is a term or condition of employment, many of the recognized mandatory objects of collective bargaining would not come within the phrase “terms and conditions of employment.” For example, grievance procedure and arbitration clauses, though usually sought by unions, limit the union’s independence in that they set up a procedure for settling disputes. A management functions clause limits a union’s independence by removing certain subjects from union consideration. A no-strike clause limits a union’s independence to call a strike. All of these clauses are mandatory subjects. See, e.g., Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945) (grievance procedure); NLRB v. Boss Mfg. Co., 118 F.2d 187 (7th Cir. 1941) (arbitration clause); NLRB v. American Nat’l Ins. Co., 343 U.S. 395 (1952) (management functions clause); Shell Oil Co., 77 N.L.R.B. 1306 (1948) (no-strike clause).

Perhaps Congress intended that employees be allowed to actually participate in the affairs of the labor organization representing them. And perhaps the strike ballot is merely a device for allowing the employees to do so. The act provides: “It is the purpose and policy of this chapter . . . to protect the rights of individual employees in their relations with labor organizations,” and a “labor organization” is “any organization . . . in which employees participate and which exists for the purpose . . . of dealing with employers . . . ” Labor Management Relations Act §§ 1, 2(5), 61 Stat. 136, 138 (1947), 29 U.S.C. §§ 141(b), 152(5) (1952). Add to this the fact that the act specifically provides for strike ballots in two situations, Labor Management Relations Act §§ 203(c), 209(b), 61 Stat. 154, 156 (1947), 29 U.S.C. §§ 173(c), 179(b) (1952), and the conclusion can be reached that Congress intended the strike ballot to be a term or condition of employment well within the collective bargaining system provided for in the statute.

59. Arguably, the ballot clause does not relate “only to the procedure to be followed by the employees among themselves before their representatives may call a strike or refuse a final offer.” First, it does not set up a procedure that must be followed prior to all strikes. It merely deals with economic strikes, so that, should an employer commit an unfair labor practice, the union would be free to call a strike immediately without having to conduct a strike ballot. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1955) (no-strike clause did not waive
the employee's right to strike against unfair labor practice). But see, Mid-West
Metallic Products Inc., 121 N.L.R.B. No. 164, 42 L.R.R.M. 1552 (1958) (employees
violating no-strike clause limiting right to strike for period necessary to complete
the grievance procedure, about 5 days, in protest against an unfair labor practice
may be discharged). This case was specifically limited to its facts. 42 L.R.R.M.
at 1555.

Second, to say that the ballot clause relates "only to the procedure to be followed
by the employees among themselves" is a gross over-simplification. The existence of
a strike ballot clause in a collective bargaining contract also influences the pro-
cedures that the union and the employer follow. In order to avoid an adverse
vote, the union must convince the employees that more can be gained by going
on strike than by accepting the employer's offer, and vice-versa with the employer.
The attempt by employer and union to win the employees to their respective view-
points was envisioned by the House Committee when it reported on H.R. 3020,
80th Cong., 1st Sess. § 2(11) (1947), which contained a strike ballot.

At least the more irresponsible strikes, those called without due considera-
tion, those concerning small issues, and those that leaders call without consult-
ing their constituents, will be greatly reduced by requiring strike votes after
each side has had an opportunity to state its position and to urge its fairness
upon those called upon to do the striking.


Also, the employer may be able to tailor his offer more to the needs of his em-
ployees, rather than to the demands of the union which may have other motives
than the welfare of the particular employees for which the union is bargaining.
This situation is most likely to occur in the area of labor racketeering. See, e.g.,
BUREAU OF NATIONAL AFFAIRS, THE McCLELLAN COMMITTEE HEARINGS — 1957,
at 326 (1958). However, a union's nonrepresentation of the desires of its members
also occurs outside the area of labor racketeering. See, e.g., Wexin, UNION De-
CISION-MAKING IN COLLECTIVE BARGAINING (1951). The author distinguishes three
elements, "the 'union,' the leadership, and the rank and file membership." Id. at 6.

[T]he goals of the three elements involved in trade unionism are often at
variance with each other. A union shop clause, giving a higher degree of
security to the 'union' may be obtained only at the sacrifice of an immediate
wage increase that would accrue to the rank and file.

Id. at 8. See also the remarks of Representative Hartley in discussing the Labor
Management Relations Act, 93 Cong. Rec. 3425 (1947), and those of Senator Ball,
id. at 4432.

60. But what test is to be used to see whether a subject "settles" a term or
condition of employment? The cases have not been clear. Partially responsible for
this lack of clarity is the difficulty of analogizing from one provision to another,
which the controversy leaves the area of wages and hours. Courts have rejected the
argument that the statutory definition should be restricted to the historical sub-
jects of collective bargaining. See, e.g., NLRB v. Niles-Bement-Pond Co., 199 F.2d
713 (2d Cir. 1952) (christmas gifts); W. W. Cross & Co. v. NLRB, 174 F.2d 875
(1st Cir. 1949) (group insurance program). However, courts have considered the
fact that a certain provision is often included in collective bargaining contracts
as a factor in determining whether a provision is a term or condition of employ-
ment. See, e.g., NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 405-07 (1952)
(management functions clause); Allis-Chalmers Mfg. Co. v. NLRB, 213 F.2d 374
(7th Cir. 1954). Another possible test that courts have suggested is that the
employer must bargain about "all matters which affect his employees as a class." See,
e.g., NLRB v. Barrett Co., 135 F.2d 959, 961 (7th Cir. 1943); NLRB v. Montogmy
Ward & Co., 133 F.2d 676, 884 (9th Cir. 1943) (cases involving
conduct of a party to a collective bargaining relationship). Still another test some
courts use is whether the provision would be an inducement for an employee to
accept a job with the company that had the provision instead of a company that
did not. See, e.g., Richfield Oil Corp. v. NLRB, 231 F.2d 717 (D.C. Cir.), cert.
the employees and their unions; 61 and, if it enables the employer to deal with its employees rather than with their statutory representative. 62 Again, these criteria would be inapplicable in many situations in which the parties are attempting to determine whether or not a particular provision is mandatory. Also, assuming that the tests are applicable, their application would be extremely difficult. For example, assuming that these were the existing rules before

denied, 351 U.S. 909 (1956) (employee stock purchase plan). But no test has been used extensively. Application of any of the above tests to the strike ballot would lead to the conclusion that the strike ballot is a term or condition of employment. To the extent that the ballot clause limits strikes it certainly "settles" a condition of employment. And the advisory strike ballot may tend to eliminate strikes by making the union more hesitant to call a strike should the employees vote to accept the employer's offer. This seems especially so since the strike to enforce union bargaining demands would be an economic strike, as distinguished from an unfair labor practice strike. In the former, the employer can hire replacements without having to give jobs back to the old employees when the strike is over; in the latter he cannot. See, e.g., NLRB v. Wheeling Pipe Line, Inc. 229 F.2d 391 (6th Cir. 1955); NLRB v. Jackson Press, Inc., 201 F.2d 541 (7th Cir. 1953).

61. Arguably, the ballot clause deals with more than just the relations between the employees and their unions. It also deals with the relations between the employer and his employees. The way in which the employer has treated his employees in the past, and the reasonableness of his final offer may influence their vote. Since the ballot clause in Borg-Warner would have prohibited the employees from striking for 72 hours immediately subsequent to the employer's submission of his final offer, it regulated for that 72 hours the relations between the employer and his employees in the same way that a no-strike clause does. In fact, it is arguable that although there are differences between a no-strike clause and a ballot clause, they cannot be distinguished. See, e.g., Mr. Justice Harlan dissenting in Borg-Warner:

[S]ince a 'no-strike' clause is something about which an employer can concededly bargain to the point of insistence . . . I find it difficult to understand even under the Court's analysis of this problem why the 'ballot' clause should not be considered within the area of bargaining described in § 8(d). It affects the employer-employee relationship in much the same way, in that it may determine the timing of strikes or even whether a strike will occur by requiring a vote to ascertain the employees' sentiment prior to the union's decision. 356 U.S. at 35. The court of appeals in Borg-Warner had decided that the strike ballot was within the statutory definition of collective bargaining. 236 F.2d 896 (6th Cir. 1956). It is interesting to note that Mr. Justice Burton, the author of the majority opinion in Borg-Warner, has since retired; and that Mr. Justice Stewart, his replacement, was one of the three judges on the court of appeals deciding Borg-Warner.

62. The ballot clause does allow the employer to deal to a limited extent with the employees rather than with the statutory bargaining representative, but only if the union agrees, as of course it need not, to allow the employer to submit his final offer to the employees for a strike ballot. But even after a union agrees to a strike ballot the employer would not be able to deal with the employees via the offer and counteroffer that constitutes collective bargaining. He would still have to deal primarily with the union, for he has to try to reach a satisfactory final proposal with them. And only after the point of impasse has been reached does the employer "in effect," deal with his employees, that is, they are allowed to vote whether or not to strike. The Court cited Medo-Photo Corp. v. NLRB, 321 U.S. 678 (1944), which involved an employer who made his offers and proposals directly to his employees, and in so doing bypassed the union. The situation created by a strike ballot clause is clearly distinguishable.
the *Borg-Warner* case was decided, and that no case had yet applied them to the strike ballot, a strong argument could be made that the strike ballot does not violate the criteria.\(^{63}\)

Fifth, the rule will reduce, insofar as nonmandatory subjects are concerned, the advantage a party in a strong bargaining position has over a weaker opponent. In this respect, the rule of the instant case seems to create a contradictory situation. Referring to subjects that are not within the statutory definition of collective bargaining, the Court stated that: "each party is free to bargain or not to bargain, and to agree or not to agree."\(^{64}\) However, as the dissent pointed out:

... I am unable to grasp a concept of ‘bargaining’ which enables one to ‘propose’ a particular point, but not to ‘insist’ on it as a condition to agreement. The right to bargain becomes illusory if one is not free to press a proposal in good faith to the point of insistence.\(^{65}\)

For all practical purposes, a party will not be able to bargain about a subject that is not within the statutory definition of collective bargaining.\(^{66}\) If a party cannot insist to the point of impasse, the other party need neither seriously consider the proposal nor suffer the consequences of coming away from the bargaining table without a collective bargaining contract, with the result that there may be no inducement to bargain about the proposal whatsoever.

However, it is arguable, contrary to the dissenters’ position, that the right to bargain becomes illusory when the parties are allowed to press a proposal to the point of insistence. Then the party in the stronger bargaining position can insist that the opposing party accept its conditions whether or not they are within the statutory definition of collective bargaining, and the weaker party is quite often not in a position to refuse without suffering serious economic consequences.\(^{67}\) Under these circumstances, the right to bargain is indeed illusory. Therefore, the *Borg-Warner* rule should tend to remove the collective bargaining relationship slightly from the use of the threat of industrial warfare by limiting the provisions that can be insisted upon by the parties.

Sixth, the rule will create practical procedural and decisional difficulties for both the Board and the courts. Prior to the adoption

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\(^{63}\) See notes 59–62 supra.

\(^{64}\) 356 U.S. at 349.

\(^{65}\) *Id.* at 352.

\(^{66}\) This, of course, depends upon the definition of “bargaining.” It would seem that a proponent could get his opponent to accept almost any particular provision if he offered the opponent enough in return.

of the new rule, the determination whether an unfair labor practice had been committed in the process of collective bargaining was relatively simple. If the proposal that was being contested was not unlawful or in derogation of the policies of the act, and if the party had bargained in good faith, there was no unfair labor practice. Under the new rule, the procedure will be much more involved. The Board must also decide whether the challenged objective comes within the statutory definition of collective bargaining. If it does, the inquiry is ended since the proponent is allowed to insist on it to the point of impasse. On the other hand, if the objective is not within that definition, but rather within the penumbral area of voluntary subjects, the next question is whether the proponent has driven the collective bargaining relationship to an impasse by insisting upon the provision too long. Here the Board will have to weigh many factors. It must first decide how long a party can insist without creating an impasse; surely this is not measurable by days or number of bargaining sessions. And yet, unless a set standard is established, the parties involved in such a situation will have no means of knowing at what point an impasse is reached. Therefore, the Board may have to set definite standards in terms of time or number of bargaining sessions. The Board must also decide whether the parties are required to pass over the objectionable provision and discuss the other provisions of the contract, or whether an impasse can be reached when only the one provision has been discussed. The Borg-Warner rule may also affect the good faith rule. A literal reading of the statute does not indicate that a party must bargain in good faith about voluntary subjects. Indeed, a party need not bargain about a voluntary subject at all, but if there is bargaining about one, fine distinctions will have to be drawn, in particular situations, as to whether “bad faith” bargaining over that subject relates only to it or to the entire proposed collective bargaining agreement. Bad faith bargaining over a

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68. Borg-Warner involved an employer that insisted upon the strike ballot as a condition of agreement. Possibly the case can be limited to those situations where a party is insisting upon a voluntary subject as a condition of agreement. However, it is submitted that there is no practical difference between insisting upon a proposal as a condition of agreement and insisting upon it as a counterproposal.

69. It is interesting to note that since the introduction of H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947), we have traveled a complete circle. H.R. 3020, contained a provision specifying what subjects could be bargained about. The Senate amendments eliminated the provision. The specified provisions are now back. The same thing may happen to the number of meetings that the parties must hold in an attempt to arrive at a contract.

70. The statute provides that the parties must meet and confer in good faith with respect to mandatory subjects. Labor Management Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1952). There is an implication that the parties do not have to meet and confer in good faith about subjects that are not mandatory.
voluntary subject could be deemed refusal to bargain in good faith on the other provisions of the proposed agreement. Finally the Board may have to lay down a test for deciding what constitutes a term and condition of employment so that when a new term is raised by a party to a collective bargaining relationship, there is some bench mark with which to compare it. These are some of the problems that the Board or courts will probably have to resolve so that the parties in a collective bargaining relationship will know how to conduct themselves.

IV. CONCLUSION

While it is arguable that the Borg-Warner rule cannot be reconciled with the legislative history of the labor acts, that the prior cases do not support the rule, that the rule violates some of the policies of the act, and that the rule raises a great many difficult problems, it is also arguable that the policy that collective bargaining be conducted at the bargaining table with as little use of the threat of industrial warfare as possible will be more nearly realized by the use of the Borg-Warner rule. Therefore, the question becomes one of balancing the various factors in an attempt to achieve the "best" result. Probably the Court formulated the new rule because it found the good faith standard did not place the parties on as near equal terms as possible at the bargaining table. Possibly the Court felt that it needed a device to prevent the stronger party in the collective bargaining relationship from forcing provisions on the other party that would act to eliminate his effectiveness. This new rule allows the Board and the courts to place these types of subjects in the voluntary category. Perhaps the new rule will raise a great many problems as yet unthought of that may make its application impractical. Perhaps the parties will be able to "bend" the new rule to serve their own purposes in ways that may necessitate returning to the single standard of good faith. But most of this is speculation. Whether the Court's apparent aim, to further approach the ideal that industrial disputes should be settled by bargaining without resort to industrial warfare, will be accomplished is a question that can be answered only after experience under the new rule has accumulated. Only then can the Borg-Warner rule be appraised in the light of its actual effect on the parties in the collective bargaining relationship.

71. A possible example of this situation might be: The employer proposes a voluntary subject, the union accepts it, using the voluntary subject as a quid pro quo to attain a desired objective. Bargaining proceeds, and all of the terms of the contract are agreed to. At this point the union refuses to execute the contract unless the voluntary provision is deleted from it. Had the subject in question been a mandatory subject, such bargaining would probably constitute an unfair labor practice.