

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED
JAN 21 2011

LAURA ROY

COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED95131

Motion filed DMC

AMERICAN FEDERATION OF TEACHERS, LOCAL 420 OF THE **91766**
AMERICAN FEDERATION OF TEACHERS, MARY ARMSTRONG, and
BYRON CLEMENS,
Plaintiffs/Appellants,

FILED

MAY 18 2011

v.

Thomas F. Simon

CLERK, SUPREME COURT

RICHARD LEDBETTER, PAUL SHAUGHNESSEY, GERARD
HUTCHINSON, HATTIE JACKSON, TERRY NELSON, DON POHL,
TRIP ZUMWALT, JOHN COSTELLO, and THE BOARD OF
EDUCATION OF THE CONSTRUCTION CAREER CENTER CHARTER
SCHOOL DISTRICT,

Defendants/Respondents.

AMICUS CURIAE BRIEF OF MISSOURI NATIONAL EDUCATION
ASSOCIATION AND ST. LOUIS POLICE OFFICERS' ASSOCIATION,
FRATERNAL ORDER OF POLICE, LODGE 68, IN SUPPORT OF
PLAINTIFFS/APPELLANTS AMERICAN FEDERATION OF
TEACHERS, LOCAL 420 OF THE AMERICAN FEDERATION OF
TEACHERS, MARY ARMSTRONG, AND BYRON CLEMENS

SCHUCHAT, COOK & WERNER

MISSOURI NATIONAL
EDUCATION ASSOCIATION

St. Louis, Missouri (MBE 29069)

St. Louis, Missouri (MBE 30883)

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TABLE OF CONTENTS

TABLE OF CONTENTSii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

JURISDICTIONAL STATEMENT3

STATEMENT OF FACTS.....3

POINTS RELIED ON4

ARGUMENT.....6

CONCLUSION 11

CERTIFICATE OF COMPLIANCE.....23

CERTIFICATE OF SERVICE23

APPENDIX.....24

TABLE OF AUTHORITIES

Constitutional Provisions

Mo. Const. Art. I, Section 29..... 1, 2, 4,
5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 17, 18, 20, 21

NJ Const. Art. I, Para. 19..... 9

Statutes

§§105.500, *et seq.*, RSMo..... 2

§160.405.5(3), RSMo. 2

§§168.104, *et seq.*, RSMo..... 2

5 U.S.C. §9701(b)(1)-(4) (Supp. II 2002) 20

Labor-Management Relations Act, 80 P.L. 101, 61 Stat. 136
(June 23, 1947)..... 15, 16

National Labor Relations Act, 74 P.L 198; 49 Stat. 449
(July 5, 1935)..... 12, 14,
15, 17, 18

Cases

Alumax Foils, Inc. v. City of St. Louis, 939 S.W.2d 907
(Mo. banc 1997) 9

Angoff v. M & M Management Corp., 897 S.W.2d 649, 654

(Mo. Ct. App. 1995)	9
<i>Burnside v. Wand</i> , 71 S.W. 337 (Mo. 1902)	14
<i>Centene Plaza Redevelopment Corp. v. Mint Props.</i> ,	
225 S.W.3d 431 (Mo. 2007).....	5, 14
<i>City of Springfield v. Clouse</i> , 206 S.W.2d 539, 543 (Mo. 1947)	8, 15
<i>Comite Organizador de Trabajadores Agricolas v. Levin</i> ,	
515 A.2d 252 (N.J. Super. 1985).....	10, 19
<i>Comite Organizador de Trabajadores Agricolas v. Molinelli</i> ,	
552 A.2d 1003 (N.J. 1989)	9, 19
<i>Cooper v. Nunley Sun Printing Co.</i> , 175 A.2d 639 (N.J. 1961)	4, 10
<i>David Ranken, Jr. Tech. Inst. v. Boykins</i> , 816 S.W.2d 189	
(Mo. banc 1991)	9
<i>Independence-NEA v. Independence School District</i> ,	
223 S.W.3d 131 (Mo. 2007).....	1, 2, 4,
5, 6, 7, 8, 10, 11, 12, 13, 15, 21	
<i>Independent Dairy Workers Union of Hightstown v. Milk Drivers</i>	
& Dairy Employees Local 680, 127 A.2d 869 (N.J. 1956) ...	4, 9
<i>Johnson v. Christ Hospital</i> , 202 A.2d 874 (N.J. Super. 1964),	
<i>aff'd</i> , 211 A.2d 376 (N.J. 1965).....	4, 10,
19	
<i>National Licorice Co. v. NLRB</i> , 309 U.S. 350 (1940).....	17
<i>Nat'l Treasury Employees Union v. Chertoff</i> , 452 F.3d 839	

(D.C. Cir. 2006)	19, 20
<i>NLRB v. Pilling & Son</i> , 119 F.2d 32 (3 rd Cir. 1941)	17
<i>NLRB v. Poultrymen's Service Corp.</i> , 138 F.3d 204 (3 rd Cir. 1943)	17
<i>NLRB v. Whittier Mills</i> , 111 F.2d 474 (5 th Cir. 1940)	17
<i>Quinn v. Buchanan</i> , 298 S.W.2d 413 (Mo. 1957).....	4, 6, 7, 8
<i>Smith v. Aurthur C. Baue Funeral Home</i> , 370 S.W.3d 249 (Mo. 1963).....	7
<i>S. Metro. Fire Prot. Dist. v. City of Lee's Summit</i> , 278 S.W.3d 659 (Mo. 2009).....	14
<i>State ex rel. Philipp Transit Lines, Inc. v. Public Service Com.</i> , 552 S.W.2d 696 (Mo. 1977).....	5, 14, 18
<i>State of Missouri v. Bern</i> , 322 S.W.2d 175, 177-79 (Mo. Ct. App. 1959)	9

Administrative Materials

<i>Atlas Mills, Inc. and Textile House Workers Union No. 2269</i> , 3 N.L.R.B. 10 (July 14, 1937)	16, 17
<i>S.L. Allen & Company, Inc. and Federal Labor Union</i>	

<i>Local No. 18526, 1 N.L.R.B. 714 (May 13, 1936)</i>	16, 17
<i>Timken Silent Automatic Co. and Ormsbee, 1 N.L.R.B. 335</i> (March 17, 1936).....	16
NATIONAL LABOR RELATIONS BOARD, First Annual Report (1936)	5, 17, 24

Secondary Sources

<i>Black's Law Dictionary (8th Ed. 2004)</i>	13
<i>Merriam-Webster Online Dictionary, www.merriam-webster.com</i> .	13
<i>Webster's Third New International Dictionary (1993)</i>	12

**AMICUS CURIAE BRIEF OF MISSOURI NATIONAL EDUCATION
ASSOCIATION AND ST. LOUIS POLICE OFFICERS ASSOCIATION,
FRATERNAL ORDER OF POLICE, LODGE 68, IN SUPPORT OF
PLAINTIFFS/APPELLANTS AMERICAN FEDERATION OF
TEACHERS, LOCAL 420 OF THE AMERICAN FEDERATION OF
TEACHERS, MARY ARMSTRONG, AND BYRON CLEMENS**

INTRODUCTION

Amicus Curiae Missouri National Education Association represents approximately 30,000 teachers and other employees of public school districts in collective bargaining throughout the State of Missouri. Amicus Curiae St. Louis Police Officers' Association, Fraternal Order of Police, Lodge 68, represents approximately 1,200 police officers in collective bargaining in the City of St. Louis. The issues presented in this case are complicated and of great public importance. At stake is the meaning of the state constitutional right to collective bargaining recognized by the Missouri Supreme Court in *Independence-NEA v. Independence School District*, 223 S.W.3d 131 (Mo. 2007). This is the first appeal to address the meaning of public sector bargaining since *Independence* was decided.

Article I, Section 29 of the Missouri Constitution provides, "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing." The Supreme Court in *Independence* overruled 60 years of precedent and held that Article I, Section 29 applies to public as well as private employees and therefore, public school teachers have a constitutional right to

engage in collective bargaining. 223 S.W.3d 131 (Mo. 2007). In the absence of a statute implementing the constitutional right of collective bargaining for teachers,¹ the Court charged school districts with the obligation to set the framework for teachers “to bargain collectively through representatives of their own choosing.” *Id.* at 136. The nature of this mandate has not been resolved by any appellate court.

This appeal presents the question whether Defendants/Respondents violated Article I, Section 29 by promising repeatedly to make counter-offers with respect to salaries but instead imposing salaries unilaterally; and negotiating a comprehensive tentative agreement, then later withdrawing the tentative agreement and refusing to bargain at all about teacher tenure² or other subjects that Defendants in their sole discretion decide should be matters of “Board policy.” The trial court found that Defendants’ conduct would, in the private sector, be considered an unlawful refusal to bargain in good faith. (Slip Op., at 4; L.F. at

¹ The Public Sector Labor Law, §§105.500-.520, RSMo., implements the constitutional right of collective bargaining for public employees other than public school teachers, police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, and college and university teachers. §105.510, RSMo.; *Independence*, 223 S.W.3d at 136 & n.2.

² Charter school teachers are not covered by the Missouri Teacher Tenure Act. *See* §160.405.5(3), RSMo.; §§168.104, *et seq.*, RSMo.

72).³ However, the Trial Court held that public employers in Missouri have no affirmative duty to bargain at all, let alone bargain in good faith, with the representatives selected by their employees. (Slip Op., at 5; L.F. at 73).⁴

JURISDICTIONAL STATEMENT

Amici Missouri National Education Association and St. Louis Police Officers' Association hereby adopt and incorporate by reference the Jurisdictional Statement of Plaintiffs/Appellants American Federation of Teachers, Local 420 of the American Federation of Teachers, Mary Armstrong, and Byron Clemens.

STATEMENT OF FACTS

Amici Missouri National Education Association and St. Louis Police Officers' Association hereby adopt and incorporate by reference the Statement of Facts of Plaintiffs/Appellants American Federation of Teachers, Local 420 of the American Federation of Teachers, Mary Armstrong, and Byron Clemens.

³ Amici will use the initials "L.F." to refer to the Legal File.

⁴ The Court purported to ***grant*** judgment for Plaintiffs on Count I of their Petition for Declaratory Judgment, but then proceeded to declare that Defendants had no duty to bargain in good faith, and Plaintiffs had no right to compel them to do so. (Slip Op. at 10, L.F. at 78). It is clear despite the wording of the judgment that Plaintiffs did not prevail on Count I.

POINTS RELIED ON

Point I: The Trial Court Erred as a Matter of Law in Issuing a Declaratory Judgment that Defendants Had No Duty to Bargain with Plaintiffs, Because Article I, Section 29 of the Missouri Constitution Imposes on Employers an Affirmative Duty to Bargain with the Exclusive Representative Selected by their Employees, in that *Independence-NEA v. Independence School District* Overruled *Quinn v. Buchanan*, Which Had Held that Employers have no Affirmative Duty to Bargain.

Mo. Const. Art. I, Section 29

Independence-National Education Association v. Independence School District,
223 S.W.3d 131 (Mo. 2007)

*Independent Dairy Workers Union of Hightstown v. Milk Drivers & Dairy
Employees Local 127* 127 A.2d 869 (N.J. 1956)

Cooper v. Nunley Sun Printing Co., 175 A.2d 639 (N.J. 1961)

Johnson v. Christ Hospital, 211 A.2d 376 (N.J. 1965)

Point II: The Trial Court Erred as a Matter of Law in Issuing a Declaratory Judgment that Defendants' Refusal to Bargain in Good Faith was Lawful, Because Article I, Section 29 of the Missouri Constitution Requires Employers to Bargain with the Exclusive Representative of their Employees in Good Faith, in that "Collective Bargaining" is a Term of Art that Necessarily Means and Historically Has Been Understood to Mean Bargaining in Good Faith with a Bona Fide Intent to Reach Agreement .

Mo. Const. Art. I, Section 29

Independence-National Education Association v. Independence School District,
223 S.W.3d 131 (Mo. 2007)

Centene Plaza Redevelopment Corp. v. Mint Props., 225 S.W.3d 431 (Mo. 2007)

State ex rel. Philipp Transit Lines, Inc. v. Public Service Com., 552 S.W.2d 696
(Mo. 1977)

NATIONAL LABOR RELATIONS BOARD, First Annual Report (1936)

ARGUMENT

Point I: The Trial Court Erred as a Matter of Law in Issuing a Declaratory Judgment that Defendants Had No Duty to Bargain with Plaintiffs, Because Article I, Section 29 of the Missouri Constitution Imposes on Employers an Affirmative Duty to Bargain with the Exclusive Representative Selected by their Employees, in that *Independence-NEA v. Independence School District* Overruled *Quinn v. Buchanan*, Which Had Held that Employers have no Affirmative Duty to Bargain.

The Trial Court’s interpretation of *Independence* reduces this landmark ruling to a nullity. According to the Trial Court, *Independence* changes nothing.

The Trial Court begins its decision by quoting the *dissent* in *Independence*. (Slip Op. at 1, L.F. at 69). Its description of the majority opinion fairly drips with sarcasm. (*Id.*) The Trial Court does find that “defendants did not bargain in good faith, as that obligation is generally understood in federal labor law.” (Slip Op. at 4, L.F. at 72). However, relying on *Quinn v. Buchanan*, 298 S.W.2d 413, 419 (Mo. 1957), the Trial Court concludes that Defendants had no affirmative duty under Article I, Section 29 of the Missouri Constitution to bargain with Plaintiffs. (Slip Op. at 5, 10; L.F. at 73, 78).

The Trial Court ignores, however, that *Quinn*, decided fifty years before *Independence*, is impliedly overruled by *Independence*.⁵ Accordingly, the Trial Court's decision resting on *Quinn* is erroneous as a matter of law.

Just like the trial court in the present case, the trial court in *Independence* found that the Independence School District “had refused to bargain collectively with the unions. . . , but concluded that Missouri law allowed such actions.” *Independence*, 223 S.W.3d. at 134-35. The Supreme Court disagreed and reversed, holding that ***the school district had violated Article I, Section 29 by unilaterally imposing a new bargaining procedure without bargaining*** with the unions representing its employees. *Independence*, 223 S.W.3d at 133 (emphasis added). *Independence* left open for future cases the precise contours of the employer's affirmative duty to bargain; but it unquestionably established the *existence* of such a duty, even in the absence of an implementing statute. The Court explained, “the public sector labor law is read to provide procedures for the exercise of this right for those occupations included, but not to preclude omitted occupational groups from the exercise of the right to bargain collectively, because all employees have that right under article I, section 29.” *Id.* at 136.

Quinn's holding that employers have no duty to bargain is totally

⁵ *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.3d 249, 254 (Mo. 1963), which relies on *Quinn*, is also impliedly overruled by *Independence*.

inconsistent with *Independence* and is no longer good law.⁶ According to *Quinn*, Article I, Section 29 does no more than protect the right of employees “to organize for the purpose of collective bargaining through representatives of their own choosing.” 298 S.W.2d at 420. Employers may be enjoined from coercing employees in the exercise of their rights under Article I, Section 29, the Court held, but they may not be compelled to come to the table. *Id.* In reaching this conclusion, *Quinn* relied on *City of Springfield v. Clouse*, 206 S.W.2d 539, 543 (Mo. 1947), which was expressly overruled by *Independence*. That alone ought to have given the Trial Court reason to doubt *Quinn*’s continuing validity.

An employee’s constitutional right to bargain collectively without a corresponding duty by the employer to bargain is no constitutional right at all. The Trial Court recognizes as much. (Slip Op. at 6; L.F. at 74) (“Plaintiffs argue with some force that the right recognized in § 29 is an empty thing without a correlative duty on the part of the employer to bargain in good faith.”). What

⁶ Even if *Quinn* is somehow still good law, it is distinguishable from the present case, because it involved a private sector employer. The Court in *Quinn* noted that Article I, Section 29 is part of the Constitution’s Bill of Rights, which may not be taken away by *government*. 298 S.W.2d at 417. In the absence of legislation or a common law remedy, *Quinn* held, an individual employee could not enforce his rights under Article I, Section 29 against a *private* employer. *Id.* This case, of course, involves a public employer.

good does it do for employees to choose a representative to make bargaining proposals to their employer if the employer can simply ignore them and walk away? The Trial Court's construction of Article I, Section 29 leads to the absurd result that Article I, Section 29 does nothing more than duplicate the right of free speech. This view violates the rule disfavoring absurd interpretations. *David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 192 (Mo. banc 1991), *overruled on other grounds by Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo. banc 1997); *Angoff v. M & M Management Corp.*, 897 S.W.2d 649, 654 (Mo. Ct. App. 1995); *State of Missouri v. Bern*, 322 S.W.2d 175, 177-79 (Mo. Ct. App. 1959).

Over fifty years ago, the New Jersey courts similarly concluded, even in the absence of implementing legislation, that their state constitution⁷ imposes an affirmative duty on employers to bargain collectively. *Independent Dairy Workers Union of Hightstown v. Milk Drivers & Dairy Employees Local 680*, 127 A.2d 869 (N.J. 1956); *Comite Organizador de Trabajadores Agricolas v. Molinelli*, 552 A.2d 1003, 1008 (N.J.1989). “[T]o impose no affirmative duty upon an employer to bargain collectively with the representatives of his employees

⁷ Article I, paragraph 19 of the New Jersey Constitution provides, “Persons in private employment shall have the right to organize and bargain collectively. . . .” Although this provision and the cases construing it pertain only to the private sector, their logic is identical to that which the Court should apply in this case.

renders impotent the rights guaranteed to employees under the constitutional provision.” *Johnson v. Christ Hospital*, 202 A.2d 874 (N.J. Super. 1964), *aff’d*, 211 A.2d 376, 377 n.1 (N.J. 1965) (“Courts would be derelict in the discharge of their historic function if they allowed a right so created to fail for lack of a means of enforcement.”) *Accord Cooper v. Nunley Sun Printing Co.*, 175 A.2d 639, 643 (N.J. 1961) (court “needs no legislative implementation to afford an appropriate remedy to redress violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.”); *Comite Organizador de Trabajadores Agricolas v. Levin*, 515 A.2d 252, 255 (N.J. Super. 1985) (“The Constitution guarantees the right to organize and bargain collectively. To say that it does not confer upon the employer a corresponding duty to likewise bargain is preposterous.”).

If Article I, Section 29 did not impose an affirmative duty on employers to bargain, there would have been no reason for the Court in *Independence* to reverse the trial court’s ruling holding precisely the opposite. Based on the holding of *Independence* and the logic of the foregoing New Jersey cases, this Court should recognize that *Quinn* is no longer good law. Whatever the “duty to bargain” means, employers unquestionably have a duty to bargain.

Point II: The Trial Court Erred as a Matter of Law in Issuing a Declaratory Judgment that Defendants' Refusal to Bargain in Good Faith was Lawful, Because Article 1, Section 29 of the Missouri Constitution Requires Employers to Bargain with the Exclusive Representative of their Employees in Good Faith, in that "Collective Bargaining" is a Term of Art that Necessarily Means and Historically Has Been Understood to Mean Bargaining in Good Faith with a Bona Fide Intent to Reach Agreement .

A. Introduction

The obligation of the employer to bargain in good faith is inextricably part of the concept of collective bargaining incorporated in Article I, Section 29. "Collective bargaining" is a term of art that has historically and universally been understood in this country to mean negotiations in good faith with a bona fide intent to reach a labor agreement. Other than the Trial Court, no other judicial or administrative authority anywhere has interpreted this term to permit an employer to refuse to bargain with a lawfully recognized union or to bargain in bad faith.

A variety of legal authorities have recognized that the "right to bargain collectively" is meaningless if it does not inherently encompass a duty to bargain in good faith, in a bona fide attempt to reach agreement. While not the specific issue addressed, this view of collective bargaining is implied in the *Independence* decision itself, as well as the dictionary definitions it relied on. It was also the

view of collective bargaining well established by the National Labor Relations Board, the federal agency responsible for private sector collective bargaining, during the ten years between the enactment of the National Labor Relations Act and the adoption of Article I, Section 29. In addition, the state courts of New Jersey construed that state's constitutional right of collective bargaining to necessarily include a requirement of good faith, and the D.C. Circuit Court of Appeals reached the same conclusion in a recent decision interpreting the undefined phrase "collective bargaining" in the Homeland Security Act.

B. The Missouri Supreme Court in *Independence* and the dictionary definitions it relies on suggest that collective bargaining inherently entails a mutual effort by both parties to reach agreement.

The *Independence* decision does not discuss the concept of bargaining in "good faith." It was unnecessary for the Supreme Court to delineate the precise contours of the duty to bargain, because the school district stipulated that its unilateral adoption of a bargaining policy "constituted a refusal to bargain collectively." 223 S.W.3d at 134. However, the Court does note, "The point of bargaining, of course, is to reach agreement." *Id.* at 138. The Court also quotes two dictionary definitions of "collective bargaining." One is "'negotiation for the settlement of the terms of a collective bargaining agreement between an employer or group of employers on one side and a union or number of unions on the other.'" *Id.* at n. 6, quoting *Webster's Third New International Dictionary* (1993). The

other is “negotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits.” 223 S.W.3d at 138 at n.6, *quoting Black’s Law Dictionary* (8th Ed. 2004). To take dictionary definitions one step further, Merriam-Webster Online Dictionary defines “negotiate” as “to confer with another so as to arrive at the settlement of some matter; . . . to arrange for or bring about through conference, discussion, and compromise.” www.merriam-webster.com. This same source lists the following synonyms for “negotiation:” “accommodation, compromise, give-and-take-concession.” *Id.*

The Supreme Court observes that a public employer “is free to reject any and all proposals made by the employees.” *Independence*, 223 S.W.3d at 137. It is illogical to leap from this premise to a conclusion that the employer does not have to bargain at all or may do so in bad faith⁸. The Supreme Court in *Independence* does not in any way suggest this leap of logic. To the contrary, its observations about collective bargaining and the dictionary definitions of “collective bargaining” it relies on all contemplate that the parties will make a bona fide, good faith effort to reach agreement.

⁸ Private employers also are not required to reach agreement, but as will be discussed below, they are required to bargain in good faith.

C. If there is any ambiguity as to the meaning of the Article I, Section 29 right to bargain collectively, it must be resolved with reference to the historical context of Section 7 of the National Labor Relations Act, which had consistently been interpreted to require parties to bargain in good faith with a bona fide intent to reach agreement.

If the Court finds an ambiguity in the meaning of Article I, Section 29, it must employ rules of construction. The two applicable rules of construction are the “historical context” and “borrowed statute” rules. The historical context surrounding the adoption of a law can help determine the meaning of an undefined term in the law. *Centene Plaza Redevelopment Corp. v. Mint Props.*, 225 S.W.3d 431, 433 (Mo. 2007). *See also, S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 668 (Mo. 2009) (“The first determinative consideration is the historical context”). “[W]hen a state borrows a statute from another state and enacts it into law, the borrowing state also adopts the interpretation placed thereon prior to the time of enactment in the borrowing state by the courts of the state from which the statute was taken.” *State ex rel. Philipp Transit Lines, Inc. v. Public Service Com.*, 552 S.W.2d 696, 700 (Mo. 1977). *See also, Burnside v. Wand*, 71 S.W. 337, 350 (Mo. 1902).

The words used in Article I, Section 29 are taken from Section 7 of the National Labor Relations Act (“NLRA” or “Wagner Act”), which originally provided: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their*

own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” 74 P.L 198; 49 Stat. 449, 452 (July 5, 1935) (emphasis added).⁹ Section 8(5) of the Wagner Act provided, “It shall be an unfair labor practice for an employer -- . . . to refuse to bargain collectively with the representatives of his employees. . . .” 49 Stat. at 452-453.

Like Article I, Section 29, the Wagner Act did not define “collective bargaining” or expressly impose an obligation on employers and representatives of their employees to bargain “in good faith.” The duty to “bargain in good faith” was not codified in the federal statute until 1947.¹⁰ 80 P.L. 101, 61 Stat. 136, 142

⁹ After noting the similarity in language between Article I, Section 29; the National Industrial Recovery Act; and Section 7 of the NLRA, the Court in *Clouse* concluded that the state constitution was “undoubtedly . . . intended to safeguard collective bargaining as that term was usually understood in employer and employee relations in private industry.” 206 S.W.2d at 543. *Independence* embraced this historical understanding, but overruled *Clouse*’s conclusion that the framers could not have possibly intended to extend collective bargaining rights to public employees. 223 S.W.2d at 137, 139.

¹⁰ Section 8(d) of the Labor-Management Relations Act of 1947 defined “collective bargaining” as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and

(June 23, 1947). Nonetheless, starting in 1936, the National Labor Relations Board (“NLRB”) recognized that the duty to “bargain collectively” necessarily encompasses more than a series of sham negotiations without serious effort to reach agreement. The Board explained in a 1936 case, “Interchange of ideas, communication of facts peculiarly within the knowledge of either party, personal persuasion and the opportunity to modify demands in accordance with the total situation thus revealed at the conference is of the essence of the bargaining process.” *S.L. Allen & Company, Inc. and Federal Labor Union Local No. 18526*, 1 N.L.R.B. 714, 728 (May 13, 1936). Without an obligation to act in good faith, the Board explained, bargaining “can do nothing to prevent resort to industrial warfare.” *Id.* In another early case, the Board found the employer guilty of refusing to bargain even though it met several times with the union, because the employer “was undisposed to explore with an open mind the possibilities of making an agreement with its employees,” and it had a “fixed policy precluding” the possibility of a written labor agreement. *Timken Silent Automatic Co. and Ormsbee*, 1 N.L.R.B. 335, 342 (March 17, 1936). *See also, Atlas Mills, Inc. and Textile House Workers Union No. 2269*, 3 N.L.R.B. 10 (July 14, 1937) (“[I]f the obligation of the Act is to produce more than a series of empty discussions, bargaining must mean more than mere negotiation. It must mean negotiation with _____
confer in good faith with respect to wages, hours, and other terms and conditions of employment” 61 Stat. at 142 (emphasis added).

a *bona fide* intent to reach an agreement if agreement is possible.”) Unilateral imposition of terms by an employer, prior to a true impasse in negotiations, constitutes a refusal to bargain in good faith. *S.L. Allen*, 1 N.L.R.B. at 726-27.

The NLRB’s First Annual Report for the fiscal year ending June 30, 1936 (“Annual Report,” see Appendix) contained a detailed description of the duty to bargain in good faith, supported by citations to numerous cases. The Board explained, “Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground.” Annual Report, at 85. No matter how frequently the employer may meet, the Board explained, there is a refusal to bargain if the employer does not approach negotiations in good faith in a bona fide attempt to reach agreement. *Id.*, at 87.

During the ten years between enactment of the Wagner Act and adoption of Article I, Section 29 of the Missouri Constitution, the Courts enforced numerous NLRB decisions recognizing the duty to bargain in good faith. *See, National Licorice Co. v. NLRB*, 309 U.S. 350, 358 (1940) (affirming Board’s finding that negotiations “were not entered into by [employer] in good faith, and were but thinly disguised refusals to treat with the Union representatives”); *NLRB v. Pilling & Son*, 119 F.2d 32, 37 (3rd Cir. 1941) (“Bargaining presupposes negotiations between parties carried on in good faith”; the parties must be willing to fully discuss and justify their proposals on reason, and, upon rejecting the other’s

proposal, should make a counter-suggestion); *NLRB v. Whittier Mills*, 111 F.2d 474, 478-79 (5th Cir. 1940) (NLRA requires “a good faith negotiation. . . Though there be surface bargaining, yet if in reality there is a purpose to defeat [labor], and willful obstruction of it, there is a refusal really to bargain”); *NLRB v. Poultrymen’s Service Corp.*, 138 F.3d 204, 208 (3rd Cir. 1943) (“[W]hile bargaining in a labor dispute can and must be conducted at arm’s length, it must be conducted in good faith”).

By adopting the same language as Section 7 of the Wagner Act, the drafters of Article I, Section 29 are presumed to have known of and adopted the interpretations placed on that language by the NLRB and the federal courts between 1936 and 1945. *State ex rel. Philipp Transit Lines*, 552 S.W.2d at 700. Accordingly, the “duty to bargain” imposed by Article I, Section 29 inherently encompasses a duty to negotiate in good faith, with a bona fide intent to compromise and strive to reach agreement.

D. Other jurisdictions have found the requirement of good faith to be inherent in the concept of collective bargaining.

Two other jurisdictions have found the requirement of good faith to be inherent in the duty to bargain, even in the absence of a statute mandating good faith. The New Jersey courts interpreted their constitutional right to bargain collectively to impose on employers a duty to bargain in good faith with the goal of achieving mutual understanding. *Johnson v. Christ Hosp.*, 211 A.2d 376, 378 (N.J. 1965); *Comite Organizador de Trabajadores v. Molinelli*, 552 A.2d 1003, 1008 (N.J. 1989); *Comite Organizador de Trabajadores v. Levin*, 515 A.2d 252, 255 (N.J. Super. 1985). The *Levin* case described the duty this way:

Surely, employees do not organize in order to conduct a sewing circle. Organization and collective bargaining, terms of art in the field, imply and impel an obligation to sit down at a bargaining table and bargain in good faith. To hold any other way would emasculate the constitutional provision. This Court declines to do so.

515 A.2d at 255.

More recently, the D.C. Circuit Court of Appeals struck down regulations promulgated by the federal Department of Homeland Security (“DHS”), because they were inconsistent with the mandate of the Homeland Security Act to “ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them. . . .” *Nat’l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 843 (D.C. Cir. 2006),

quoting 5 U.S.C. §9701(b)(1)-(4) (Supp. II 2002). The regulations severely restricted the scope of subjects for bargaining and permitted DHS to abrogate collective bargaining agreements at its sole discretion. 452 F.3d at 844. The statute did not define the department’s obligation to “bargain collectively.” *Id.* at 857. The Court held that “collective bargaining” is a “term of art, defined in other statutory schemes, and DHS was not free to treat it as an empty linguistic vessel.” *Id.* at 860. At its core, the duty to bargain rests “on the assumption that each side’s evolving bargaining position will reflect a series of trade-offs that move the parties toward a mutually satisfactory endpoint.” *Id.* It is this notion of mutuality, the Court concluded, that distinguishes “collective bargaining” from mere “consultation” or “notification” required by other federal statutes. *Id.*

Although the New Jersey cases and the D.C. Circuit case post-dated the adoption of Article I, Section 29 of the Missouri Constitution, their logic about the contours of the duty to bargain is persuasive.

E. Defendants refused to bargain in good faith.

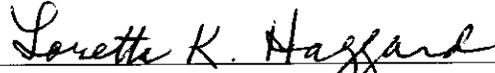
According to the stipulated facts, Defendants in the present case refused to bargain in good faith by repeatedly promising to negotiate over wages, then unilaterally imposing wages without any bargaining at all; and by withdrawing tentative agreements on non-economic subjects and refusing to even consider agreement over teacher tenure and other terms deemed to be matters of “policy.”

CONCLUSION

The Trial Court's judgment would effectively nullify the *Independence* decision and the Article I, Section 29 constitutional right it recognized for all Missouri's public employees. The lower court's decision is also devoid of any meaningful legal authority. The Supreme Court's majority opinion in *Independence* cannot credibly be construed to have recognized a hollow and meaningless constitutional right that does not require anything of public employers. All other tribunals interpreting the meaning of the term, collective bargaining, have held that it requires employers to bargain with a recognized union in good faith. Amici respectfully urge this Court to reject and reverse the Trial Court's unreasonable view of Article I, Section 29 as inconsistent with all applicable rules of construction and the mandate of the *Independence* decision.

Respectfully submitted,

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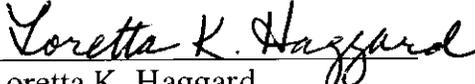


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CERTIFICATE OF COMPLIANCE

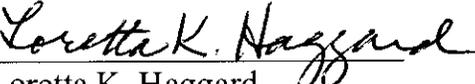
The undersigned certifies that:

- 1) this brief contains the information required by Rule 55.03;
- 2) this brief complies with the limitations contained in Rule 84.06(b);
- 3) there are 5,592 words in this brief
- 4) an electronic version of this brief will be provided to the Court, and it complies with Rule 84.06(g)


Loretta K. Haggard

CERTIFICATE OF SERVICE

The foregoing Amicus Curiae Brief of Missouri National Education Association and St. Louis Police Officers' Association, Fraternal Order of Police, Lodge 68 has been served on this 21st day of January, 2011, by electronic mail and first-class mail, postage prepaid, on George O. Suggs and James C. Chostner, Attorneys for Plaintiffs/Appellants, Schuchat, Cook & Werner, 1221 Locust St., Second Floor, St. Louis, MO 63103, gos@schuchatew.com and jcc@schuchatew.com; and on Darold E. Crotzer and Cindy Reeds Ormsby, Attorneys for Defendants/Respondents, Crotzer & Ormsby, 130 South Bemiston, Suite 300, St. Louis, MO 63105, DCrotzer@crotzerormsby.com and COrmsby@crotzerormsby.com.


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