THE EROSION OF MANAGEMENT'S RIGHTS THROUGH DECISIONS IN PLANT SHUTDOWN AND RELOCATION CASES

By

RICHARD C. EINBECKER

A DISSERTATION PRESENTED TO THE GRADUATE COUNCIL OF
THE UNIVERSITY OF FLORIDA
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE
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CHAPTER I

INTRODUCTION

Labor-management contracts in the United States have almost universally contained a provision reserving the right to the company to manage the business of the firm.

Management is charged by the owners of the enterprise with the responsibility of directing those physical, financial, mechanical, and human resources available to the firm and of operating the business in such fashion that the interests of the owners are protected and, hopefully, enhanced. Obviously such an assignment carries with it the responsibility to make decisions in the conduct of the firm's affairs. The right of management to make these decisions is, of course, not an unqualified right (e.g., legislation governing industrial safety, employment of child labor, air pollution, etc., imposes limitations on management).

This inquiry deals with an examination of the impact on management's rights of National Labor Relations Board and court decisions in plant shutdown and relocation cases. First, it seems advisable to discuss briefly the role of management and the theory of management's rights.

John R. Commons and the Transactional Approach

The contemporary nature of Dr. John R. Commons' writings has caused most of them to pass into the history of economic thought. One of his greatest contributions, perhaps recognized latently, was the

transactional approach to a theory of management he offered in his Institutional Economics published in 1934.

An institution is defined by Commons as "collective action in control, restraint, liberation or expansion of individual action."[1] The collective or group action may be public (i.e.,governmental) or private (e.g., a church, a corporation, a labor union, a bank, or a service club). These entities for collective action, however impermanent they may be, arise because of conflicts in a world of scarcity; they become the agents for the creation of order which the mutual dependence of individuals requires.

Individuals are constantly interacting with other individuals or groups of other individuals. Individual members find their group interacting with another individual, individuals, or other groups. Such interactions, or trans-actions, constitute the behavior of individuals when this behavior is taking place in a business setting. The transaction therefore becomes the fundamental "unit of economic activity."[2] All transactions can be classified as either bargaining, rationing, or managerial. These transactions "are fundamentally interdependent and together constitute the whole which we name a Going Concern."[3]

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[1] Commons, John R. Institutional Economics. New York: The Macmillan Company, 1934, pp. 64-93.

[2] Ibid., p. 55.

[3] Ibid., p. 58.

The bargaining transaction in a market economy transfers the ownership of wealth from one party to the other in the transaction. In each bargaining transaction there are at least four parties -- the actual seller, the actual buyer, the potential seller , and the potential buyer. A fifth party, government, is also involved directly or indirectly in each transaction. It is government that establishes the right of private property and the right of contract, and that also actually or potentially acts to limit or expand the powers of the parties in order to assure a fair bargain.

The bargaining transaction is presumed to be fair only if and when the four parties, "the two buyers and two sellers, are legally treated as equals by the ruling authority that decides the disputes."[4] This assumption implies that voluntary negotiation by the transacting parties takes place so that each successful party is satisfied that the bargain is equitable at the time it is consummated. If the bargain subsequently works to the disadvantage of one participant -- i.e., one party finds he has made what proves to be a bad bargain -- it is irrelevant in the absence of duress or undue coercion.

When inequality of bargaining power for some individuals or groups becomes so patently evident that unfair or inequitable bargains would appear to be inevitable, government has intervened

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[4] Ibid., p. 59.

under due process of law either to bolster the strength of the weaker party or to curtail the strength of the stronger party. Such legislation is either suppressive, preventive, regulatory or promotive in nature -- e. g., antitrust laws, tariffs, patent legislation, subsidy laws, etc. The intent, however imperfect its realization, is to make bargaining transactions fair. Frequent appeals, amendments, exemptions, revisions, and extensions of such legislation suggest how imperfectly these remedial acts deal with problems of fairness when the problems themselves are constantly changing.

A collective bargaining agreement is evidence of a bargaining transaction having been consummated between an employer and a labor union. When the National Labor Relations Board and the courts in their administration and judicial review of the statutes, add to or subtract from the provisions of the contract made between the parties there is an erosion of management's rights.

The bargaining transaction creates rights and duties for each party. There is the duty of the buyer to make payment and of the seller to deliver the goods or service agreed upon. Each has the right to expect performance by the other party.

Bargaining transactions are those business transactions that the businessman engages in when buying or selling goods and services. All of the exogenous business transactions are thus bargaining transactions.

Both rationing and managerial transactions are endogenous to the firm. The rationing transaction dictates the apportionment

of the benefits and the burden of wealth creation. The managerial transaction commands wealth to be created. Each of these involves at least two parties who, unlike those in a bargaining transaction, must be unequals. However, both parties have rights and duties, but the superior party has the privilege of command.

The employee may bargain for his wages, hours of work and conditions of employment either individually or collectively, but once he has accepted such terms of employment he is subject to such command as he has agreed may be made upon him in a managerial or rationing transaction. If abuse or unfairness with respect to the bargaining transaction occurs in the course of a managerial or rationing transaction, the aggrieved employee may quit, grieve, possibly request arbitration, demand a new bargain or even sue in equity in the courts.

The rationing transaction in a business firm is used in many activities. The board of directors approves or makes capital and operating budgets. Production scheduling, shipping schedules, setting of sales quotas, expense account limitations, determination of business hours, lunch hours and coffee breaks and other such activities are familiar examples.

The managerial transaction between non-equals also requires the party with power to command to have legal ownership. He may not command directly nor delegate this power of command without first having legal ownership of this power. Modern management uses managerial transactions to command obedience of workers so that inputs will give desired outputs in the production of wealth.

Managerial transactions always involve futurity. Rationing and bargaining transactions can be virtually instantaneous but usually involve futurity. The market, short-run and long-run time period approach to price theory in economics is an excellent example of the role of futurity in bargaining transactions. But the production of wealth is seldom instantaneous. Managerial transactions involved in wealth production are usually very numerous to accomplish the production of even the most simple goods. With futurity comes risk and uncertainty for the manager and, of course, all the problems that accompany risk and uncertainty.

Chamberlain's Approach to Management's Function

Dr. Neil W. Chamberlain, Professor of Economics at Yale University, defined management as the unique function of coordinating the bargaining inescapably present in an enterprise.[5] His definition of bargaining would seem to include the rationing and managerial activities which Commons identified separately. The law of property and contract, as it is operative in a capitalistic system, is also implicit in Chamberlain's view of the role of management.

In an earlier classic study, Chamberlain identified the principal areas of management as finance, personnel, procurement, production, distribution, and coordinative. The union challenge to

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[5] Chamberlain, N. W. The Labor Sector. New York: McGraw-Hill Book Co., Inc., 1965, p. 349.

the "right" of management to exclusively formulate policy would occur in these areas as the union sought a voice in the resolution of policy questions having an impact on the employees.[6]

Chamberlain viewed the issue of managerial rights as arising because the right of unions to organize and bargain has run counter to the right of management to manage. The conflict thus becomes set in motion when, in the encouragement of collective bargaining, public policy dictates that the employer must recognize the majority representative of his employees. The rights of management then begin to be restricted by the union.[7]

In discussing the union impact on the management function, Chamberlain, in quoting an editorial appearing in the February 7, 1851, issue of the Journal of Commerce, makes clear that the prerogative issue has a long history on the American business scene. Speaking out at a time when the typographers were making what the Journal's editors termed "unjustified" demands on the publishers, the editors wrote:

> Who but a miserable, craven-hearted man, would permit himself to be subjected to such rules, extending even to the number of apprentices he may employ, and the manner in which they shall be bound to him, to the kind of work which shall be performed in his office at particular hours of the day, and to the sex of the persons employed, however separated into different apartments or buildings? For ourselves, we never employed a female as a compositor, and have no great opinion of apprentices, but sooner

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6 Chamberlain, N. W. Union Challenge to Management Control. New York: Harper & Row, Inc., 1948, pp. 46-47.

7 Ibid., p. 4.

> than be restricted on these points, or any other, by a self-constituted tribunal outside of the office, we would go back to the employment of our boyhood, and dig potatoes, pull flax, and do everything else that a plain, honest farmer may properly do on his own territory. It is marvelous to us how any employer, having a soul of a man within him, can submit to such degradation.[8]

The Growing Importance of the "Rights" Issue

Recent history provides evidence that the issue of management's rights reached a critical stage.

In 1945, President Truman convened the National Labor-Management Conference with the aim of developing a formula for industrial peace.

A special committee composed of top union and management leaders was created to draft a basic statement of principle that would spell out the areas of business decision-making which fell within the scope of the unions' interests and those which fell outside that sphere.

An impasse soon developed and in its report to the conference, the management group stated:

> Labor members of the Committee on Management's Right to Manage have been unwilling to agree on any listing of specific management functions. Management members of the committee conclude, therefore, that the labor members are convinced that the field of collective bargaining will, in all probability, continue to expand into the field of management. The only possible end of

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[8] Chamberlain, The Labor Sector, p. 341.

> such a philosophy would be joint management of enterprise. To this the management members naturally cannot agree. Management has functions that must not and cannot be compromised in the public interest.[9]

The differing views of management and the union on the issue of management's rights were clearly presented in 1956, in a discussion between James Phelps, a representative of the Bethlehem Steel Corporation, and Arthur Goldberg, the then General Counsel of the United Steelworkers of America.

In presenting the management view, Phelps employed the following argument, commonly used to support the management position:

> The job of management is to manage. The operation of the enterprise at its maximum efficiency is management's responsibility and obligation. If a management believes that, in order to discharge its obligations, it must retain in full measure the so-called prerogative of management, it has the right to refuse to agree in collective bargaining to restrict those rights. If the management should agree to limit its exclusive functions or even to delegate certain of its duties to a union, it can enter into an agreement that will clearly define how far it has agreed to go.
>
> To the extent the parties have not seen fit to limit management's sphere of action, management's rights are unimpaired by the contract.[10]

A much different philosophy embracing a concept of the consent of the governed as forming the basis for change was expressed by Goldberg:

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[9] U. S. Department of Labor. The President's National Labor-Management Conference, November 5-30, 1945. Washington: Government Printing Office, 1946, p. 56.

[10] Phelps, James C. "Management's Reserved Rights: An Industry View," Management Rights and the Arbitration Process, Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators. Washington: Bureau of National Affairs, 1956, p. 117.

> A backlog of rights and practices and precedents does develop as the collective bargaining relationship continues, based not on pre-union history but based on the period of the collective bargaining relationship.
>
> ...the practices which grow up during decades of a collective bargaining relationship cannot be swept aside... [they] inevitably represent the set of circumstances which formed the backdrop of the negotiation of the current agreement.
>
> ...To the extent that present conditions and methods for change are not revised, they are accepted. Therefore, each party has the right to assume that changes in wages, hours, or working conditions not provided for by contract can be made only by mutual agreement or by following practices for making changes which have existed during the collective bargaining relationship or by virtue of management's exercise of an exclusive right (such as the introduction of new products, new machines, new material, new methods of manufacture, etc.). To suggest that management can make changes at will unless the contract specifically bars it is unfair and can lead to placing so many bars in the contract as to make successful negotiation increasingly difficult and operations less and less flexible....[11]

In an interesting appraisal of these two positions Chamberlain concluded that neither was defensible. His criticism of the management view was that it seemed to relegate the union to the role of a simple supplier with no stake in the continued operation of the enterprise. The management view tended to discount the importance of mutuality in the collective bargaining relationship and emphasized the legal aspects of the formal agreement.

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[11] Goldberg, Arthur J. "Management's Reserved Rights: A Labor View," ibid., pp. 125-126.

On the other hand, Chamberlain felt that the union view seemed to limit management initiative to situations in which the union had given its agreement. The union position would convert the individual firm into "a kind of legislative forum." In Chamberlain's view this would be an indefensible attack upon an important aspect of management, the right of initiation.[12]

Chamberlain viewed as essential the need for the parties to establish some middle ground between these views.

The Scope of this Study

Since public policy is expressed through legislation, government becomes involved directly or indirectly in the business transactions with which management is concerned. In the United States, many laws have been enacted to protect the physical and economic well-being of the public in its dealings with the firm, but it is not the purpose here to examine the limitations imposed upon the freedom to manage implicit in a great deal of such legislation.

The purpose is rather to inquire into the administration and interpretation of that legislation which governs the collective bargaining relationship between the company and the union and its impact on the freedom to manage.

Section 8(d) of the Taft-Hartley Act requires management to bargain collectively over wages, hours, and other terms and

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[12] Chamberlain, N. W. "The Union Challenge to Management Control," Industrial and Labor Relations Review, January, 1963, p. 184.

conditions of employment. Recent decisions of the National Labor Relations Board and Federal courts seem to have broadened the scope of subject matter that falls within this requirement. If, in fact, the scope of mandatory bargaining is being extended, this would appear to limit the freedom of management to operate the enterprise.

Dr. Eli Ginzberg, Professor of Economics and Director of the Conservation of Human Resources Project at Columbia University, New York, writing in 1963, pointed out that "among the most important dimensions of entrepreneurial initiative is the decision of the employer as to where to locate, or relocate his plant."[13]

This research will consist of an examination of recent NLRB and U. S. Circuit and Supreme Court decisions in the area of plant relocation or shutdown, including the discontinuance of specific operations within a firm.[14]

Plant relocation cases involve the shutting down of operations at one site with a later resumption of the same operations at a new site. Plant shutdown cases, as discussed in this analysis, involve at least one of the following situations:

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[13] Ginzberg, E. and Berg, I. E. Democratic Values and the Rights of Management. New York: Columbia University Press, 1963, p. 54.

[14] Another approach to a study of management's rights was taken by Professor Margaret Chandler in her recent work which sought to develop an organizational analysis of management rights issues in general through an analysis in depth of the single issue of contracting out the maintenance and construction work of the firm. Emphasis in her research was placed on the impact of the technical organization of work, the implications of technological change, and the alignment of organizational interest groups inside and outside the firm. Chandler, M. K., Management Rights and Union Interests. New York: McGraw-Hill Book Co., 1964.

1) a total and permanent discontinuance of all operations of the enterprise;

2) a total and permanent discontinuance of only one of several plants of a multi-plant enterprise with the remaining plants to continue operations;

3) the permanent discontinuance of specific operations within an enterprise. In such cases the firm continues to operate but the income generating or service functions have been reorganized in some significant manner (e.g., the elimination of certain operations due to technological innovation or more economical performance by an outside supplier).

In the early days of collective bargaining under the National Labor Relations Act, the principal issues were recognition of the union, wages, security provisions covering the union, and arrangements covering employee grievances.

Today, emphasis is directed to such issues as supplemental unemployment benefits, expanded insurance and pension programs and subcontracting as well. The issue of plant relocation or shutdown also appears to have assumed some prominence in recent collective bargaining history as competitive pressures increase.

It is likely also that this issue is receiving increasing attention as a result of the disposition of disputes by the NLRB and the courts in cases involving the issue. Management's freedom to relocate or shutdown plants may be being eroded in the process.

Although this hypothesis is probably incapable of absolute, inescapable proof, it is quite possible that the premise stated can be supported substantially by examining testimony introduced in hearings prior to passage of the original National Labor Relations Act of 1935 as well as amendments covered in the Labor Management Relations Act of 1947.

To lay the groundwork for such a study, one must explore in some detail the legislative intent surrounding the "duty to bargain" provisions of the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA), and eight recent cases which have had an impact on the scope of collective bargaining. Several of these are considered to be landmark cases involving the duty to bargain, and the remainder were selected to provide an understanding of the Board's and the courts' positions on diverse issues arising out of bargaining negotiations.

This exploration is fundamental to a discussion of the current status of management rights regarding decisions on plant relocation or shutdown.

Union animus is one cause of plant relocation or shutdown; another is based on economic considerations. Where animus toward the union is involved, the unfair labor practice may include a refusal to bargain, but the more compelling violation of the Act will be predicated upon a discriminatory action.

Three important cases in the literature have been selected which illustrate recent legal rationale where animosity toward the union is a factor.

There are many more which are predicated solely on economic considerations. Seventeen such cases spanning the past eight years will be outlined and analyzed.

At the conclusion of this study, on the basis of the material examined, it should be possible to ascertain whether, in fact, management is currently experiencing an abridgement of its freedom to manage the firm. If this conclusion is in the affirmative, it might be expected that certain suggestions could be advanced, designed to achieve a more appropriate public policy.

CHAPTER II

THE LEGAL OBLIGATION TO BARGAIN AND THE INTENT OF CONGRESS

Under current federal law the National Labor Relations Act, as amended, provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees...."[1]

What is meant by collective bargaining? How does an employer fulfill the requirements of the law? What is an employer obligated or not obligated to do in the furtherance of this legal obligation?

The National Labor Relations Act of 1935 did not answer such questions for the Act did not attempt to define "collective bargaining." Statutory definition of this term did not occur until the Labor Management Relations Act was passed in 1947. At this time the NLRA was amended by the addition of section 8 (d) which states in part that:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives 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

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[1] Section 8(a)(5), 61 Stat. 141 (1947). This amendment in the Taft-Hartley Act replaced the similar provision in Section 8(5) of the National Labor Relations Act, 49 Stat. 453 (1935). The full text of the National Labor Relations Act, as amended, is contained in the Appendix.

> party, but such obligation does not compel either party to agree to a proposal or require the making of a concession....[2]

This is the statutory obligation to bargain. During the fiscal year 1966, 35 percent of all unfair labor practice charges filed against employers under the National Labor Relations Act involved a refusal to bargain collectively.[3] Unless one wishes to assume a willful disregard for the law on the part of employers, he is drawn to the conclusion that such a record may be due to rather widespread doubt or ignorance among employers as to the conduct essential on their part to satisfy this obligation.

What are the proper subjects of collective bargaining? What is meant by "other terms and conditions of employment"? How free is the employer to refuse to agree to a proposal or to refuse to make a concession in bargaining?

The answers to such questions will not be found in the statute itself. Questions such as these are answered in the case-by-case decisions of the National Labor Relations Board and the courts as they administer, interpret and rule on the law which Congress has passed. Such meaning as Congress intended to be given the general language found in the statute is supplied by the Board and the courts in their rulings. Only by examining a number of cases can it be ascertained what the Board and the courts have found "the duty to bargain" to mean.

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[2] Section 8 (d), 61 Stat. 142 (1947).

[3] Thirty-first Annual Report of the National Labor Relations Board, Washington: Government Printing Office, 1967, p. 186.

But first, it is necessary to know what Congress intended in the original National Labor Relations Act--as well as the subsequent amendment--that the employer's obligation to bargain collectively should mean.

A review of pertinent Congressional debate and testimony concerning the legislation prior to its enactment is helpful in establishing this intent.

In Senate debate on the proposed National Labor Relations Act in 1935, Senator Walsh, Chairman of the Committee on Education and Labor, in discussing the important provisions of the bill said:

> The bill does provide the means and manner in which employees may approach their employers to discuss grievances and permit the board to ascertain and certify the persons or organization favored by a majority of the employees to represent them in collective bargaining, when the question of that representation is in doubt or dispute. Beyond this the bill does not go.
>
> A crude illustration is this: The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representataves or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded.[4]

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[4] National Labor Relations Board, Legislative History of the National Labor Relations Act, 1935, Volume II, Washington: Government Printing Office, 1949, p. 2373, hereafter referred to as II Legislative History. The first volume will be cited as I Legislative History.

Senator Walsh further went on to discuss the essence of the bill in the following manner:

> When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.
>
> It anticipates that the employer will deal reasonably with the employees, that he will be patient, but he is obliged to sign no agreement; he can say, "Gentlemen, we have heard you and considered your proposals. We cannot comply with your request", and that ends it.[5]

The meaning here would seem to be that an employer is under an obligation to recognize the union but that the substantive terms of any agreement is a matter to be resolved by the parties.

During the debate Senator Wagner, sponsor of the measure, commented on the duty to bargain collectively as follows:

> Most emphatically this provision does not imply governmental supervision of wage or hour agreements. It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met.[6]

Although this statement is not perhaps as vivid as those of Senator Walsh, regarding the role of government in the bargaining process, it does seem to suggest that the government did not intend to enter the bargaining room.

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5 Ibid.

6 II Legislative History, pp. 2335-2336.

Senate Report No. 573, issued in May, 1935, of the Committee on Education and Labor, which recommended passage of the Act, supported the view that the intent of Congress in passing section 8 (5) was only to compel employer recognition of a duly certified union.

On the issue of the duty to bargain, the report stated:

> The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.
>
> But, after deliberation, the committee has concluded that this fifth unfair labor practice [8 (5)] should be inserted in the bill. It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored.[7]

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[7] II Legislative History, p. 2312.

During the debate on the bill in the House of Representatives several key statements were made which add additional support to the contention that section 8 (5) was included in the Act simply to insure employer recognition of the union.

In the light of current disputes over plant shutdown to be discussed later, the statement of Representative Griswold of Indiana is particularly interesting. When asked whether there was anything in the bill to prevent an operator from closing his plant, Representative Griswold stated:

> There is nothing in the bill to keep an operator from closing his plant. There is nothing in the bill that says you shall reach an agreement--nothing of that sort. It simply provides that labor may bargain collectively.[8]

Representative Connery, Chairman of the House Committee on Labor, was called upon by one of his colleagues to describe the employer's bargaining obligation. He replied as follows:

> The gentleman may say "I will not give you the 10 cents an hour you ask." There is nothing they can do then. Nobody asks that you be made to give them the 10 cents an hour. This bill just compels you to deal with the men collectively. You must sit across the table and talk things over with them.[9]

Consistent with the views expressed by Representative Griswold were the remarks of Representative Welch who at one point stated:

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[8] II Legislative History, p. 3110.

[9] II Legislative History, p. 3118.

> It [the Act] does not require an employer to sign any contract to make any agreement, to reach any understanding with any employee or group of employees. This board created in the bill is not empowered to settle labor disputes; nothing in the bill allows the Federal Government or any agency to fix wages, regulate rates of pay, limit hours of work, or to effect or govern any working condition in any establishment or place of employment.[10]

So ran the tenor of debate in Congress concerning the employer's obligation to bargain in the days preceding passage of the National Labor Relations Act in 1935.

Professor Smith in a discussion of the bargaining obligation concluded that "the major emphasis in Congress itself was of a delimiting character. There was the most complete agreement on what the bargaining provision would not do rather than on what it would do."[11]

Professors Cox and Dunlop in discussing the regulation of collective bargaining by the NLRB concluded that there was nothing in the hearings, the committee reports, or the debates "to suggest that the Act would define the subjects of collective bargaining and give the Board power to resolve the issue in disputed cases."[12]

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[10] II Legislative History, p. 3183.

[11] Smith, Russell A. "The Evolution of the 'Duty to Bargain' Concept in American Law," Michigan Law Review, Vol. 39, May, 1941, p. 1089.

[12] Cox, A. and Dunlop, J.T. "Regulation of Collective Bargaining by the National Labor Relations Board," Harvard Law Review, Vol. 63, January, 1950, p. 395.

In the opinion of Cox and Dunlop, section 8 (5) of the NLRA imposed on the employer only the duty to recognize the union and accept the practices and procedures of collective bargaining.

It should be noted that there is not universal agreement that Professors Smith, Cox, and Dunlop have correctly appraised Congressional intent concerning the duty to bargain.

Professor Ross has enunciated the view that Congress certainly intended that the Board define the scope of bargaining. Ross states a belief that in appraising Congressional intent not enough attention has been paid to the experience of the labor boards set up under the National Industrial Recovery Act of 1933. He notes:

> It should not be overlooked that the experience of the NRA labor boards played a prominent role in the Congressional debates. There was continual reference to the decisions of the early labor boards on the nature of the duty to bargain...
>
> The Houde decision, which was the leading NRA labor board holding the duty to bargain, specifically condemned a company's practice of discussing with the union matters of secondary importance, such as toilet facilities, safety measures, coat racks, slippery stairs, etc. The board held...that such discussion could not be considered collective bargaining since the employer refused to discuss 'the recognized subjects of collective bargaining,namely, wages, hours and basic working conditions.' [13]

Perhaps one must leave this discussion of Congressional intent concerning the duty to bargain provision of the NLRA of 1935 on the note that opposing views exist regarding the intent of Congress and that reasonable arguments have been advanced in each instance.

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[13] Ross, P. The Government as a Source of Union Power: the Role of Public Policy in Collective Bargaining. Providence: Brown University Press, 1965, pp. 99-100.

Attention is now directed to a review of such "evidence" as is on record of Congressional intent in enacting the Labor Management Relations Act of 1947.

It seems clear that there was a considerable concern in the House of Representatives over the manner in which the NLRB and the courts had interpreted and administered section 8 (5) of the National Labor Relations Act.

This concern seemed to center on two questions which section 8 (5) did not specifically answer. The first dealt with the question of whether the employer was acting in "good faith" in the conduct of his bargaining (e.g., was the employer willing to make concessions or counterproposals?). The second dealt with the scope of the bargaining obligation (i.e., what subjects must the parties bargain about?).

This research is concerned with determining whether the NLRB and the courts have limited management's freedom through decisions expanding the scope of bargaining. The question of whether the NLRB and the courts have similarly limited management's freedom through decisions involving employer "good faith bargaining" is beyond the purpose of this inquiry and will not be discussed except to the extent that it is deemed essential to analysis of the scope of bargaining.

The concern of the House of Representatives over the interpretation of the law is evidenced by the inclusion of the following language in section 2 (11) of the House version of the bill:[14]

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[14] It should not be inferred that this position is a reflection of complete Congressional intent since the Senate bill did not contain this language, and the Act as finally passed conforms much closer to the Senate version than to that of the House. However, since the Hartley Bill did pass the House by a vote of 308 to 107, there was a clear mandate in one chamber for such legislation.

> Such terms [bargain collectively and collective bargaining] shall not be construed as requiring that either party reach an agreement with the other, accept any proposal or counterproposal either in whole or in part, submit counterproposals, discuss modification of an agreement during its terms except pursuant to the express provisions thereof, or 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.[15]

Furthermore, the House bill made it an unfair labor practice under section 8 (b) (3) for an employee or for his representative "to call, authorize, engage in, or assist any strike or other concerted interference with an employer's operations, an object of which is to compel the employer to accede to the inclusion in a collective bargaining agreement of any provision which under section 2 (11) is not included as a proper subject matter of collective bargaining."[16]

The House Committee on Education and Labor made the following statement which could be construed as an indictment of the NLRB, in its report on the bill before the House:

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[15] H. R. 3020, 80th Congress, 1st Session (1947), Volume I, Legislative History of the Labor Management Relations Act, 1947, Washington: Government Printing Office, 1949, pp. 166-167, hereafter referred to as I Legislative History, L.M.R.A. The second volume will be cited as II Legislative History, L.M.R.A.

[16] I Legislative History, L.M.R.A., p. 179.

> He [the employer] has been required by law to bargain over matters to which it was economically impossible for him to accede, and when he refused to accede has been accused of failing to bargain in good faith.[17]

The report goes on to say:

> At the same time, the bill defines the procedure of collective bargaining, and by setting forth the matters on which one side may require the other to bargain, limits bargaining to matters of interest to the employer and to the individual man at work.[18]

In asserting a need to define the terms "bargain collectively" and "collective bargaining" the House report also strongly condemned the NLRB in the following lengthy statement:

> The present act does not define these most important terms. Some of the most glaring injustices of decisions of the present Board arise from that omission.
>
> The present section 8 (5) requires an employer to bargain collectively with the representatives of his employees. The Supreme Court, in the Jones & Laughlin case (301 U. S. 1), upholding the constitutionality of the Act, said:
>
> > The Act does not compel agreements between employers and employees.
> >
> > It does not compel any agreement whatever. It does not prevent an employer from refusing to make a collective contract and hiring individuals on whatever terms the employer may by unilateral action determine....
> >
> > The theory of the Act is that free opportunity for negotiation with accredited representatives of employees

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17 I Legislative History, L.M.R.A., p. 296.

18 I Legislative History, L.M.R.A., p. 298.

> is likely to promote industrial peace and bring about the adjustments and agreements which the act in itself does not attempt to compel....
>
> Notwithstanding this language of the Court, 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 counter-proposals that he may or may not make.[19]

The House report then cited a number of specific cases which resulted in Board decisions declaring the employer had bargained in "bad faith." Asserting that the Board through such decisions was controlling the terms of collective bargaining agreements, the report called for Congress to write into the law guides for the Board to follow in judging the conduct of the parties.

In its concluding comments on Board decisions involving "bad faith" bargaining on the part of the employer, the report noted:

> ...the Chairman of the Board has stated that whether or not a person is bargaining "in good faith" requires appraising his "state of mind". The possibility of error and injustice when three Board members, none of whom are psychiatrists, undertake to do this is very great, as can be seen from decisions of the Board itself. The committee therefore takes the question out of the realm of speculation, guess work, and, too often, bias and prejudice, and provides that "free opportunity for negotiation" that the Supreme Court said the act should bring about. Since the bill requires unions as well as employers to bargain, the committee's doing this is as important to them as to employers.[20]

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19 I Legislative History, L.M.R.A., p. 310.

20 I Legislative History, L.M.R.A., p. 312.

The House report also had some significant remarks to make concerning the scope of bargaining as follows:

> Reference has already been made to liberties the Board has taken with the term "collective bargaining" due to the absence from the present act of language defining the scope of bargaining. The last paragraph of section 2 (11) cures this defect, limiting the scope of bargaining by either employees or unions to matters of mutual concern.
>
> Just as the employer has no right to bargain about who the union's officers and representatives will be, what dues and assessments it shall impose, how it shall spend its money or otherwise conduct its internal affairs so long as they do not affect the employer's operations, so the union has no right to bargain with the employer about who his agents will be, what prices he will charge, what his profits shall be, or how he shall manage his business, so long as he does not violate the union's contract with him or ignore his obligations under the Labor Act.
>
> The bill provides, in sweeping terms, for bargaining concerning wages, hours, work requirements or "work loads", discharge, supervision, lay-off, recall, seniority, and discipline.
>
> It likewise provides for bargaining on promotions, demotions, transfers and assignments of people within the bargaining unit to other positions in the same unit and of people from outside the unit to positions in the unit.
>
> A union representing people in one unit may not dictate what position shall be held by an employee who leaves the unit and goes to another unit, which another union may represent.
>
> The bill further provides for bargaining on safety, sanitation, and protecting the health of employees in the bargaining about procedures for settling disputes on all these subjects.

> It does not require bargaining on any matter during the term of a collective bargaining agreement, except as the express terms of the agreement permit. This contemplates that the parties will bargain on grievances in accordance with the agreed grievance procedure, and permits clauses such as those on "wage reopening".[21]

As mentioned earlier, it would be difficult to wholly sustain the position that the views represented in the House bill could correctly be interpreted as Congressional intent since section 8 (a) (5) and 8 (d) as passed reflect the Senate version of the proposed legislation.

However, it would be equally in error to suggest that this represented total rejection of the legislation as proposed in the House.

As is frequently the case in Congress, compromises must be made in order to obtain legislation which will prove acceptable to the entire Congress.

Representative Hartley, author of the House bill, recognized a much more difficult task in getting appropriate legislation through the Senate than in the House. His thoughts on this point are well stated in his book written one year after passage of the Labor Management Relations Act:

> The Senate of the United States traditionally has been slow to follow shifts in public sentiment.
>
> Students of government have ascribed this tendency to the six-year term which retains a Senator in

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21 I Legislative History, L.M.R.A., pp. 313-314.

> office for several years after the basic issues on which he may originally have been elected have ceased to be significant. While the entire membership of the House of Representatives faces an election every two years, the Senate sends only one-third of its members before the polls that frequently.
>
> As a result, public opinion recasts the political complexion of the House of Representatives every other year.
>
> The members of the House who voted so overwhelmingly for the Hartley bill were fresh from election campaigns. They remembered vividly the issues of those campaigns, and acted so as to redeem their election promises.
>
> The Senate was a different matter.
>
> While the control of the Senate had shifted from Democratic to Republican, that control was by a narrow margin, so narrow indeed that the Republican leaders in the Senate had to watch that margin closely to maintain their leadership.
>
> Many of the Senators who were bitterly opposed to corrective labor legislation in any form had been in the Senate for several years since they were last elected.
>
> This "behind the times" sentiment in the Senate made the passage of really corrective labor legislation more difficult than in the House.
>
> In fact, the Senate leadership had considerable difficulty in getting a bill out of committee, that is, a bill in line with the general thinking prevalent on both sides of the capitol.[22]

The House report dealing with the changes in the House bill made in the joint House-Senate Conference Committee stated that although section 8 (d) of the Senate bill did not prescribe

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[22] Hartley, F. A., Jr. Our New National Labor Policy. New York: Funk & Wagnalls Company, 1948, pp. 62-63.

an objective test of what were the proper subjects for collective bargaining as the House bill did, it had substantially the same effect since it rejected, as a factor in determining good faith, the test of making a concession and thereby prevented the NLRB from determining the merits of the parties' positions.

It was on this basis that compromise was reached.

After considering at some length the question of Congressional intent concerning the duty to bargain as it is reflected in the NLRA and the LMRA, what can be concluded from this analysis?

It seems that, although sentiment was clearly prevalent in 1935 for legislation espousing the cause of collective bargaining, there was no great desire on the part of Congress to turn over to the NLRB the role of determining the proper subject matter of bargaining.

As Senator Walsh put it, the legislation was designed to escort the representative of the employees to the employer's door. There is no indication that the NLRB was to play a material part in the bargaining process by specifying the scope of bargaining.

In a report dealing with the public interest in labor policy issued in 1961, the Committee for Economic Development, headed by Clark Kerr, came to the same conclusion. In discussing the duty to bargain, this group felt that the original intent of

the provision was to insure "a minimal degree of recognition so that efforts to decide the question of representation by an orderly process would not be frustrated."[23]

It does not seem that the LMRA, in the final analysis, added anything to the authority of the NLRB in its administration of section 8 (a) (5) cases. The House of Representatives would certainly have limited the subject matter of bargaining. The Act as passed seems to leave the situation much as it was under the NLRA.

Actually, with the addition of section 8 (d), providing that the employer need not make a concession in the fulfillment of the bargaining obligation, the Board's proper jurisdiction seems to have been even further limited.

Having examined the language of the law itself and having reviewed Congressional intent surrounding "the duty to bargain," it is next necessary to see how the law has been interpreted in specific situations.

Federal labor legislation has provided a skeletal framework concerning the scope of bargaining. The flesh has been added by the NLRB and the courts. The virtually unlimited scope of bargaining is clearly illustrated in the following cases.

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[23] Committee for Economic Development. The Public Interest in National Labor Policy. New York; 1961, p. 81.

CHAPTER III

THE SCOPE OF BARGAINING

As stated in the law, the mutual obligation of the employer and the union is to bargain concerning "wages, hours, and other terms and conditions of employment."

This is the scope of bargaining specified by statute. In the course of administration and interpretation of the law the NLRB and the courts have on many occasions been faced with the question of whether a specific topic sought to be bargained over falls within the meaning of this phrase. If the Board and the courts determine that a particular topic is within the meaning of this phrase, then the parties are obligated to bargain over it or be found guilty of a violation of section 8 (a) (5) of the Act. If the particular topic is not interpreted by the Board and courts to fall within the meaning of the phrase, the parties cannot be found in violation of the Act for refusing to bargain over the matter.

Eight cases have been selected to illustrate how in recent years the Board and the courts have dealt with this problem of the scope of the bargaining obligation. Certain of the cases to be examined are landmark cases because of the principles which were enunciated by the Board and courts. Others are of interest because of the rationale employed in arriving at the decisions.

These cases cover issues ranging from

1) a secret ballot strike vote which might be presumed to be an internal union matter;

2) the classification of employer contributions to an insurance program as constituting "wages";

3) the classification of industry contributions to an industry promotional fund as constituting "terms of employment";

4) the legality of a "hiring hall" provision in a state with a "right-to-work" law;

5) the need for an employer to bargain over permitting union time studies on company premises;

6) the classification of a change in a company's product line as constituting a change in terms of employment;

7) the obligation to bargain over a change in the cafeteria prices charged by an outside supplier;

8) to the need to bargain over decisions affecting work assignments designed to increase productivity.

All of these cases, in some measure, spell out what is proper employer conduct in the eyes of the law when questions of a bargaining obligation are at issue. The eight cases are presented in chronological order based on the date of the decision by the National Labor Relations Board.

The Borg-Warner Company Case

A landmark decision dealing with the scope of the employer's obligation to bargain came in the Borg-Warner case.[1]

The NLRB decision came in 1955 but the importance of the case in labor law occurred as a result of the U. S. Supreme Court's decision in 1958.

Facts of the Case

In this case the company, among other items, proposed that the contract include a provision prohibiting the union from calling a strike or from amending, modifying or terminating the agreement unless a majority of the employees in the bargaining unit indicated approval of such action through a secret ballot vote taken after the employer's last offer had been announced.

The union refused to accept such a condition and ultimately charged Borg-Warner with an unfair labor practice for refusing to bargain.

The NLRB Decision

Conceding that the employer, or the union for that matter, had the right to put on the bargaining table any proposal not in conflict with provisions of the Act, the Board in its decision upholding the union stated:

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[1] Wooster Division of Borg-Warner Corporation and International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, 113 NLRB 1288 (1955), 236 F2d 898 (1956), 356 U. S. 342 (1958).

> However, we are here concerned not with what the parties might do by mutual consent beyond the obligatory mandate of the statute, but with what the obligation to bargain under the Act requires the parties to do....
>
> Thus, a union might propose that an employer reduce the salaries of its officers as a means of obtaining wage increases for employees, and the employer may voluntarily agree, but it does not follow that the employer is required to bargain about such a matter. Likewise, while a union might agree to any of the following proposals, it has been held that an employer cannot require bargaining by a union with respect to organizing competitors, posting of performance bonds, complying with State licensing requirements, or accepting oral or members-only contracts.[2]

The Board concluded that:

> ... we do not believe that the subject of protecting employees [e.g., through the secret ballot process] from the speculative arbitrariness of their duly selected exclusive bargaining representative is an obligatory subject of collective bargaining.[3]

The Circuit Court Decision

The Board's ruling on this issue was reversed in the Sixth Circuit Court. The Court found a parallel in an earlier case which held that a strike vote clause was within statutory bargaining and so the employer was permitted to insist upon his position on this item.[4] In the Borg-Warner case the Court noted:

> The bargaining area of the Act has no well-defined boundaries; the phrase "conditions of employment" has not acquired a hardened and precise meaning.... The area of compulsory

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[2] Ibid.

[3] Ibid.

[4] Allis Chalmers Mfg. Co., v. NLRB 213 F2d 374 (1954).

> collective bargaining is obviously an expanding one....
>
> In our opinion, the strike ballot proposal was within the area.[5]

The Supreme Court Decision

The NLRB appealed this decision to the U. S. Supreme Court, and the Board's view was upheld when the Circuit Court's decision was reversed. In delivering the majority opinion Justice Burton held:

> Since it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without, the 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. The "ballot" clause 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

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5 NLRB v.Wooster Div. of Borg-Warner Corp., 236 F2d 898 (1956), 356 U. S. 342 (1958).

> 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.[6]

In writing a lengthy dissenting opinion, Justice Harlan, who was joined by three other members of the Court, stated:

> 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....
>
> I fear that the decision [Borg-Warner] may open the door to an intrusion by the Board into the substantive aspects of the bargaining process which goes beyond anything contemplated by the National Labor Relations Act or suggested in this Court's prior decisions under it.
>
> The Court considers both the "ballot" and "recognition" [the recognition clause is not at issue in this study] clauses to be outside the scope of the mandatory bargaining provisions of section 8 (d) of the Act, which in connection with sections 8 (a) (5) and 8 (b) (3) imposes an obligation on an employer and a union to "confer in good faith with respect to wages, hours, and other terms and conditions of employment."
>
> From this conclusion it is said to follow that although the company was free to "propose" these clauses and "bargain" over them, it could not "insist" on their inclusion in the collective bargaining contract as the price of agreement, and that such insistence was a per se unfair labor practice because it was tantamount to a refusal to bargain on "mandatory" subjects.
>
> At the same time the Court accepts the Trial Examiner's unchallenged finding that the company had bargained

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6 Ibid.

> in"good faith", both with reference to these clauses and all other subjects, and holds that the clauses are lawful in themselves and "would be enforceable if agreed to by the unions."
>
> Preliminarily, I must state that 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....
>
> This watered-down notion of "bargaining" which the Court imports into the Act with reference to matters not within the scope of section 8 (d) appears as foreign to the labor field as it would be to the commercial world.[7]

Justice Harlan went on to state that the phrase (e.g., conditions of employment) is inherently vague and prior to this decision has been accorded by the Board and courts an expansive rather than a grudging interpretation. He added that many matters which had been thought to be the sole concern of management are now dealt with as compulsory bargaining topics.[8]

The dissenting opinion cited Senator Walsh's remarks prior to the passage of the National Labor Relations Act as indicating that there had never been any intent to grant the National Labor Relations Board power to prevent bargaining on any subject which was not in direct violation of any provision of the Act. In this minority opinion, the Court also referred to the original House version of the Labor Management Relations Act as further

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[7] Ibid.

[8] Ibid.

evidence that Congress had intended that the parties to collective bargaining should have the greatest possible freedom in their negotiations and that the Board was "to remain as aloof as possible from regulation of the bargaining process in its substantive aspects."[9]

In this five to four decision, the minority view maintained that the Act "does not purport to define the terms of an agreement but simply secures the representative status of the union for purposes of bargaining."[10]

The majority opinion in this case sets up three categories of subject matter for collective bargaining--mandatory subjects, permissive subjects and unlawful subjects.

Mandatory subjects are those encompassed within the meaning of "wages, hours, and other terms and conditions of employment." The duty to bargain is limited to those subjects and neither party is legally obligated to yield his position.

Permissive subjects are those which do not fall within the statutory obligation but which are not expressly illegal under the Act. The secret ballot strike vote is illustrative of a permissive subject. The parties may agree to include permissive subjects in the agreement but insistence upon the inclusion of a permissive subject forms the basis for an unfair labor practice involving a refusal to bargain.

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[9] Ibid.
[10] Ibid.

Illegal subjects are those which the Act expressly prohibits. Insistence upon bargaining directly with employees rather than with a duly certified union is an example of an illegal subject. Bargaining over unlawful subjects is clearly an unfair labor practice.

Concern has been expressed with the Board's assumption of authority over the determination of which subjects shall be considered mandatory and which permissive. In Justice Harlan's opinion:

> It may be that an employer or union, by adamant insistence in good faith upon a provision which is not a statutory subject under section 8 (d), does in fact require the other party to bargain over it. But this effect is traceable to the economic power of the employer or union in the circumstances of a given situation and should not affect our construction of the Act.[11]

This view was echoed by the report of the Committee for Economic Development:

> In the light of the realities of the bargaining situation, distinctions between matters that are subject to "mandatory bargaining" and those that are not have a hollow ring.[12]

The Court's definition of--and disagreement on-- the scope of bargaining has made the Borg-Warner case important in labor law.

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[11] Ibid.

[12] Committee for Economic Development, op. cit., p. 82.

The Sylvania Electric Products Company Case

The scope of bargaining is hard to define. This particular case turned on the issue of whether an employer was guilty of a refusal to bargain if he declined to divulge to the union the amount of premiums and the premium rates paid in connection with a non-contributory insurance policy.[13] In other words, do these constitute "wages" within the meaning of the Act?

Facts of the Case

During the course of negotiating a new contract, the union asked the company for information regarding the level of benefits of a group insurance program then in effect, the scope of its coverage, the amount of claims paid and its cost (borne entirely by the company). The employer provided this information with the exception of the cost data. Claiming that it could not intelligently frame its economic demands without the cost data, the union charged the company with refusing to bargain.

The NLRB Decision

The Trial Examiner drew an important distinction between the benefits of such programs which he ruled as "wages" within the meaning of the Act and the cost of providing such benefits.

He further drew a distinction between the cost of such programs financed in part by employee contributions which certainly

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13 Sylvania Electric Products, Inc., and United Steelworkers of America, AFL-CIO, 127 NLRB 924 (1960), 291 F2d 128 (1961).

were vitally related to wages and the cost of programs such as that of Sylvania which was entirely financed by the employer.

In the latter case he could see no tie with wages and compared this cost to that of raw materials or interest on debt. Accordingly he ruled against the union.

Overturning the Trial Examiner's report, the Board grouped both the benefits and the costs of such programs into a single category of "emoluments of value" which were to be considered "wages". Specifically the Board said:

> The term "wages", concerning which bargaining is required by the Act, has been held to comprehend the emoluments of value which may accrue to employees out of the employment relationship. It seems indisputable to us that where the employer shoulders the entire cost of a group insurance program, so that the employees themselves are not required to allocate any part of their weekly wages for the purposes, there inures to the employees a benefit which constitutes an emolument of value, and that this benefit flows from the employment relationship.
>
> This benefit to the employees which represents part of the remuneration received by them for their labor therefore constitutes "wages" and, as such, the cost thereof to the Respondent stands on a different footing for purposes of the Act from the operating costs with which it is equated by the Trial Examiner.[14]

The Circuit Court Decision

The First Circuit Court agreed that the benefits associated with an insurance program were "wages" within the

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[14] Ibid.

meaning of the Act and it also accepted the view that the cost of contributory plans constitutes "wages", but it took a different view of the Board's position.

> It is quite another matter, however, to go further and endorse the Board's broad conclusion that the cost of a group employee insurance program defrayed entirely by the employer also constitutes "wages" to employees. In the absence of any controlling authority, or indeed, of any judicial authority cited or discovered by our own efforts, we decline to take that step.[15]

There was no dissenting opinion, nor was the case appealed.

The implications of this decision would seem to be that an employer may not refuse to bargain over fringe benefit issues such as life or health insurance programs, pensions, etc., but in the case of non-contributory plans, he is within the law if he refuses to disclose his cost of financing such programs.

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15 Ibid.

The Mill Floor Covering Company Case

Must an employer be compelled to bargain over company financed contributions to an advertising or promotional fund? An NLRB Trial Examiner answered in the affirmative in the Mill Floor Company case.[16]

Facts of the Case

In this case the union requested the employer to execute a labor agreement similar to that which the union held with a multi-employer association in the same area. This agreement contained the following provision:

> The Employers agree as of the effective date of this Agreement to establish a Floor Covering Industry Association Promotional Fund, which shall be used exclusively for the purpose of promoting, publicizing, and advancing the interests of the floor covering industry.
>
> Each employer agrees to contribute one (1¢) cent per hour for each hour worked by each Employee covered by this Agreement to said Promotional Fund in addition to the other Funds paid under this Agreement.[17]

The employer was not a member of the multi-employer bargaining association and objected to the inclusion of this clause in the proposed labor agreement covering his operation.

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16 Detroit Resilient Floor Decorators Local Union No. 2265 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Mill Floor Covering, Inc., 136 NLRB 769 (1962).

17 Ibid.

The union was adamant in its position, and the employer finally signed an agreement including this provision but he reserved the right to file a charge accusing the union of a refusal to bargain since in his view this was not a mandatory subject of bargaining.

The NLRB Decision

In recommending dismissal of the charge against the union the Trial Examiner apparently found no difficulty in declaring this a mandatory subject since in his intermediate report he said:

> ... it seems wholly logical to hold that "promoting" the industry is intimately relevant to "wages, hours and other terms of employment". As industry grows, so increase the job and work opportunities.
>
> The benefit, if any, is necessarily mutual and not exclusive. Out of his own experience, in the decade of the 1920's, when he served as something of a mouthpiece for the promotion of New England industry, the Trial Examiner recalls hearing the frequent complaint of employers that unions and their members were so selfishly concerned with adding to the pay envelope that they failed to consider the employer's problems of marketing--that unless business increased wages could not. And it may be considered common knowledge in the labor-management field that for many years labor organizations representing garment workers have developed a number of mutually beneficial "promotions" to increase both business and wages.[18]

These reminiscences of the examiner are very interesting but hardly compel one to accept the view that an industry promotional fund constitutes a "condition of employment." The Board itself felt this way and rejected the Trial Examiner's recommendations.

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18 Ibid.

In its decision, the Board cited the Borg-Warner case and concluded that an industry promotional fund, much like advertising, involves a relationship between an employer and his customers rather than a relationship between an employer and his employees. Consequently, the establishment of such a fund could not be held to be a mandatory subject of bargaining.

The Houston General Contractors Case

Although it might seem that under the Borg-Warner doctrine set by the U. S. Supreme Court in 1958 an employer would not be guilty of a refusal to bargain when the subject at issue is illegal, the Fifth Circuit Court seemed to rule otherwise.[19] The issue concerned an obligation to bargain over a hiring hall provision in Texas, a state with a right-to-work law.

Facts of the Case

The Houston Chapter of Associated General Contractors, a multi-employer bargaining unit, was faced with a demand calling for the establishment of a nondiscriminatory hiring hall whereby the union was to be the sole source of applicants for employment. The union was to select and refer applicants for employment on the basis of certain factors such as length of service in the industry but was not to discriminate between applicants on the basis of membership or non-membership in the union.

The employer association rejected this demand on the ground that it was illegal under the Texas right-to-work law and obtained a court order enjoining a strike in support of this demand. The union filed a complaint with the NLRB charging the company with a refusal to bargain.

The NLRB Decision

In its ruling finding the employer in violation of the

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[19] Houston Chapter, Associated General Contractors of America, Inc., and Construction and General Laborers Union, Local No. 18, et al., 143 NLRB 409 (1963), 349 F2d 449 (1965).

Act the Board spoke to this point:

> It is abundantly clear that a union-operated nondiscriminatory hiring hall does not, by definition, require membership in that union as a condition of referral, and thus of employment. Rather, the nondiscriminatory hiring hall operates to serve both members and non-members of the union, and also services employers.
>
> An employee seeking a job referral to an employer having an appropriate contract need not become a member of the union which is running the hiring hall, nor must he even tender "agency shop" payments to the union in lieu of membership. In sum, there are no union-oriented conditions of employment which he is required to satisfy, which might arguably be considered forms of union security.[20]

The Circuit Court Decision

In its decision affirming the Board's view the Fifth Circuit Court observed:

> No doubt union membership will be encouraged under the arrangement, indeed it may be a boon to the union; nevertheless such an arrangement does not constitute compulsory unionism so long as the arrangement is not employed in a discriminatory manner....[21]

In neither the Board's nor the Circuit Court's decisions was any mention made of several earlier court cases dealing with the legality of a hiring hall arrangement in a state having a right-to-work law.

In a Nevada case, the labor agreement provided that the employer had to apply to the union to supply his craftsmen; he was prohibited from employing others unless the union was

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[20] Ibid.

[21] Ibid.

unable to supply the necessary personnel within 48 hours. The union argued that the agreement was not one which required employment of union members but merely was an agreement by the employer which designated the union as his employment agency. In rejecting this contention, the court stated:

> By such a provision the employer, in practical effect, agrees that as long as the union is able to supply craftsmen, he shall employ only union labor. So long as the union is able to supply craftsmen, then, those not union members would be deprived of opportunity to obtain employment because of their non-membership.[22]

In dismissing the argument that the South Carolina statute (similar in language to the Texas statute at issue in the Houston case) did not expressly prohibit an agreement whereby employment was conditioned upon union refusal or approval the court held that:

> Where legislative intent to declare an act unlawful is apparent from consideration of the statute, it matters not that the prohibition of the act is not declared in specific language, for an act that violates the general policy and spirit of the statute is no less within its condemnation than one that is in literal conflict with its terms.[23]

Some conflict seems to exist between the Board and the Fifth Circuit Court on the one hand and the views of the Nevada and South Carolina Courts on the other hand concerning the legality

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[22] Building Trades Council, etc.,v. Bonito, 71 Nev. 84 (1955), 280 P.2d 295 (1955).

[23] Branham v. Miller Electric Co., 237 S. C. 540 (1961), 118 S.E. 2d 167 (1961).

of hiring halls in states with right-to-work legislation.

From this case it appears that not only is it difficult to distinguish between mandatory and permissive subjects of bargaining but the boundaries surrounding illegal subjects are also fluid.

The Fafnir Bearing Company Case

The Fafnir Bearing Company case involved an employer's refusal to permit a union representative to conduct independent time studies on company premises concerning piecework rates established by the company.[24]

Facts of the Case

In this case the union filed grievances asserting that certain piecework rates were improperly established by the company. The contract contained a grievance procedure with arbitration as the final step.

The union appealed the grievances up to the point of arbitration and then requested that the com pany furnish all data which they had utilized in establishing the rates. The company complied but the union was dissatisfied with the "adjustment factor" used in setting the rates. At this point the union representative requested permission to conduct a union time study of the operations involved so that he could "verify the Company's proposed rates and intelligently advise the Union whether to accept them or invoke arbitration...."[25]

The company refused on the grounds that (1) such a study was unnecessary to determine whether to go to

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[24] The Fafnir Bearing Company and International Union, United Automotive, Aerospace and Agricultural Implement Workers of America, Local No. 133, UAW, AFL-CIO, 146 NLRB 1582 (1964), 362 F2d 716 (1966).

[25] Ibid.

arbitration; (2) the labor agreement did not authorize the union to conduct independent time studies; and (3) the union was protected since the arbitrator would conduct his own studies, as he had done many times in the past in similar disputes.

The union then filed a refusal to bargain charge against the company.

The NLRB Decision

The Trial Examiner recommended dismissal of the complaint noting:

> But I am unable to find any present compelling authority in decided cases or in the legislative history of the Act which sanctions the view that a union is entitled to make its own independent time studies after it has received the employer's time study records.[26]

The Board rejected this view and found the company in violation of the Act. This case then went to the Second Circuit Court.

The Circuit Court Decision

The Court in affirming the Board's action said:

> The company argues...that section 8 (a) (5) does not encompass refusals to admit Union representatives to plant facilities for the purpose of conducting "live" studies. The Company points out that it has already turned over to the Union all of its time study data and suggests that by so doing it has fulfilled its obligation to bargain in good faith. This contention presents the most troublesome issue for our decision.

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26 Ibid.

> An employer's duty to provide relevant information to union representatives so that they can effectively bargain on behalf of their members has been established beyond question...
>
> And, it is true that by turning over its own time study data, the company believed it had complied with all that was required of it under the Act. The issue confronting us, however, is whether in the circumstances presented here, the company in fact was required to take that next step and grant permission to the Union to make a live study so that it could reliably evaluate the company's data.
>
> While it is true that the material the Union sought, because of its subjective nature, was not in the company's filing cabinets, it was nevertheless within the company's exclusive control....
>
> Consequently, on the evidence and findings presented in this proceeding, we believe the Board, exercising its expertise and special competence, could properly determine that the Union's need to conduct these tests outweighed the company's interests in closing its doors to outsiders.[27]

It might be argued that such a decision diminishes the value of a grievance procedure, providing for arbitration, freely arrived at through the bargaining process. The Court even conceded that "...access to company property for the purpose of conducting these studies could be employed by the unscrupulous as a tool of harassment."[28]

However, the Court hastened to assure the employer that such was not the case here. The basis for such a prophetic remark was not revealed.

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[27] Ibid.

[28] Ibid.

The Ador Company Case

A fundamental problem continually facing many manufacturing organizations is the desirability, or even necessity, of making changes in product lines. The Ador Company case raises the issue of the employer obligation to bargain concerning such decisions.[29]

Facts of the Case

Following a period of unprofitable operations, the Ador Corporation, a door and window manufacturer, went into bankruptcy. Under a court approved arrangement, a new general manager was appointed and the plant resumed production. One of the first decisions made by the new general manager was to discontinue an inexpensive line of doors and windows, since, in his opinion, most of the financial problems of the company could be traced to production and sales difficulties attendant to this line.

Following his decision, no further orders were taken and production of this line consisted solely of filling orders which already had been accepted.

Within several months, the backlog had been cleaned up and the company laid off fourteen employees no longer required.

The employer admittedly did not offer to consult or bargain with the union concerning this decision and maintained

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[29] Ador Corporation and Shopmen's Local 509, International Association of Bridge, Structural and Ornamental Ironworkers, 150 NLRB 1658 (1965).

that under the labor agreement in effect at the time the decision was made, management had no obligation to bargain concerning such action. Concerning rights granted to management under the agreement, the contract stated in part:

> The management of the company's plant and the direction of its working forces, including the right to establish new jobs, abolish or change existing jobs, increase or decrease the number of jobs, change materials, processes, products, equipment and operations shall be vested exclusively in the company...
>
> Subject to the provisions of this agreement, the company shall have the right to...lay off employees because of lack of work or other legitimate reasons....[30]

The NLRB Decision

The union filed an unfair labor practice charge against Ador for failure to bargain over the decision to discontinue the product line. The Trial Examiner, in holding for the union, recognized that a labor organization may waive certain statutory rights which it possesses, but such a waiver must be put in clear and unmistakable terms. Referring to the management rights clause contained in the contract, the Trial Examiner observed:

> The so-called management rights clause in section 6 (A) of the collective bargaining agreement...does not spell out a waiver of negotiations over Respondent's decision to discontinue its window and inexpensive door operations.

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30 Ibid.

> The issue here is not Respondent's decision to discontinue certain of its business operations. Rather, the issue is whether the Act gives to the Union the absolute right to be notified and consulted regarding Ador's decision to discontinue certain of its business operations and to afford the Union an opportunity to bargain about such changes before they become an accomplished fact.
>
> It is thus clear that section 6(A) of the contract cannot be construed as a waiver of this right.
>
> This is so because Respondent's decision resulted in the change of working conditions which resulted in the termination of 14 employees after their jobs had been discontinued and the Union had the right under the Act to be notified and consulted regarding these terminations unless it had waived such right.[31]

The Board reversed the Trial Examiner's ruling. In its decision the Board noted:

> Contrary to the Trial Examiner, we find that Respondent's course of action respecting the discontinuance of its "Challenger" line of products and the consequential layoff of employees theretofore engaged in the production of such products did not contravene the statutory mandate that it bargain about matters affecting changes in the terms and conditions of employment of its employees.
>
> The so-called management rights section of the collective bargaining contract in effect at the time Reinhard [the general manager of the company] made his decision and took the basic steps in the implementation thereof, gave to the Company the exclusive right to eliminate production of any of its products and to lay off employees who were, as

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31 Ibid.

> a consequence of such decision, no longer needed. The parties had, in effect, bargained about the manner in which such decisions were to be made during the term of the collective bargaining agreement and had agreed that the company could take unilateral action in this regard.[32]

In the absence of the specific contract provision the Board used in support of its position, the question might be raised whether the Board would have upheld the employer's action as coming within a sphere properly reserved to management.

The implications of this case for employers generally would seem to be that perhaps the most effective way of insuring the right of unilateral action in decisions affecting the management of the enterprise is to be quite explicit in the labor agreement. Decisions to be reserved exclusively to the management must be so stated. Vague or general clauses regarding the rights granted to management would probably be of little value to the employer if challenged by the union.

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32 Ibid.

The Westinghouse Electric Corporation Case

Should a company be forced by the union to bargain with an outside supplier concerning food service within its own plant?

Facts of the Case

The Westinghouse Electric Corporation maintained cafeterias in several of its plants located near Baltimore, Maryland.[33] Westinghouse provided only the physical facilities and an outside company actually operated the cafeterias. Upon notice of an increase in food prices, the union requested that Westinghouse negotiate concerning the price increases.

The company maintained that it had no legal obligation to bargain since the cafeterias were operated by an independent contractor which set the prices and that any bargaining with the union over matters beyond the control of the company would be futile.

The company also argued that the furnishing of a cafeteria service is neither a condition of employment nor wages. The service is a convenience to the employees to use or not as they desire.

The NLRB Decision

The Trial Examiner held that since the contract with the caterer was terminable on 60 days' notice, the company was in a strong position to exert pressure regarding changes in food

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[33] Westinghouse Electric Corporation and Salaried Employees Association of the Baltimore Division, Federation of Westinghouse Independent Salaried Unions, 156 NLRB 1080 (1966).

prices and consequently was under a duty to discuss the subject with the union. He also held that the Board has rejected as being too narrow the argument that the term "condition of employment" as used in the Act applied only to conditions under which employees were compelled to work and did not apply to conditions which the employer had established as a matter of convenience for the employees. In the Board's view the term was meant to encompass many noncompulsory aspects of the employment relationship.

The Board, in affirming the finding of a refusal to bargain on the part of Westinghouse stated:

> Respondent has cafeterias on its premises because there are inadequate dining facilities within a reasonable distance of its plants. If it did not have these facilities, it would not be able to attract the necessary number of employees to man its plants. In practical terms, on-site eating facilities are held out to the employees and prospective employees as an inducement to work for Respondent. They are thus conditions of employment.
>
> The problem is as simple as that.
>
> It is no answer to say that employees can bring their lunches if they do not like the prices charged in the cafeterias. We suppose that employees can also eat cake, if the cafeterias do not serve bread, or the employees can go elsewhere if they do not like Respondent's conditions of employment.
>
> The fact is that a considerable number of employees do not wish to bring their lunches from home, and if they had to do so would presumably look for employment elsewhere. Such employees are in substance and effect captive customers of the on-site cafeterias, even though Respondent chooses to have an outside company operate the cafeterias.[34]

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34 Ibid.

The dissenting position of two Board members offers a different solution:

> Collective bargaining is healthy, but if bargaining over a penny-a-cup increase in coffee becomes mandatory to the menu on the bargaining table, the result is liable to be acute indigestion. The statute requires that an employer bargain over wages, hours and conditions of employment. Here, an employer has voluntarily provided cafeterias for his employees. An independent contractor furnishes the food and sets the prices.
>
> Employees may also bring their lunches and eat them in the cafeterias. There is no compulsion to buy or to bring lunches; indeed, only 40 to 45 percent of the work force makes use of the cafeterias. In this case, a union, one of three in the plants, proposes that the prices, including the most recent increase of a penny-a-cup on carry-out coffee and 5 cents on hot items, be the subject of mandatory bargaining.
>
> Since there is joint, although limited use, of the cafeterias, the bargaining over the prices on each item on the menu by each of the three unions has the potential for extensive preemption of management and employee time. And if this position is sustained, will the next step require bargaining over color of restroom walls, adequacy of pool table equipment, and the like?
>
> The matters of wages, hours, working conditions, job security, and the like are deserving of the status of mandatory collective bargaining; penny-a-cup increases in carry-out coffee are better left to the mercies of the voluntary action of the market place. When the cash register stops ringing, the price of coffee will begin descending.[35]

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35 Ibid.

This case becomes significant because of the position in which the employer finds himself in situations essentially involving transactions between his employees and outside vendors. Conceivably this decision could be used as a precedent in situations where an employer permits vending machines on company premises (and the prices of the merchandise are raised) or where a firm arranges for industrial laundry facilities to be provided at employee expense (and the prices for the service are raised). No one is delighted at the prospect of paying higher prices for a good or service but, in the typical situation, the individual is generally able to discover alternative courses of action if he is unwilling to pay the higher price.

The Dixie Ohio Express Company Case

The Board's policy of expanding the scope of bargaining by broadly defining "terms and conditions" of employment is revealed by the Board's decision in the Dixie Ohio Express Company case.[36]

The Board's reasoning in this case would seem to impose a bargaining requirement on virtually any management decision designed to reduce inefficiency, eliminate wasteful operating practices or reshape work assignments. Failure to bargain over the decision to take such action would be, in the Board's eye, violative of the employer's statutory obligation and would therefore constitute an unfair labor practice.

Facts of the Case

The facts in the Dixie Ohio Express case are simple. The Dixie Ohio Express Company was engaged in interstate motor freight transportation and operated a terminal located in Nashville, Tennessee.

On August 17, 1965, the company made two changes in its freight handling operations on the dock in order to eliminate inefficiencies.

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36 Dixie Ohio Express Company and Teamster, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327 et al., 167 NLRB 72 (1967).

First, the company had used two-man crews in loading and unloading freight. The first man, a checker, sorted the freight and signed the bill of lading. The second man, a dockman, assisted the checker and stacked freight according to the checker's directions. Although the dockman was supposed to report for reassignment when the checker no longer needed his assistance, in practice he usually stayed longer than he was actually needed. Under the new arrangement, the crew consisted of a single checker with a second employee to provide help only when, and so long as, the checker requested extra help.

Second, prior to August 17, the loading and unloading of freight from the company's trucks and trailers had been done at the same time.

Under the new arrangement each operation was done at a different time. In addition, unloaded cargo was stacked by destination, more carts were used to move it about, and where possible, freight consigned to a certain city was unloaded near a trailer going to that city.

These two simple changes permitted the company to reduce its manpower requirements by about one-third and resulted in the termination of a number of employees. Since these changes were made unilaterally by the company, a complaint was filed by the union charging a refusal to bargain.

The NLRB Decision

In its decision finding the company in violation of

section 8 (a) (5) of the Act, the Board stated:

> ...although the Respondent [company] had the right to determine the need for a reorganization of its operations along more efficient lines, the Act imposed upon it the obligation to notify the Union of its reorganization plan and to afford the Union an opportunity to negotiate concerning changes in the plan itself, the manner and timing of the implementation of the plan, and the effects of the changes on employees whose jobs were to be eliminated.[37]

Board Member Jenkins, in a dissenting opinion, pointed out the serious implications of the Board's decision when he stated:

> ...the majority [of the Board] also holds that Respondent was obligated to bargain with the Union about its decision to make the changes, or as the majority phrases it "changes in the plan itself," as well as "the manner and timing of the implementation of the plan, and the effects of the changes on employees whose jobs were to be eliminated." That is, Respondent was required to bargain about whether to take the action at all, as well as about how to accomplish the changes and the manner of distributing the impact.
>
> ...Respondent made minor changes in work procedures in unloading trailers and stacking shipments on the dock, and eliminated the idle time of unloading assistants whose idleness developed only out of their own breach of the work rules for the job. As a result of this re-arrangement of work procedures and the elimination of wasteful steps of the operation, Respondent's requirement for employees decreased....
>
> Here the employees continued to do the same type work in essentially the same manner as before,

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37 Ibid.

> and the same volume of freight continued to pass through the terminal, the differences being where truck cargo was stacked and when additional men were assigned to help the checker. There is nothing to indicate that the jobs themselves became more onerous, difficult, protracted, or intensive. These minimal changes in procedure resulted in efficiencies which permitted a reduction in the total number of employees needed.
>
> Such slight procedural changes are not mandatory subjects of collective bargaining but rather are part of the day to day managerial control of an enterprise...
>
> Inefficiencies and mistakes creep into an operation, and management attempts to weed them as they are discovered. The fact that they exist for a time without being discovered or eliminated does not elevate them to being "terms and conditions" of employment which must be bargained about.[38]

The implication of this decision for management is that if lax supervision permits employees to violate established work rules, the employer may find himself charged with an unfair labor practice if he unilaterally attempts to "put his house in order." The importance of actual past practice rather than prescribed past practice seems to be of considerable importance in establishing whether management has a defensible position in changing plant work rules.

The National Labor Relations Act as amended has presumably set the scope of bargaining as limited to wages, hours and other terms and conditions of employment. But from the very brief view of these eight cases involving diverse issues, it can be concluded

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38 Ibid.

that there is no clearly defined standard to differentiate, for example, whether a given issue involves a condition of employment.

In the Borg-Warner case, the National Labor Relations Board concluded that a proposal calling for a secret vote of employees on an employer's final offer was not within the mandatory scope of bargaining. In the Mill Floor Covering case, a Trial Examiner supported the position that an industry promotional fund falls within the meaning of "wages, hours and other terms and conditions of employment". It should be noted that the Board did not support the examiner's decision.

In the Fafnir Bearing case an employer learned that a request to permit union time studies on company premises was adjudged a mandatory topic of bargaining. In the Ador Company case a Trial Examiner held the belief that an employer violates the Act by unilaterally making adjustments in his product line. The Board overruled the examiner in this case. The results of the Westinghouse Electric case showed that prices in the company cafeteria are subject to negotiation with the union. The Dixie Ohio Express case shows that an employer can violate the Act if he attempts to unilaterally introduce work assignment changes designed to improve productivity.

In trying to locate the perimeters of the bargaining obligation, one is forced to the view that the issues to which bargaining was intended to be confined are not to be found in the words of the law but, are in reality, determined by the subjective evaluations of the five men who compose the National Labor Relations Board

at any given moment, and their views are subject only to the case-by-case interpretation of the courts.

The fundamental purpose of the Act is literally being circumscribed when the NLRB is given the authority to specify whether bargaining issues are mandatory, permissive or illegal. The National Labor Relations Act was intended to equalize the balance of power between employers and individual employees by guaranteeing the right to bargain collectively. The words of the statute are perfectly clear on this point:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of membership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[39]

In other words the law was enacted to rectify an inequality in bargaining power between the parties. Parties with

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[39] Section 1, 49 Stat. 449 (1935).

equality of bargaining power have the resources at hand to come to agreements with which they are willing to live. The law was not enacted to regulate collective bargaining; but the Board clearly is controlling collective bargaining (subject to review of the courts) when, for example, it tells an employer that he cannot insist on discussion of a secret employee vote on the employer's final offer. Such conduct is an abridgement of management's freedom of contract contrary to the declared policy of the statute. It is an equal abridgement of the union's freedom of contract when the Board declares issues which the union is interested in pursuing only "permissive" subjects of bargaining.

Creative collective bargaining cannot be compelled. Creative collective bargaining is not being "encouraged" as the Act would seek when either party (in practice, more commonly the union) can come crying to the shoulder of the NLRB for assistance in its negotiations with management. Even more regrettably, the rights of property and contract, upon which this society places a value, become eroded.

CHAPTER IV

THE ISSUE OF PLANT RELOCATION OR SHUTDOWN: UNION ANIMOSITY AS A MOTIVE

The obligation to bargain is defined only in general terms by law. A review of recent NLRB and Federal Court decisions has illustrated current court interpretations of this duty.

It is not the objective of this research to identify all the subjects about which an employer must bargain under current interpretation of the law. Such a task would be literally impossible. The selection of cases was designed only to make the point that the range of topics upon which bargaining has become obligatory is indeed great despite the attempt in the Borg-Warner decision to place some restrictions on the parties' obligations.

The specific issue which it is important to examine in considerable depth concerns employer decisions to relocate specific plants or to shut them down either partially or completely.

The significance of the issue is put in perspective by recalling Dr. Ginzberg's comment that "among the most important dimensions of entrepreneurial initiative is the decision of the employer as to where to locate, or relocate his plant."[1]

An analysis of many of these NLRB cases follows with the aim of determining what guidelines the Board and the courts have set out governing conduct in such situations.

Employers generally could be expected to view the court decisions calling for an obligation to bargain on this subject as a

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[1] Ginzberg, E. and Berg, I. E. op. cit., p. 54.

further usurping of their prerogatives. Whether it actually is a further infringement on management rights can only be determined by a review of these legal decisions.

Before beginning an analysis of specific cases, it is desirable to review the traditional position of the employer and the union in decisions involving plant relocation or shutdown. If this subject has become the source of true and troublesome contention, one should have some understanding of each of the parties' positions.

Position of the Parties

There would seem to be two possible motives supporting an employer decision to relocate or shutdown his plant. One is anti-union feeling on the part of the employer. Through relocation or shutdown, the employer hopes to discourage union membership. Motivation rests on a desire to avoid recognition of the union. In such circumstances the employer would be technically guilty of a violation of section 8 (a) (5) of the National Labor Relations Act but the more compelling violation would be of section 8 (a) (3) which prohibits such anti-union conduct.

The other possible employer motive would be one dictated by economic considerations. Hostility to the union is not at issue. The employer, bearing the responsibility of preserving the economic well-being of the firm, is acting purely out of economic motives. If he is found guilty of an unfair labor practice, the only possibility open would be that he failed to bargain with the union in coming to his decision.

Under either consideration, the fundamental union position is concern for the security and preservation of the bargaining unit. Having won an election from an employer, the union is reluctant to see its membership wither away as the result of a plant relocation or shutdown. The effect on the bargaining unit is the same as that which occurs when operations are subcontracted, which, after all, is often quite comparable to a partial shutdown involving a reduction in force, or when a technological innovation is introduced which has the effect of eliminating jobs. Preservation of the bargaining unit is in a sense a struggle for survival for the union.

A former General Counsel of the National Labor Relations Board summed up these contrasting positions well when he told the Wisconsin Bar Association that:

> It has been said that one of the facts of life in industrial relations today is the "erosion of the bargaining unit." And perhaps the most significant problem raised under the Act in this regard is the question of whether and to what extent an employer must bargain about a decision to change his method of operations where there is a consequent effect on the employment of the employees in the bargaining unit. For example--a decision to contract out, transfer, or terminate all or part of his business. In such a case, management's interest in efficient and economic operation and the employee-union interest in unit employment conditions are in the balance.[2]

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[2] Address by Stuart Rothman, NLRB General Counsel, before the Labor Law Section of the Wisconsin Bar Association in Milwaukee, Wisconsin, February 15, 1963.

The New Madrid Manufacturing Company Case

The right of an employer to terminate the operations of his plant because of hostility toward the union was tested in 1953 in the New Madrid Company case.[3]

Facts of the Case

The New Madrid Company was a manufacturer of ladies garments with its principal plant located at New Madrid, Missouri. For about a year prior to October, 1951, the company also maintained a branch plant at Malden, Missouri and employed Harold Jones as manager of this plant.

During a union organizational drive at the Malden plant, the company locked out all its employees early in October, 1951, and in the latter part of November, 1951, sold all the machinery, equipment and supplies to Jones.

After this purchase by Jones, the machinery and equipment were moved to Portageville, Missouri, where Jones opened up a plant under the name of the Jones Manufacturing Company. New Madrid continued to operate its principal plant.

Under the terms of its sales contract with Jones, New Madrid agreed to advance Jones funds to set up the proposed plant and guaranteed to provide him with a specified amount of work for the plant. New Madrid also agreed to make cash advances on work in process at the proposed plant to enable Jones to meet his payrolls.

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[3] New Madrid Manufacturing Company, a corporation, and Harold Jones, an individual d/b/a Jones Manufacturing Company and International Ladies Garment Workers Union, AFL, 104 NLRB 117 (1953), 215 F2d 908 (1954).

Jones agreed to pay for the machinery, equipment and supplies purchased from New Madrid on an installment basis. He also agreed to perform no work for other customers without the approval of New Madrid and not to withdraw from the business, until the purchase price had been paid, more than a specified amount for compensation and expenses.

The NLRB Decision

In light of these contract arrangements, the Board concluded that New Madrid and Jones should be regarded as co-employers at the Portageville plant and held jointly and severably liable for remedying the unfair labor practices arising out of the discriminatory termination of operations at the Malden plant. The Board remedy then called for New Madrid either to resume operations at the Malden plant or to provide employment for the terminated employees at the Portageville plant at their same or equivalent positions. New Madrid was also to be held liable for the payment of lost wages from the date of the lockout to the date of offer of reinstatement of employment.[4]

Although there is no question that New Madrid's decision to dispose permanently of the Malden plant was motivated by a desire to avoid dealing with the union, the manner in which the Board concluded that the company was a co-employer at the Portageville plant and hence under a substantial liability to its former employees

[4] Ibid.

long after the cessation of operations and sale of facilities at the Malden plant is of concern.

The Circuit Court Decision

The Eighth Circuit Court, in its September, 1954, decision, rejected the Board's finding of a co-employer relationship at the Portageville plant when it stated:

> The sale transaction...first must be approached in relation to such legal realities as its terms and provisions ostensibly have created. And, unless those terms and provisions, either expressly or as a matter of reasonable implication, can be said to have given New Madrid a right or power of control over Jones' prerogative of management in general, or over his labor relations in particular, there is no basis on the contract itself to brand Jones and New Madrid as having created the status of co-employership in respect to the Portageville plant. The only other basis that then could exist to so regard them would be, if New Madrid, despite the lack of any such legal right or power under the agreement, could, from outside indication, be said to have been in fact exercising control over the labor relations, affairs and policies in the Portageville plant.[5]

The Court then reviewed the specific provisions of the sales contract and the conduct of the parties with respect to the operation of the Portageville plant and concluded that on neither basis could New Madrid be held to be occupying a co-employer relationship and that the Board had engaged in pure conjecture in so finding.

With respect to an employer's right to terminate his operations and his consequent obligations under federal labor law

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[5] Ibid.

in so doing the Court made a significant pronouncement when it held:

> But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business, or to actually dispose of his business to another, for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to a remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing or true and bona fide change in ownership has occurred.
>
> No one can be required to stay in private business, and no one can be prevented from permanently closing or abdicatingly selling such a business.
>
> And the Act affords no basis on which to order a person to reinstate employees in a business which he has, with plain finality, put out of existence, or which he has actually disposed of to another, and as to which he neither in law nor in fact possesses any power over the operations of his successor, either of management right in general or of labor relations control in particular.
>
> No more, in our opinion, can the Act be said to contain any basis to assess remedial back-pay against such a person, beyond the date of his permanent closing or abdicating sale of the enterprise.[6]

Accordingly, New Madrid was held to be liable only for back-pay from the date of the discriminatory lockout until the date of the sale to Jones. The Eighth Circuit Court, in so holding, clearly did not attach any importance to the fact that New Madrid permanently closed only a portion of its total enterprise since it still continued to operate its principal plant after the sale of the Malden plant.

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[6] Ibid.

The Barbers Iron Foundry Company Case

Whether an employer can without violating the Act permanently close his entire operation and go out of business if the decision is motivated by animus toward the union was the issue in the Barbers Iron Foundry Company case.[7]

Facts of the Case

On November 13, 1957, the union won a representation election at the employer's plant and several days later sent contract proposals to the company. The company temporarily locked out all employees from November 21 to November 25 and on November 27 closed the plant down permanently.

Although the employer claimed economic considerations prompted the closing of the plant, the Trial Examiner found that the decision to close the plant was not made until after the union had appeared on the scene and there was no doubt but that the actual closing was discriminatorily motivated.

The NLRB Decision

The Board agreed with the Trial Examiner's conclusions in the case and found the employer in violation of section 8 (a) (3) of the Act.

The dissenting views of Board member Rodgers were to be echoed by the Supreme Court in the Darlington case. In his dissent Rodgers stated the very simple proposition that:

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7 Rudy Barber et al.,d/b/a Barbers Iron Foundry and International Molders and Foundry Workers Union of North America, AFL-CIO, 126 NLRB 30 (1960).

> I cannot agree with my colleagues that the Respondent [company] violated the Act when it permanently closed down its plant and went out of business. In this respect, I do not believe that the motivation for the Respondent's actions is material. There is nothing contained in the Act which limits an employer's right to go out of business at such time and under such circumstances as he chooses, regardless of the reasons therefor.[8]

Since this case was not appealed by the employer, the Board's position remained sustained. In that view, if hostility to the union is present, not even a complete and final termination of the enterprise will serve to bar an unfair labor practice charge.

In the Darlington case, the Supreme Court modified this view.

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8 Ibid.

The Darlington Company Case

A precedent-setting case involving the issue of plant shutdown is the Darlington Company case.[9] Although there were many complications introduced by virtue of the relationship between the Darlington Manufacturing Company and Deering Milliken & Co., Inc., the Board and the courts held essentially that these corporations constituted a single employer.[10]

Facts of the Case

In September, 1956, following an organizational campaign lasting approximately six months, the union won a certification election at the Darlington Manufacturing Company's sole plant located in Darlington, South Carolina. The vote was 258 in favor of the union and 252 opposed. Several days following the election,

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[9] Darlington Manufacturing Company; Roger Milliken; Deering Milliken & Co., Inc.,and Textile Workers Union of America, AFL-CIO, 139 NLRB 241 (1962), 165 NLRB 100 (1967), 325 F2d 682 (1963), 380 U.S. 263 (1965).

[10] The Board found that the Milliken family, through Deering Milliken, operated 17 textile manufacturers, including Darlington, whose products, manufactured in 27 different mills, were marketed through Deering Milliken.

Ownerhsip of the common stock of the Darlington Manufacturing Company was divided as follows:

Deering Milliken & Co., Inc.	41.4%
Cotwool Manufacturing Corp.	18.3
Roger Milliken and members of his immediate family	6.4
Directors and employees of Deering Milliken & Co., Inc.	2.9
Outsiders or non-Milliken family or interests	31.0
	100.0%

the company's board of directors met and voted to recommend dissolution of the plant in a special stockholders' meeting called for October 17, 1956.

The stockholders voted to accept this recommendation and in late November, 1956, the plant was closed with all employees having been discharged in the interim. The machinery and equipment were sold at auction in December, 1956, and the Darlington Manufacturing Company ceased to exist as an operating organization.

The NLRB Decision

Although the company sought to defend its action before the National Labor Relations Board on the grounds that the decision to close the plant was economically motivated, the Board concluded on the basis of statements made at the time by a number of members of the management, including the president, that the plant closure was made for discriminatory reasons and was accordingly a violation of section 8 (a) (3) of the National Labor Relations Act.

This section of the Act states that it is an unfair labor practice for an employer to discriminate with respect to hire, terms of employment, or in any other condition of employment for the purpose of encouraging or discouraging union membership. The Board felt in this case that by closing the plant Darlington was discriminating with respect to its employees' tenure of employment.

The central issue in this case of concern in this study is whether an employer has the absolute right to go out of business regardless of the reason. Citing the preamble of the National Labor

Relations Act as amended, the Board justified its findings as follows:

> The "policy of the United States" is to mitigate and eliminate obstacles to the free flow of commerce "by encouraging the practice and procedure of collective bargaining" and by protecting workers in the exercise of their right to organize and select a bargaining representative.
>
> On the other hand, Darlington's policy, as evidenced by its conduct, is directly contrary to that prescribed by the statute. Once the employees had exercised this statutory right of selecting the Union by the process prescribed by the statute--the Board election--Darlington destroyed the possibility of collective bargaining by shutting its plant.
>
> Darlington is mistaken in its claim that by going out of business and permanently reducing "the free flow of commerce" the statute made lawful its discharge of employees for their engagement in organizing activities. Congress has taken from employers the right to discharge employees for engaging in protected activities. The withdrawal of this right is absolute and unequivocal.[11]

The Circuit Court Decision

The Board's decision was appealed to the Fourth Circuit Court of Appeals and, in its decision of November 15, 1963, the Court declined to enforce the orders of the Board against the employer. The relevant portions of the court's reasoning are as follows:

> To go out of business in toto or to discontinue it in part permanently at any time, we think was Darlington's absolute prerogative. The

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[11] Ibid.

> fundamental purpose of the National Labor Relations Act is to preserve and protect the rights of both industry and labor so long as they are in the relationship of employer and employee. But the statute's scope does not exceed that province. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity so long as the obligations of any employment contract have been met. Such withdrawal, alone and of itself does not create any obligation of either the employer or the employee to the other under the Act....
>
> If a cessation of business is adopted to avoid labor relations, the proprietor pays the price of it: permanent dissolution of his business, in whole or in part....
>
> Of course, the right of discontinuance which we here uphold, means an actual, unfeigned, and permanent end of operations--not a removal, nor subcontract, nor a change merely in the form of the corporate entity. No ruse or subterfuge is suggested here. Darlington's was an absolute desistence, not a temporary intermission....
>
> There was no provisional lockout, the mill was not transplanted elsewhere, and its sale was concededly entire, bona fide and irrevocable. The Trial Examiner demonstrated beyond debate that Darlington was not a "runaway" plant--that is, a plant having another existence in another form--finding that Darlington was not hidden among the other Milliken corporations.[12]

The Supreme Court Decision

The case was appealed to the United States Supreme Court and in March, 1965, the court vacated the judgments and remanded the case to the National Labor Relations Board for additional findings. The court held that an employer could,

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12 Ibid.

without committing an unfair labor practice, close his entire business even if the closing was motivated by hostility toward the union.

However, in the court's view, closing of part of a business is an unfair labor practice under section 8 (a) (3) of the Act if the purpose of the closing is to discourage unionism in any of the employer's remaining plants. The court held that the NLRB had made no findings as to the purpose and effect of the closing at Darlington with respect to the employees at the other plants in the Deering Milliken complex and, accordingly, ordered the case returned to the Board to permit such findings to be made.

Significant comments made by the Supreme Court in this case are as follows:

> We hold that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases, but disagree with the Court of Appeals that such right includes the ability to close part of a business no matter what the reason....
>
> ...we are constrained to hold, in disagreement with the Court of Appeals, that a partial closing is an unfair labor practice under section 8 (a) (3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.[13]

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13 Ibid.

In June, 1967, following additional hearings, the NLRB concluded that a motive in closing the Darlington plant was to curb the possibility of unionization in the other plants of Deering Milliken.

If animosity toward the union is found to be the principal reason for shutting down or relocating a plant, the ground rules governing employer conduct are fairly clear. Under current interpretation of the law, an employer may terminate his operations completely and permanently without fear of sanction. However, a permanent shutdown of only a portion of the enterprise, or a relocation of the firm, to avoid bargaining with the union would result in the employer being found in violation of an unfair labor practice.

CHAPTER V

THE ISSUE OF PLANT RELOCATION OR SHUTDOWN: ECONOMIC CONSIDERATIONS AS A MOTIVE

Animosity toward union organization is not always the only reason that firms have chosen to relocate or go out of business. In many instances the reasons appear to be purely economic.

In many respects an analysis of Board and court cases involving economic issues is a more relevant avenue of inquiry than an examination of cases involving employer hostility to the union. Section 8 (a) (3) of the Act prohibits an employer from discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...." These words are much less susceptible to diverse interpretation than is the wording of section 8 (a) (5) and employers do not rely on a presumed "right"of mangement to discipline or discharge individuals for engaging in union activity. Any such "right" has been rather clearly expunged by the very words of the law.

Situations in which well-intentioned, economically motivated employers shut down or relocate their plants in response to competitive pressures are much more likely to raise the issue of the "rights" of management.

A total of 17 cases in which economic considerations formed the basis for the employer's conduct will be reviewed to permit an examination of Board and court positions when such a motive is at

issue. The first of the cases was decided by the Board in March, 1960, and the last in January, 1967, so the positions taken by the Board and the courts are of current interest.

The cases are presented in chronological order based on the date of the NLRB decision with two minor exceptions made in order to simplify the presentation of the material and to identify more clearly relevant views of the Board and the courts.[1]

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[1] The two exceptions are as follows:

1) The two Fibreboard decisions have been discussed together and have been included chronologically on the basis of the second decision since it represents current Board policy,

2) The Adams Dairy Company case has been presented after the Fibreboard analysis although the NLRB decision occurred about three months prior to the NLRB decision in the second Fibreboard case. However, the U. S. Supreme Court decision in Fibreboard occurred prior to the Supreme Court decision in the Adams Dairy case. The results of the Supreme Court decisions seemed important in setting the order of presentation of these two cases.

The J. M. Lassing Case

The J. M. Lassing case involves the permanent discontinuance of one phase of an enterprise for economic reasons.[2]

In this case the employer was faced with the familiar "make or buy" decision which firms continually face in a dynamic economy. The case also is of interest since it reveals that there is not always agreement between the Board and the courts whether an employer's action was motivated by economic reasons or by animosity toward the union. The case was decided by the Board in March, 1960.

Facts of the Case

Consumer Gasoline Stations was a partnership operating an independent chain of retail service stations in Kentucky and Tennessee. In connection with its operations the company maintained several gasoline transport trucks and employed several drivers for use in delivering a portion (30%) of its gasoline requirements from bulk stations to its own retail stations. The balance of the company's requirements was transported by common carriers. During the latter part of 1958 the company had undertaken a study to determine whether it should continue to truck gas with its own equipment and employees, particularly in the light of mounting costs and inadequate equipment.

As a result of this study, the employer had come to the decision that it would utilize common carriers to handle all of its

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2 J. M. Lassing et al.,d/b/a Consumer Gasoline Stations and Teamsters, Chauffeurs, Helpers & Taxicab Drivers Local Union No. 327, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, & Helpers of America, 126 NLRB 1041 (1960), 284 F2d 781 (1960).

delivery requirements as soon as anything occurred which would increase costs and, in any event, after April 1, 1959.when its truck licenses expired.

On January 1, 1959, the company's drivers joined the union which immediately requested a meeting for the purpose of negotiating a collective bargaining agreement. Prior to the meeting with the union the company notified the drivers on January 19, 1959, that it was discontinuing its own transport operation and that their employment was terminated.

The NLRB Decision

In his report the Trial Examiner, whose findings were upheld by the Board, concluded that although the employer pleaded economic necessity as the reason for discontinuing the transport operation, his real motive was an unwillingness to recognize and deal with the union. In justifying his coming to this conclusion, the Trial Examiner stated:

> But..., it must be remembered, the Union's request was not for a specific contract or for a stated wage rate, but rather for recognition of its status as the representative of...Respondent's... drivers, and for a bargaining meeting; rights established in these employees' behalf by the express language of... 8 (a) (5) of the Act. Respondent, then, by so moving to maintain or improve its economic stability would seem to have moved too soon. And in so doing it has confused the statutory rights of its employees and their representatives with its own statutory prerogatives.
>
> Thus while Section 8 (d), among other things, relieves an employer of any necessity to "agree to a proposed proposal or require the making of a concession" it does not permit him to avoid the statutory mandate to recognize and meet with the representative of its employees.

> There is an obvious difference between refusing to recognize or to sit down and bargain, as contrasted with refusing to agree or make a concession. And in the situation before us Respondent never reached a point in its labor relations where there was anything to agree upon, or where it could properly refuse to make a concession, none having been asked. All Respondent had was a request to recognize and to bargain, and the surmise that it was about to be faced with higher wage costs. No contract had been offered; no wage rates suggested.[3]

The Circuit Court Decision

The Sixth Circuit Court, in its decision of December 17, 1960, took the position that an employer is free to change operations if motivated by financial or economic reasons and such action cannot be deemed to be an unfair labor practice. Speaking to the Trial Examiner's conclusion noted above, the Court held:

> Although the Union had made no demand for increased pay, the evidence fully justified Respondent's belief that such demands would be made and could not be met.
>
> Under the circumstances we do not believe it was incumbent upon the Respondent to delay the effective date of its new method of operation previously decided upon before the advent of the Union.
>
> It will be noticed that the Respondent's decision to change its method of operation did not include a commitment to continue under its existing method of operations until April 1, 1959. That date fixed the maximum period of time which would elapse before the change would become effective. The Respondent had decided to make the change effective before that date if anything occurred which would increase its costs. The advent of the Union was a

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3 Ibid.

> new economic factor which necessarily had to be evaluated by the Respondent as a part of the overall picture pertaining to costs of operation.
>
> It is completely unrealistic in the field of business to say that management is acting arbitrarily or unreasonably in changing its method of operations based on reasonably anticipated increased costs, instead of waiting until such increased costs actually materialize.[4]

The implications of the decisions in the case are significant. Although the Board found the employer guilty of a violation of the Act, the language of the Trial Examiner's decision, which was adopted by the Board, seems to indicate that if the employer had recognized and met with the union and then had unilaterally decided to discontinue the transport operation, his action would have been within the law. The Board seems to have been concerned with the timing of the employer's action rather than with the action itself.

An important aspect of the court's opinion is that it held that an employer need not actually incur additional costs anticipated because of the entry of the union; a legitimate presumption of added expense is sufficient to grant the employer freedom of action.

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4 Ibid.

The Rapid Bindery Company Case

The freedom of management to make decisions involving plant relocation or shutdown begins to be weakened by the Second Circuit Court in 1961. In the Rapid Bindery Company Case, the Court clearly stated that the employer was not obligated to bargain over his decision to relocate a plant, but he was under a duty to bargain over the effects of such a decision.[5]

Facts of the Case

Shortly after the union won a representation election at the employer's Dunkirk, New York plant, the employer closed this plant and moved his operations to a plant in Tonawanda, New York, a distance of about 50 miles.

Although the employer was admittedly something less than happy to have the union on his premises, the relocation was essentially dictated by economic motives. Space in the plant had become inadequate; it was difficult to maintain a competent work force; transportation costs in connection with a large contract the company had just secured would have been exorbitant at this plant. It is conceded that the employer made no mention of this impending plant relocation to the newly certified union during negotiations which were underway at the time for a collective bargaining agreement.

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5 Rapid Bindery Inc. et al.,and Local Union No. 685, Printing Specialties and Paper Products Union et al., 127 NLRB 212 (1960), 293 F2d 170 (1961).

The NLRB Decision

The Board adopted the Trial Examiner's findings that the employer was guilty of a refusal to bargain. In his conclusions concerning this violation the Trial Examiner noted;

> While engaging in surface negotiations,...the Respondents [employers] in bad faith failed to inform or consult with the Union regarding the move of machinery and resultant loss of employment hours at Dunkirk....
>
> The Respondents closed their Dunkirk operations and effectively discharged all employees without consulting with the Union or giving it an opportunity to bargain with respect to the contemplated change as it affected employment.[6]

It seems that the concern of the Board at that time was with enforcing an obligation to bargain about the effects of a plant relocation.

As will be noted in the Fibreboard case, the Board has since come to consider the obligation to bargain concerning the decision to relocate as being equally mandatory.

The Circuit Court Decision

In the Rapid Bindery case the Second Circuit Court plainly delineated the employer's obligation when the case came to the Court on a proceeding for enforcement. In its opinion the Court held:

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6 Ibid.

> ...we recently considered in some detail the purport of the requirement that the employer bargain collectively.[7] We there held that this statutory duty insures, first, that the employer shall commence a bargaining with respect to rates of pay and hours and conditions of employment, and, second, that once the bargaining has commenced the employer shall make a good faith effort to reach agreement. But there is no statutory requirement that agreement be reached.
>
> In the present case the second stage of the employer's duty was not involved, for the move was never submitted as a subject for bargaining. Only the first stage is involved.
>
> Was the failure to submit the move as a subject for bargaining a refusal to bargain with respect to rates of pay, hours and conditions of employment? The decision to move was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion. However, once that decision was made, section 8 (a) (5) requires that notice of it be given to the union so that the negotiators could then consider the treatment due to those employees whose conditions of employment would be radically changed by the move.
>
> Nothing affects conditions of employment more than a curtailing of work, and such a curtailment is properly the subject of collective bargaining.[8]

In this case the Court ordered enforcement of the Board remedy calling for the employer to offer reinstatement at the Tonawanda plant to all employees terminated at the Dunkirk plant to their former or equivalent positions with no prejudice to their

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[7] NLRB v.Katz 289 F2d 700 (1961).

[8] 293 F2d 170 (1961).

seniority or other rights.

The circuit court decisions in the Rapid Bindery case and the J. M. Lassing case occurred less than one year apart, but they present two different views concerning the employer's obligation to bargain. The question may be raised whether an employer's freedom to shut down or relocate a plant is, at least in part, affected by his geographic location within the country. One cannot know for certain how the Sixth Circuit Court would have decided the Rapid Bindery case but, based on the Court's remarks in the J. M. Lassing case, it is possible that it would have found the employer free of any violation.

In any event, it is significant to note that in one court's view the employer is under no obligation to bargain over his decision to shut down or relocate but he is under the duty to bargain concerning the effects of this decision.

The New England Web Company Case

In a case decided in 1962, the First Circuit Court, in refusing to enforce a Board order, concluded that an employer has the right to close his plant without committing an unfair labor practice when, in the exercise of legitimate business judgment, he determines that such action is either economically desirable or economically necessary.[9] In determining the legitimacy of a plant shutdown the Court also held that the presence or absence of employer hostility to the union was relevant.

Facts of the Case

The New England Web Company was a small manufacturer of webbing, employing about fifteen people in its weaving operation. Beginning in September, 1959, the company began to receive an unusually large number of returns of defective merchandise from its customers and, in fact, lost the business of several customers for this reason. The employer concluded that the high rate of defective material which was being produced could be traced to the fact that the weavers were paid on a piece rate basis, rather than on an hourly basis, and that consequently they were much more concerned with the quantity of their output than with its quality.

The employer then notified the weavers on March 8, 1960, that he was going to discontinue the use of piece rates and place all weavers on an hourly rate.

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9 The New England Web, Inc., et al.,and Rhode Island State Joint Board, Textile Workers Union of America, AFL-CIO, 135 NLRB 1019 (1962), 309 F2d 696 (1962).

The employer then notified the weavers on March 8, 1960, that he was going to discontinue the use of piece rates and place all weavers on an hourly rate.

To demonstrate to his employees that this change in method of payment was being made in good faith, the employer showed these employees his books, the letters from customers, the returns of merchandise for credit and evidence of the severe financial losses which were currently being sustained.

On the day following the meeting at which the above information was provided, the weavers struck, although a group of them met with the employer and requested that the proposed hourly rate be increased. When the company rejected this request, the employees contacted the union, requested representation by the union and began to picket the plant.

Several weeks later a representation election was held, which was won by the union and on April 5, 1960, the first negotiation meeting took place. At this meeting the company informed the union that New England Web had lost its largest customer, as well as several others, and that, accordingly the company was going to shut down permanently. The company indicated a need for a certain number of weavers to complete the work then in process and at a meeting on April 7, the company and the union agreed on the individuals who would perform this work and on the rate they would be paid.

Several days later, the union and each individual still on strike formally notified the company that the strike was being

terminated and requested reinstatement. At several subsequent meetings with the union the company reiterated its intention to shut down permanently at the end of May, 1960, following completion of all work in process.

The NLRB Decision

The Trial Examiner found the company free of any violation of the Act, but the Board overruled his decision and concluded that the company's decision to close the plant was motivated by hostility toward the union and that, in unilaterally shutting down the plant following the election, the company violated its obligation to bargain.[10]

The Circuit Court Decision

The case came before the First Circuit Court which refused to support the Board's position. In its decision the Court stated:

> We start with the proposition that a businessman still retains the untrammeled prerogative to close his enterprise when in the exercise of a legitimate and justified business judgment he concludes that such a step is either economically desirable or economically necessary. This prerogative exists quite apart from whether or not there is a union on the scene....
>
> In determining whether the shutdown was justified, we first note that there is nothing in the record indicating a prior history of Union opposition or hostility on the part of New England Web. The presence or absence of this factor is always relevant in questions of this nature.
>
> Assuredly among those factors which would induce a "legitimate" business judgment to close operations, few can exceed financial distress. Here the record indicates that due to the production of defective merchandise, New England Web had experienced serious

[10] Ibid.

> customer dissatisfaction, resulting in the loss of customers and a consequent and predictable loss in revenues.
>
> At the March 9, 1960, meeting with the weavers--even before the advent of the Union--Jarvis [a company officer] showed the workers the books of the company and the tax returns to indicate the seriousness of this situation....
>
> In short, we have no hesitation in agreeing with the Trial Examiner that "the facts plainly disclose the financial distress of New England Web." While it is true that there is no evidence in the record that the company had formally considered closing down operations prior to the advent of the Union, it is equally true that the officers felt that some decisive measures were necessary to avert the rapidly deteriorating economic position of the company.
>
> The decision to change the mode of compensation was significant evidence of this. When this decision--far from immediately ameliorating the company's economic position--caused a walkout and a strike by the weavers and their subsequent unionization, then this was assuredly a new factor to be considered by the New England Web management in determining a future course of action. Viewed in the context of the shakey financial status with which New England Web was confronted, a decision--at that point--to go on no more cannot be said to be inherently implausible.[11]

The New England Web Company case illustrates, as did the J. M. Lassing case, that the Board and the courts have differed concerning the motives of the employer in taking action. In both of these cases the courts reversed the Board's finding that the employer's decision was motivated by hostility to the union, found the motive was economic, and so sanctioned the employer's action.

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11 Ibid.

It is also significant to note that the First Circuit Court in the New England Web case made no mention of an employer obligation to bargain concerning the effects on employees of a plant shutdown although the Second Circuit Court in the Rapid Bindery case had earlier held that an employer was under a duty to bargain over this aspect of the shutdown. Reconciliation of the views of the circuit courts appears impossible to achieve.

The Town and Country Company Case

Of considerable importance to this research of administrative and judicial policy concerning the employer decisions to relocate plants or permanently discontinue operations is the reasoning presented in several cases involving the issue of subcontracting.

Facts of the Case

The first of these cases has come to be known as the Town and Country Company case.[12] In this instance the employer, a manufacturer of mobile home trailers, subcontracted his hauling operation to an independent trucking company shortly after his own drivers voted to be represented by the union.

The employer claimed that the subcontract was motivated by a desire to rid himself of certain difficulties he was experiencing with the Interstate Commerce Commission in the operation of his own hauling operation.

The NLRB Decision

The National Labor Relations Board concluded on the basis of certain hostile statements made by members of the firm's management prior to the representation election that the subcontracting was motivated by discriminatory reasons and was a violation of sections 8 (a) (3) and 8 (a) (5) of the Act.

The Board then discussed at some length the

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[12] Town and Country Manufacturing Company, Inc., and Town and Country Sales Company, Inc.,and General Drivers, Chauffeurs and Helpers Local Union No. 886, 136 NLRB 1022 (1962), 316 F2d 846 (1963).

bargaining obligation in a subcontracting situation wherein hostility to the union was not present.

Shortly before this case was decided, the Board had ruled in the first Fibreboard Paper Products Corporation case that an employer was under no obligation to bargain over subcontracting if hostility to the union was not present and the decision was entirely motivated by economic reasons.[13]

Both Fibreboard cases will be reviewed later, but at the moment, it is relevant to examine the change occurring in the Board's position as evidenced by its statement in the Town and Country case.

> In Fibreboard Paper Products Corporation, the Board held that an employer, which unilaterally subcontracts a portion of its operations for economic reasons, does not violate section 8 (a) (5) of the Act by failing to notify and negotiate with the representative of its employees with respect to this decision. The act of the employer was deemed to constitute a management prerogative without impact on the conditions of employment within an existing bargaining unit.
>
> Accordingly, the decision to subcontract unit work was not a mandatory subject of bargaining and hence no discussion with the employees' representative was required.
>
> Upon reconsideration of the Fibreboard opinion, we are now of the view that it unduly extends the area within which an employer may curtail or eliminate entirely job opportunities for its employees without notice to them or negotiation with their bargaining representative.

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[13] 130 NLRB 1558 (1961).

> In our opinion, the precedents cited and discussed by the majority and minority decisions in that case support the conclusion that the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase "other terms and conditions of employment" and is a mandatory subject of collective bargaining within the meaning of Section 8 (a) (5) of the Act. Moreover, the duty to bargain about a decision to subcontract work does not impose an undue or unfair burden upon the employer involved.
>
> This obligation to bargain in nowise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment. Experience has shown, however, that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. But it commands no less.
>
> Accordingly, even if Respondent's subcontract was impelled by economic or I.C.C. considerations, we would nevertheless find that Respondent violated Section 8 (a) (5) by failing to fulfill its mandatory obligation to consult with the Union regarding its decision to subcontract. To the extent that the majority opinion in the Fibreboard case holds otherwise, it is hereby overruled. [14]

One of the members of the NLRB dissented. In his dissent, Board Member Rodgers articulately expressed a concern over

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14 136 NLRB 1022 (1962).

a fundamental erosion of management prerogative:

> I...disagree with my colleagues' holding that Respondent violated Section 8 (a) (5) by failing to bargain with the Union over its decision to terminate the trucking operation. In Fibreboard Paper Products Corporation, 130 NLRB 1558, this Board stated, and correctly so, that the statutory obligation to bargain is not "so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial efforts."
>
> Courts, too, have recognized that such decisions are within the realm of managerial discretion and are not mandatory subjects of collective bargaining. The decision of this Respondent to terminate its trucking operation was, of course, such a managerial determination, and, therefore, a prerogative exercisable without negotiation.
>
> I must also disagree with my colleagues' view that an employer when terminating an operation must bargain with the union over the effects of that termination.
>
> As stated above, whether to continue or terminate an operation is a prerogative of management not subject to collective bargaining. To hold, therefore, that an employer can be forced to bargain over the effects of a decision to terminate necessarily renders that prerogative meaningless. For, obviously, to require an employer to bargain over this aspect of his decision does not leave him free to make the decision; in such a situation he is left, for all practical purposes, in no better position than he would have been in had he been required to negotiate with the union the whole subject of termination.[15]

The Circuit Court Decision

The case was appealed to the Fifth Circuit Court. In its decision enforcing the Board order the Court declined to present its

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[15] Ibid.

views on the issue of the need to bargain over an economically motivated subcontracting decision and, in essence, based its decision on the conclusion that the employer undertook subcontracting as a means of ridding itself of the union.[16]

An analysis of this case shows the apparent change in the Board's position concerning the duty to bargain from that expressed in the J. M. Lassing and Rapid Bindery cases. In the J. M. Lassing case, the Board emphasized the need to recognize and meet with the union but declined to say specifically that basic changes involving the discontinuance of certain operations were mandatory subjects of bargaining. In the Rapid Bindery case, the Board's decision would seem to emphasize a need to discuss only the effects on the employees of a basic change in operations. In the Town and Country case, the Board would appear to have gone further in expanding the scope of bargaining by requiring the employer to bargain over the decision to alter his operation.

It is, perhaps, regrettable that the Fifth Circuit Court in the Town and Country case did not make known its views concerning the legality of an economically motivated decision to subcontract work (which might also have application in plant relocation or shutdown cases). An expression from the court might have been helpful in the resolution of later cases.

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16 Ibid.

The Renton News Record Case

The impact of an advance in technology may well lead an employer to alter his operations in order to improve his financial position. A case decided by the Board in 1962 involved such an employer decision and the specific circumstances are so closely akin to those prevailing in partial plant shutdown or subcontracting situations that the case is relevant to this analysis.[17]

Facts of the Case

Faced with the demands of increased competition and expanding markets, five weekly newspaper publishers formed a separate company, in which they shared ownership, to print their own newspapers as well as jobs for other customers. The printing was to be done on a new offset press which would replace the letterpress printing operations formerly maintained by each of the five publishers. Concurrently with this decision, the publishers decided to utilize coldtype composition, a process particularly suitable for use in conjunction with printing by the offset process. This method of composition was considered to be best suited for their needs because it gave an increased volume of production at lower costs, provided a superior final product, and the machinery and equipment required were less expensive than that used in hot metal composition.

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17 Carl Rochet and Charles Ruud, d/b/a The Renton News Record and Bellevue American Publishing Company, Inc., et al., and Seattle Typographical Union No. 202, AFL-CIO, 136 NLRB 1294 (1962).

To handle this aspect of the work the five publishers joined with an outside party to form a separate corporation in which the five publishers had no voting power. With the formation of the new corporation, the publishers then terminated all composing room employees formerly employed at their respective plants.

The union then filed charges against two of the publishers charging them with a failure to bargain over the closing of their composing rooms. The Companies took the position that this change in their operations was a matter of managerial prerogative and did not require bargaining with the typographical union.

The NLRB Decision

In its decision holding the employers guilty of a refusal to bargain, the Board stated:

> The change in the method of operations in this case is the result of technological improvements. Obviously, such improvements serve the interests of the economy as a whole and contribute to the wealth of the nation. Nevertheless, the impact of automation on a specific category of employees is a matter of grave concern to them. It may involve not only their present but their future employment in the skills for which they have been trained.
>
> Accordingly, the effect of automation on employment is a joint responsibility of employers and the representatives of the employees involved. To the extent that this responsibility imposes a statutory obligation on either party to bargain in good faith about wages, hours, and conditions of employment, it is a matter over which this Board has jurisdiction.
>
> Certainly, in some cases, the adverse effect of changes in operation brought about due to improved, and even radically changed, methods and equipment, could be at least partially dissipated by timely advance planning by the employer and the bargaining

> representative of its employees. Obviously, this is not possible, where, as here, the employers did not advise the Union in advance of the change, and, in fact, never did notify the Union, but rather, when the time came, informed the employees.[18]

Unlike its decision in the Town and Country case, the Board here was reluctant to order bargaining concerning the decision to terminate composing room operations.

This reluctance appeared to be predicated on the grounds that such a remedy would have a detrimental impact on the other publishers and individuals who were not parties to this case. The Board accordingly ordered the two publishers involved to bargain only concerning the effects of the termination on those employees affected.

After considering the facts peculiar to this case, the outcome appears to be consistent with the Board policy enunciated in the Town and Country case. The implications appear to be significant. It would seem that in any situation in which employees might be displaced due to technological change (and one can scarcely pick up a journal without reading of some new labor-saving device on the industrial scene) that the employer is under an obligation to bargain with the union concerning his decision to utilize such new facility. It is small wonder that the issue of "managerial rights" generates controversy.

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18 Ibid.

The Fibreboard Paper Products Company Cases

The two cases involving the Fibreboard Paper Products Company bear directly on the issue of management's duty to bargain over the decisions to subcontract portions of the work or to shutdown or relocate plants, and many of the Board's recent decisions involving these issues are based on the Board and subsequent court decisions in the record of these cases.[19]

Facts of the Case

The facts in the case are relatively simple.

Beginning in 1937, the employer had bargained with a local union of the United Steelworkers of America covering a unit of about 50 maintenance workers. The last of the series of labor agreements expired on July 31, 1959. Between 1954 and 1956 the employer had considered the feasibility of contracting out its maintenance work as a means of effecting certain economies in the plant, but no affirmative action had been taken.

In June, 1959, the feasibility study was reviewed and on July 27, 1959, the employer made the decision to implement the plan on the basis of the substantial annual savings forecast.

The employer promptly notified the union of its decision

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[19] Fibreboard Paper Products Corporation and Local 1304, East Bay Union of Machinists, United Steelworkers of America, AFL-CIO, et al., 130 NLRB 1558 (1961), 138 NLRB 550 (1962), 322 F2d 411 (1963), 379 U.S. 203 (1964).

to change its method of operation upon the expiration of the current labor agreement and stated that it was prepared to grant termination pay to those employees who would be discharged.

There was no finding that the subcontract was let for discriminatory reasons, and the central issue for the Board to rule upon was whether the decision to subcontract must necessarily have been bargained with the union.

The NLRB Decision

In its decision in the first case dismissing the union complaint the Board again drew a distinction between the obligation to bargain over the decision to subcontract and the duty to negotiate over the effects of such a decision. Concerning this point the Board reasoned:

> The statutory obligation imposed upon employers by Section 8 (a) (5) is unquestionably broad, and includes the obligation to bargain not only concerning matters affecting employees while they are employed, but also concerning matters as they affect termination and post-termination rights and obligations.
>
> None of the obligations heretofore imposed with respect to this latter category concern, however, the question whether, as here, a termination will occur; all, rather presuppose that terminations will occur, and are concerned solely with such matters as selection for termination among present employees, and benefits flowing from present employment which employees may be entitled to receive at the time of or following the termination of employment.
>
> These matters, therefore, although they look to the future, nevertheless involve matters presently affecting employees within an existing bargaining unit; for that reason they fall within the statutory language as "conditions of employment."

> The obligation which the General Counsel would impose is, however, of an entirely different nature. For it is not concerned with the conditions of employment of employees within an existing bargaining unit; it involves, rather, the question whether the employment relationship shall exist.
>
> Although the determination of that question obviously affects employees, that determination does not relate to a condition of employment, but to a precondition necessary to the establishment and continuance of the relationship from which conditions of employment arise. Moreover, although the statutory language is broad, we do not believe it so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort.
>
> Under all circumstances, therefore, we conclude that Section 8 (a) (5) of the Act does not obligate the Respondent to bargain with the Steelworkers concerning its economically motivated decision to subcontract its maintenance operations.[20]

In September, 1962, the Board reconsidered its decision in the first Fibreboard case and issued a supplemental decision holding that the decision to subcontract work was a mandatory subject of bargaining. In support of its decision the Board relied in part on the 1960 decision of the United States Supreme Court in the Railway Telegraphers case decided under the Railway Labor Act.[21]

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[20] Ibid.

[21] Order of Railroad Telegraphers et al., v. Chicago and North Western Railway Company, 362 U.S. 330 (1960).

In this case the Supreme Court held that an employer's economic decision to consolidate or abandon certain stations with the consequent effect of eliminating certain bargaining unit jobs must, of necessity, be bargained with the union.

The Supreme Court Decision

The second Fibreboard case was eventually appealed to the U. S. Supreme Court. In its decision affirming the Board's findings the court held:

> The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See Order of Railroad Telegraphers v. Chicago and N.W.R. Co., 362 U.S. 330. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.
>
> The inclusion of "contracting out" within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act.
>
> One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.
>
> The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife.... To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace....

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation.
>
> The Company's decision to contract out the maintenance work did not alter the company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees eith those of an independent contractor to do the same work under similar conditions of employment.
>
> Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business....
>
> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case -- the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment -- is a statutory subject of collective bargaining under section 8 (d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.[22]

Although the court decision was purported to be limited to the facts in this case, Justice Stewart, in a concurring opinion felt compelled to comment on some of the implications of the court's opinion. In his opinion he observed:

> The phrase "conditions of employment" is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. Such an interpretation, which would in effect place the compulsion of the

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[22] Fibreboard Paper Products Corp. v. National Labor Relations Board et al. 379 U.S. 203 (1964).

> Board behind any and all bargaining demands, would be contrary to the intent of Congress,...yet there are passages in the Court's opinion today which suggest just such an expansive interpretation, for the Court's opinion seems to imply that any issue which may reasonably divide an employer and his employees must be the subject of compulsory collective bargaining.[23]

The second Fibreboard case in which the U. S. Supreme Court said, for the first time, that an employer must bargain over the basic management decision to restructure his operation is considered to be one of the landmark cases in recent collective bargaining history. The case provokes serious thought today for those who exhibit concern over the Board's continued extension of the scope of bargaining.

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23 Ibid.

The Adams Dairy Company Case

The Adams Dairy Company case involves a major restructuring of an employer's operations and was decided by the NLRB in June, 1962, two months after the precedent-setting Board decision in the Town and Country case.[24]

The case was ultimately appealed to the U. S. Supreme Court, and the Supreme Court's review took place several months after the Court's opinion in the second Fibreboard case had been released. The outcome of the Adams Diary Company case can therefore be contrasted with two other important cases which were decided at approximately the same time.

Facts of the Case

The Adams Dairy Company was engaged in the processing and sale of dairy products to retail outlets for resale to consumers. The company made no retail sales or home deliveries. In the operation of its business, the firm employed a number of driver-salesmen who handled the distribution of the company's products to its customers. These employees were compensated on a salary-plus-commission basis. In February, 1960, in response to competitive pressures, the company discontinued its own distribution operation and made arrangements to sell its products dockside to independent distributors.

As a result of this decision the company terminated the employment of all its driver-salesmen and sold all of its delivery

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[24] NLRB v. Adams Dairy, Inc., 137 NLRB 815 (1962), 322 F2d 553 (1963), 379 U. S. 644 (1965), 350 F2d 108 (1965).

trucks. Since the company had undertaken this decision without consultation with the union representing these employees, a complaint charging a refusal to bargain was entered by the union.

The NLRB Decision

The Board, concurring with the Trial Examiner's findings, concluded that the company's decision to change its distribution operation and the consequent termination of its driver-salesmen constituted a change in the terms and conditions of employment concerning which the company was obliged to bargain.

The Circuit Court Decision

The case moved to the Eighth Circuit Court and in its September, 1963, decision the Court held that the decision of Adams to terminate a phase of its business and distribute its products through independent operators was not a mandatory subject of bargaining. In its decision the Court laid great emphasis on the principle that the element of intent is crucial to the determination of whether or not certain acts can be considered unfair labor practices. Concerning this matter, the Court noted:

> Since Adams was found to lack any subjective illegal intent or discriminatory motive and since its decision to abandon a phase of its operation and distribute entirely through independent contractors did not constitute an objectively illegal result, it seems to us that the Board, by ignoring intent, motivation and natural consequences altogether, has not applied the proper standard in determining the "unfairness" of the respondent's decision to terminate the employment by change-over to independent contractors.[25]

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[25] Ibid.

However, the Court held that the company, once having made the decision to modify its operations, was under a duty to negotiate with reference to the treatment of employees who were terminated by the decision.

The Supreme Court Decision

The case was then appealed to the U. S. Supreme Court and in a per curiam decision on January 18, 1965, the Supreme Court remanded the case to the Eighth Circuit Court for reconsideration in light of the Supreme Court's ruling in the Fibreboard Paper Products case [379 U. S. 203].[26]

The Circuit Court's Reconsideration

In its review of the Adams Dairy case the Eighth Circuit Court pointed out that the Supreme Court had carefully limited its decision in Fibreboard to the facts presented in that case. The Circuit Court then proceeded to identify the substantive factual differences between Fibreboard and Adams Dairy as follows:

> ...we note, first, that the decision to contract out the maintenance work in Fibreboard did not change the basic operation of the company involved. The maintenance work was let out under a terminable contract on a cost-plus basis. The contractor performed the same work previously performed by company employees on company premises with company machines and equipment. The contractor was under the direct control of the company. The Company directly enjoyed the benefits of the contractor's work....

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26 Ibid.

In Adams Dairy, on the other hand, a basic operational change did take place when the dairy decided to completely change its existing distribution system by selling its products to independent contractors. After the decision was made by the dairy to sell its products dockside to independent distributors, all of the trucks used previously by driver-salesmen were sold to independent distributors. Adams Dairy did not finance the sale, nor in any way arrange for such financing.

The routes driven by the independent distributors, though covering a similar territory, did not correspond to the previous routes of the driver-salesmen. The independent distributors took title to the products at dockside and Adams , thereafter, legally had no concern with what was done with the products. The distributors were solely responsible for selling the products. The work done by the independent contractors, contrary to the situation in Fibreboard, was not primarily performed in the Adams plant for the benefit of the dairy. Adams was not directly concerned with whether or not any given distributor sustained a profit or loss, as would have been the situation with the driver-salesmen.

The only major restrictions that Adams placed upon the independent distributors by contract related to sanitation matters and to the maintenance of high product standards and the maintenance of good will.

Contrary to the situation in Fibreboard, then, there is more involved in Adams Dairy than just the substitution of one set of employees for another. In Adams Dairy there is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in Fibreboard, there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment.

To require Adams to bargain about its decision to close out the distribution end of its business

> would significantly abridge its freedom to manage its own affairs.[27]

The Circuit Court also took note of the Supreme Court's decision in the Darlington case and concluded that since the partial termination of operations was motivated solely by economic reasons, totally void of any hostility toward the union, no unfair labor practice could issue concerning Adams' decision.

The Board petitioned the Supreme Court for a review of this second decision by the Eighth Circuit Court, but in January, 1966, the Supreme Court declined to review the Circuit Court's ruling.

The Adams Dairy case is significant since, at least in some measure, it represents additional evidence of a belief on the part of the Circuit Courts that some restraints are necessary to curb the Board in its effort to broaden the scope of collective bargaining.

It is interesting to view the decisions of the Board and the courts in this case in the light of decisions made in several earlier cases.

The NLRB decision was quite consistent with its views in the Town and Country and second Fibreboard cases. In those cases the Board had held that the employer must bargain over the decision to shut down a part of the company's operation and subcontract it. The Board also took this view in the Adams Dairy case.

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27 Ibid.

The Eighth Circuit Court had several earlier court decisions to look to for guidance. In its original opinion the Court adopted the same posture taken by the Second Circuit Court in the Rapid Bindery case. An employer need not bargain over a decision such as that made by Adams Dairy, but he must bargain over the effects of such a decision on his employees.

In the Eighth Circuit Court's reconsideration of the case upon remand from the U. S. Supreme Court, the Court rejected the notion that the Fibreboard principle had an application to the Adams Diary case since the matters of fact were substantially different.

The views of the U. S. Supreme Court on the case are more difficult to assess since one must make an evaluation predominantly on the basis of the Court's actions. The Supreme Court, in declining to review the second decision of the Eighth Circuit Court, technically did not either approve or disapprove of the Circuit Court's reconsideration. However, this action might be interpreted as constituting a silent endorsement of the Circuit Court's views. It will be recalled that the Supreme Court did take pains to state that the Fibreboard decision was based on the facts in that case and was not necessarily to be applied to cases involving a different set of conditions.

The Star Baby Company Case

The Star Baby Company case, decided by the Board in 1963, provides a further example that the Board and the courts may hold differing views on whether a plant shutdown or relocation was motivated by animus toward the union.[28]

The case also provides a recent examination of the Board's views on the extent of an employer's liability for unfair labor practices in a case where he goes completely out of business. A 1954 Board decision on this issue was previously discussed in the New Madrid case.

Facts of the Case

The Star Baby Company was a partnership engaged in the manufacture of infants' and children's wear. On November 22, 1961, the union representing a majority of the company's employees asked to meet with the company for the purpose of negotiating a contract. When the company refused to meet with the union, the employees struck the company. Between November 29 and December 7, three meetings were held between the company and the union but no contract was negotiated. On December 26 the owners of the company executed an agreement dissolving their partnership and providing for the sale of the firm's assets. By January 15, 1962, the last item of

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28 Esti Neiderman and Gizela Eisner d/b/a Star Baby Co., and Snow Suit, Skiwear, Leggings and Infants' Novelty Wear Workers' Union, Local 105, International Ladies Garment Workers Union AFL-CIO, 140 NLRB 678 (1963), 334 F2d 604 (1964).

equipment had been removed from the company's plant, and shortly thereafter the owners notified all employees that their employment had been terminated and the business had been discontinued.

The NLRB Decision

The Trial Examiner found that after the union had requested the company to enter into a collective bargaining agreement observing union standards, the company went to its customers to see if they would accept price increases sufficient to enable the company to pay the union wage scale. When the company was unsuccessful in this effort it notified the union that it had been unable to persuade any of its customers to accept price increases.

The Trial Examiner concluded that the company's decision to terminate its operations was predicated on the assumption that it could not meet union wage scales and survive and was not discriminatorily motivated. The company was accordingly not found to be in violation of section 8 (a) (3) of the Act.[29]

The Board rejected this finding of the Trial Examiner and concluded that the company discontinued its operations to avoid dealing with the union. In terminating its employees for such a reason the company was in violation of section 8 (a) (3) of the Act.

This conclusion of the Board was based on the fact that just prior to the entrance of the union on the scene the company

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29 Ibid.

had enjoyed a successful business season; a week before the strike the company had given one employee a $2 a week raise; the company failed to call any of its customers to testify at the Trial Examiner's hearing that they would not accept a price increase.

The Board order to remedy the illegal discharges then called for the company to reimburse the employees for any loss in earnings from January 15, 1962, the date of the final plant closing until such time as each employee had secured substantially equivalent employment with another concern.[30]

The case then went on appeal to the Second Circuit Court.

The Circuit Court Decision

In its July, 1964, decision, the Court noted that it had not considered the argument that an employer had the absolute right to liquidate his operation without violating section 8 of the Act. This was regrettable since the argument constitutes a fundamental issue in the case and other circuit courts had dealt with the point.

However, the Court rejected the Board's view that the plant closing was discriminatory and refused to enforce the Board order calling for back-pay. In a comment critical of the evidence which the Board used in reaching its conclusion the Court stated:

> The Board's finding that Star Baby could have well afforded unionization was without satisfactory support. That the company's most recent season was an improvement over the past, and that one employee had recently been given a $2 salary increase by no means establishes that the company could afford unionization of the entire plant.[31]

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30 Ibid.

31 Ibid.

This case reveals some reluctance on the part of the NLRB to accept prior circuit court rulings on a given issue. This may be due to the lack of uniform treatment of a given issue by the circuit courts themselves. However, in this case the Board chose to ignore the precedent furnished by the Eighth Circuit Court in the New Madrid case which held that an employer's liability for unfair labor practices ceases as of the date of final closing of the enterprise.

The Royal Plating and Polishing Company Case

In the Darlington case, the United States Supreme Court ruled in 1965 that an employer could completely shut down his entire operation permanently for whatever reason he might choose but that an employer would be guilty of an unfair labor practice if he engaged in only a partial shutdown of operations with the intent of curbing the spread of unionism in the remaining operations.

The Darlington case was essentially considered an employer violation of section 8 (a) (3) of the Act and the Court did not pass on the legality under section 8 (a) (5) of a unilateral employer decision to effect a partial shutdown where no discriminatory motive was present.

In the Fibreboard case the Court held that an employer is obligated under section 8 (a) (5) to bargain over an economically motivated decision to subcontract certain subsidiary operations in an enterprise.

The issue in the Royal Plating and Polishing Company case involves the complete and permanent shutdown of one plant of a multiplant enterprise predicated solely on economic grounds.[32]

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32 Royal Plating and Polishing Co., Inc., and Metal Polishers, Buffers, Platers and Helpers International Union, Local 44, AFL-CIO, 148 NLRB 545 (1964), 152 NLRB 619 (1965), 350 F2d 191 (1965).

Facts of the Case

The Royal Plating and Polishing Company operated two plants, designated as the Bleeker Street plant and the Sussex Street plant, in Newark, New Jersey.

On April 1, 1963, the employer decided that it would close down its Bleeker Street plant for economic reasons, and on June 3 it concluded an agreement with the City of Newark for the purchase of the plant. This agreement provided that the employer could remain as a tenant on a monthly basis for a period of six months.

During the period when negotiations concerning the sale of the property were taking place, the employer was also engaged in negotiating a renewal of his collective bargaining agreement which had expired on April 18, 1963. Following a strike on May 17, the employer and the union came to terms and a new agreement was signed on May 23.

At no time prior to the execution of the new labor agreement did the employer advise the union of its intention to close the Bleeker Street plant or disclose the fact that it was concurrently negotiating a sale of the property.

On June 14, after the sale had been completed, the employer informed the union of the sale of the property and of the fact that it was closing its operations and that all remaining employees would be terminated. By the end of June all operations at the Bleeker Street plant ceased, and the employer proceeded to sell all equipment and machinery at public auction.

Operations continued at the Sussex Avenue plant until August 26, 1963, when the employer notified the union that he had decided to dispose of the plant and offered to discuss the matter with the union. On August 31, 1963, the Sussex Avenue plant was closed, and all operations of the employer ceased.

The complaint filed by the union in the case charged the employer with a failure to bargain concerning the shutdown of the Bleeker Street plant. No action was taken by the union concerning the subsequent shutdown of the Sussex Avenue plant.

The NLRB Decision

The Board held that the employer was under an obligation at the start of negotiations for a new labor agreement to notify the union of the impending sale of the company property in order to:

> ...afford the Union an opportunity, if it desired, to consult and negotiate with Respondent [employer] about the contemplated action and the possibility of alternative approaches that might avoid such action. Failing other resolution, the union had the right to bargain about the effects upon employees of the impending action.
>
> As we have emphasized before, seemingly unsolvable problems can, upon occasion, be solved if the parties to a bargaining relationship confront each other honestly and openly across the bargaining table with their respective problems and positions....
>
> It is not necessary that a satisfactory solution to the serious issues involved in a closedown of operations be the probable result of bargaining negotiations for the obligation to give notice and opportunity for discussions of such matter to be a viable and intrinsic part of the statutory bargaining obligation.

> The basic concepts of the Act call for utilization of joint efforts at the bargaining table to solve difficult and seemingly insoluble problems as well as those more amenable to a resoltuion satisfactory to both sides. The Act does not, of course, compel agreement; it does compel notice and opportunity for discussion to the end that all possible bases for agreement are fully explored.[33]

In substance then, the Board held that in the case of an economically motivated partial shutdown of operations the employer is under a duty to bargain about the decision to close as well as the effects of such decision upon his employees.

In this case, the Board remedy provided, in part, that the employer compensate all terminated employees for any loss in pay suffered from the date of the first bargaining meeting with the union until the employee secured equivalent employment or December 4, 1963, whichever occurred first.

December 4 was set as the date of maximum employer obligation for lost pay since this was the date the employer would have had to vacate the Bleeker Street plant in accordance with its agreement with the City of Newark.

The Board decision in this case occurred before the United States Supreme Court decision in the Darlington case. In May, 1965, the Board reexamined its decision in the light of the Supreme Court's ruling in Darlington to determine if any modification of its decision was in order. Upon review the Board held:

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33 Ibid.

> The Supreme Court clearly indicated that managerial decisions to close a part of an integrated business are subject to the Act's provisions prohibiting discrimination with respect to hire and tenure of employment when such discrimination is practiced for the purpose of encouraging or discouraging union membership.
>
> In short, under Darlington, Respondent's decision to close down the Bleeker Street plent, one of the two plants comprising a single appropriate bargaining unit, would be a proper subject of scrutiny under the provisions of Section 8 (a) (3) under the Supreme Court's ruling in the Darlington case. In these circumstances, we perceive no reasonable basis on which it can be said that the Court's decision requires a holding that a partial closing is not a subject for scrutiny under Section 8 (a) (5).[34]

Although the Board therefore concluded that its earlier decision was not disturbed by the ruling in the Darlington case, it did modify its remedy to provide that the employer had no obligation for back-pay beyond August 31, 1963, the date that the company's Sussex Avenue plant was closed and operations terminated in their entirety.

The Circuit Court Decision

The Third Circuit Court of Appeals then reviewed the Board's decision and, in part, rejected the position taken by the NLRB. In noting that the Board decided that by unilaterally closing its Bleeker Street plant, the employer violated section 8 (a) (5) of the Act, the Court stated:

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34 Ibid.

> The validity of this decision, under the facts of this case, depends on whether such a partial termination of operations is a mandatory subject of bargaining under Section 8 (d) of the Act, which provides for mandatory bargaining in good faith with respect to wages, hours, and other terms and conditions of employment. The words used by Congress in this section are broad and in each case the interests of the employees and the purpose of the National Labor Relations Act in securing industrial tranquillity must be carefully balanced against the right of an employer to run his business.[35]

Citing the Supreme Court decision in the Fibreboard case the Third Circuit Court went on to say:

> ...the Supreme Court held that the decision to subcontract maintenance work formerly performed by employees of the company was subject to the provisions of Sections 8 (a) (5) and (d) of the Act.
>
> However, in the cited case there was no change in the economic direction of the company and the same functions were to be performed by the independent contractor as were performed formerly by the company's own employees. The decision of the management in Fibreboard involved no decision respecting commitment of capital investment....
>
> Here the facts are dissimilar. The decision to close the Bleeker Street plant rather than move the operations to another location involved a management decision to recommit and reinvest funds in the business.
>
> The business had been suffering severe losses for approximately seven years and the management had to decide whether the business should be continued. There is no question but that the decision to terminate was made for economic reasons. The decision involved a major change in the economic direction of the company.

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35 Ibid.

> We conclude that an employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down.
>
> However, under circumstances such as those presented by the case at bar, an employer is still under an obligation to notify the union of its intentions so that the union may be given an opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision....
>
> Bargainable issues such as severance pay, seniority and pensions, among others, are necessarily of particular relevance and importance.[36]

The Third Circuit Court thus drew a distinction between the duty to bargain over the basic decision as contrasted with the effects of the basic decision in those cases where it concerned the economic direction of the organization.

The Third Circuit Court's decision appears to be consistent with the earlier decisions of the Second Circuit Court in the Rapid Bindery case and the Eighth Circuit Court in the Adams Dairy case. The Third Circuit also rejected the notion that the Fibreboard ruling has any application in a plant shutdown case.

This Court would seem to hold the employer under an obligation to bargain about both the decision as well as its effects in situations not affecting the economic direction of the company but would absolve the employer of a duty to bargain concerning his decision in cases where the economic direction of the organization was affected.

It might appear that the Circuit Courts are willing to

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36 Ibid.

grant greater freedom to management to conduct its own affairs unhampered by bargaining obligations than the NLRB is willing to concede.

In this case the Board continues to rely on the interpretation of the law which it adopted in several earlier cases and which was affirmed, in a limited way, by the U. S. Supreme Court in the second Fibreboard case. In the Royal Plating and Polishing Company case, the Board also discussed the Darlington decision of the Supreme Court. Under the Board's interpretation of the Court's decision an employer could be compelled to bargain over an economically motivated partial shutdown. The Supreme Court did not clearly endorse such a view when it declined to review the Adams Dairy case several months later.

The Burns Detective Agency Case

The importance of the Darlington and Fibreboard decisions in plant shutdown or relocation cases is again illustrated in the Burns Detective Agency case.[37]

The case also provides a further opportunity to contrast the views of the circuit courts concerning an employer's obligation to bargain about a termination of operations.

Facts of the Case

The Burns Detective Agency, a national organization, had for some time prior to April, 1963, maintained operations in Omaha, Nebraska, furnishing guard service to employers in the area.

On March 5, 1963, the company was notified that its contract with the Kellogg Company was being terminated effective April 8, 1963. With the termination of this contract the Burns Agency was left with only one contract in the Omaha area, since other cancellations had occurred shortly before the Kellogg termination. This remaining contract was with Creighton University.

Following the loss of the Kellogg contract, the Burns Agency undertook a financial analysis of its Omaha operations and concluded that it would be unprofitable to continue this operation on the basis of only one contract. The company then proceeded to notify Creighton University that it was terminating its contract effective April 15, 1963.

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[37] The William J. Burns International Detective Agency, Inc., and International Guards Union of America, 148 NLRB 1267 (1964), 346 F2d 897 (1965).

The company conceded that at no time did it discuss the termination of its Omaha operations with the union representing its guard service employees. The firm contended that since the termination of the Creighton University contract was a management decision based solely on economic grounds it had no obligation to consult with the union concerning its decision to terminate the contract.

The NLRB Decision

Citing prior decisions in the Town and Country case and the Fibreboard case, the Trial Examiner and the Board found the employer violated section 8 (a) (5) of the Act by failing to discuss a mandatory subject of bargaining and unilaterally terminating its operations. The firm was ordered to bargain with the union concerning resumption of operations in the Omaha area and to compensate its employees for any loss of pay they may have suffered as a result of the unfair labor practice.

The Circuit Court Decision

Taking note of the United States Supreme Court decision in the Fibreboard and Darlington cases (the Darlington decision came subsequent to the Board's decision in the Burns Detective Agency case) the Eighth Circuit Court reversed the Board's finding of a violation of section 8 (a) (5). Commenting at some length on the Fibreboard case, the Court stated:

> The Board's argument is based upon the Supreme Court decision in Fibreboard.... Our present case is clearly distinguishable factually from Fibreboard.

In Fibreboard, the employer without negotiating with the union, employed an independent contractor to perform the maintenance work at its plant, terminating the employment of its maintenance workers. The Court held that such contracting out was a subject of mandatory bargaining under section 8 (d) and that failure to bargain was violative of section 8 (a) (5). The Court's opinion as well as the concurring opinion joined in by three Justices each stresses that the decision is based upon the facts of the case before the Court....

In our present case, the employer has completely discontinued its operation at Omaha. Unlike the Fibreboard situation, Burns is not continuing the same work at the same plant under similar conditions of employment. No form of contracting out or subcontracting is here involved. Burns for valid economic reasons has withdrawn completely from providing any services in the Omaha area. No one is performing for Burns by subcontract or otherwise the services formerly rendered by its Omaha guards.

Mr. Justice Stewart in the course of his concurring opinion in Fibreboard states:

> "Only a narrower concept of 'conditions of employment' will serve the statutory purpose of delineating a limited category of issues which are subject to the duty to bargain collectively. Seeking to effect this purpose, at least seven circuits have interpreted the statutory language to exclude various kinds of management decisions from the scope of the duty to bargain....
>
> "While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining."[38]

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38 Ibid.

With respect to the Darlington case which the Supreme Court had decided subsequent to the Board's decision in the Burns Detective Agency case, the Eighth Circuit Court observed:

> ... the Court [United States Supreme Court] without dissent determined that when an employer closes his entire business such action does not constitute an unfair labor practice even if motivated by vindictiveness toward the union. With reference to a partial closing, the Court holds:
>
> > "a partial closing is an unfair labor practice under section 8 (a) (3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing will likely have that effect."
>
> Both the Examiner and the Board heard this case prior to the Supreme Court decision in Darlington. Hence, no consideration was given to the teaching of Darlington that a partial closing of one's business is not an unfair labor practice in the absence of a showing of motivation which is aimed at achieving a prohibited effect.
>
> The rationale of Fibreboard as applied to the facts of this case does not support the Board's decision.
>
> Under Darlington, the finding of lack of anti-union motivation in closing the Omaha division for economic reasons precludes a finding of unfair labor practice in refusing to bargain with the Union on the cancellation of the Creighton contract and the closing of the Omaha division.[39]

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[39] Ibid.

The Board's position in this case was quite consistent with its position in the Adams Dairy and Royal Plating and Polishing cases. All of these Board decisions can be traced to the position taken in the Town and Country and later affirmed in the second Fibreboard case. One may question the Board's interpretation of the law in these cases, but it cannot be argued that the Board has been inconsistent in its decisions.

The Eighth Circuit Court's decision in the Burns case squares with that of the Third Circuit Court in the Royal Plating and Polishing case to the extent that both courts held that the Board's reliance on the Fibreboard case in support of its decision was improper. However, the Third Circuit Court had held that the employer must bargain about the effects of his decision while the Eighth Circuit Court took no such position in the Burns case. In this respect the Eighth Circuit Court does not appear to be following its own precedent set several years earlier in the Adams Dairy case. In that case the Court had held that the employer must bargain about the effects of his decision on his employees.

The Standard Handkerchief Company Case

During negotiations concerning the terms of a new contract, the employer, in this case, terminated operations at his existing plant and moved to another plant without advising the union of his intentions.

Facts of the Case

The parties had engaged in a collective bargaining relationahip for about thirteen years prior to this case and no evidence was introduced that the plant relocation was prompted by hostility toward the union.

The employer maintained in his defense that the decision to move was a matter of management prerogative, was motivated solely by economic circumstances, and the union had made no request to bargain concerning the move.

The NLRB Decision

The Trial Examiner, whose decision was upheld by the Board in 1965, concluded that the employer had acted in bad faith by failing to disclose that a plant move was under consideration while negotiations were taking place. In the Examiner's view:

> His failure to do so reduced the negotiations which did occur to no more than an exercise in frivolity, and demonstrates Smooke's [the employer's] purpose of keeping the Union on the "string" until the negotiations regarding the move to Amsterdam were finally concluded. This...constituted bad-faith bargaining....[40]

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[40] Standard Handkerchief Co., Inc., and Ladies' Neckwear Workers' Union Local 142, International Ladies' Garment Workers Union, AFL-CIO, 151 NLRB 15 (1965).

The Board also agreed with the Examiner that by proceeding unilaterally with the move the employer was guilty of a refusal to bargain.

In the words of the Trial Examiner:

> Among the purposes behind an employer's obligation to disclose and bargain with a union representing its employees regarding a contemplated change in a term or condition of employment, particularly in the instant case about moving the location of the plant from New York City, is to give the Union an opportunity to reach agreement with the employer concerning the economic effect of the move upon the employees, such as rights to employment at the new location for those desiring it, moving expenses for those who elect to move, severance pay for those who elect not to move, and other related matters.[41]

The remedy in this case called for reinstatement of all terminated employees who were willing to relocate, payment of their moving expenses, and provisions concerning payment of lost wages. The Board's decision was not appealed by the employer.

The Board's decision is quite compatible with the decisions it had made since the Town and Country case. Unlike its earlier decision in the Burns Detective Agency case, the Board's remedy did not call for the employer to bargain concerning a resumption of operations in New York City. The remedy appears essentially directed at dealing with the effects of the decision on the employees. It is possible that the employer did not appeal this

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41 Ibid.

case because of the fact that the Second Circuit Court, to whom the appeal would have been made, had previously held in the Rapid Bindery case that an employer was under an obligation to bargain over the effects of a decision such as this.

The New York Mirror Case

This case concerns a discontinuance of operations with the resulting termination of all personnel formerly employed by the organization.[42]

Facts of the Case

On October 15, 1963, the New York Mirror, publisher of a daily newspaper in New York City, terminated all operations and notified all employees covered by its labor contracts that it would not be necessary for them to report for work after that date. The decision to discontinue publication of the paper was based solely on economic grounds and had not been discussed in advance with any of the unions involved.

Relying on Board decisions in the Town and Country Manufacturing Company and the Fibreboard Paper Products Company cases, the unions charged that the employer violated section 8 (a) (5) of the Act by failing to notify the unions of the contemplated decision and providing them with an opportunity to negotiate before a final decision was made and executed.

The publisher contended that its decision to shut down was not a mandatory subject of bargaining, but that even conceding that this position might not be sustained, the unions had waived

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42 New York Mirror, Division of the Hearst Corporation and New York Newspaper Printing Pressmen's Union Number Two, International Printing Pressmen and Assistants' Union of North America, AFL-CIO, et al., 151 NLRB 834 (1965).

their rights to bargain about it. The waiver argument was predicated on two provisions contained in the labor agreements.

First, the contracts provided for severance pay for eligible employees in the event of merger, consolidation, or permanent suspension of the newspaper.

Second, the contracts contained what is known as a "zipper" clause which the employer claimed obviated any need on this part to discuss this subject. The specific clause follows:

> The parties hereto agree that they have fully bargained with respect to wages, hours and other terms and conditions of employment and have settled the same for the terms of this agreement in accordance with the terms thereof.[43]

The NLRB Decision

The Board flatly rejected the position that the decision to shut down was not a mandatory subject of bargaining by holding that the principles set forth in the Town and Country and Fibreboard cases, although they involved subcontracting operations rather than total cessation of operations, were equally applicable to this case. Specifically, the Board stated:

> Thus our decisions in Town and Country and Fibreboard did not turn on the means whereby, or the extent to which, the employer terminated operations, but rather on the fact that a management decision "eliminating unit jobs...is a matter within the statutory phrase 'other terms and conditions of employment.'" The elimination of unit work is no less within that statutory phrase when it is to result from a management decision affecting an entire operation.[44]

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[43] Ibid.

[44] Ibid.

The Board was also unimpressed with the employer contention that the unions had waived any rights to negotiate over the shut down. Disposing of this contention, the Board commented that:

> Turning to the issue of waiver, we, of course, recognize that the statutory right of a union to bargain about changes in terms and conditions of employment may be waived by the union. However, a waiver of a statutory right is not to be lightly inferred but must be "clear and unmistakable." The Board will not find that contract terms of themselves confer on the employer a management right to take unilateral action on a mandatory subject of bargaining unless the contract expressly or by necessary implication confers such a right.
>
> In the instant case, as noted, the Respondent would support an inference of waiver primarily on the severance and termination pay provisions. Undoubtedly these provisions...clearly establish that the parties had bargained about the compensation to be received by the employees in the event of a lawful suspension of the Mirror's operations ....
>
> But on the specific waiver issue with which we are here concerned, the severance and termination provisions are at best equivocal. They contain no specific reference to a right by the Respondent to terminate operations without prior notice or consultation with the Unions and on their face are entirely consistent with the reservation by the Unions of such right....
>
> Nor are we able to find adequate support for an inference of such waiver by considering the severance and termination pay provisions in juxtaposition with the zipper clause in the contracts. This boilerplate clause, carried over from previous agreements, does no more than indicate that the parties embodied their full bargaining agreement in the written contracts.

> A wrap-up clause of this nature affords no basis for an inference that the agreement contains an implied undertaking over and beyond those actually written into the agreement.[45]

In this case then, the Board underscored the principle that, irrespective of the legitimacy of the motive to permanently close operations, an employer is obligated to bargain about the specific decision to close unless the union has clearly and unmistakably waived its right in the contract itself or in the negotiations leading to the contract.

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45 Ibid.

The Spun-Jee Company Case

A case decided in 1967 in the Second Circuit Court turns on the question of the need for positive union action requesting bargaining over plant relocation, plant shutdown or subcontracting decisions.

Facts of the Case

In the Spun-Jee Company case the employer was a garment manufacturer located in New York City.[46] The employer controlled one corporation engaged in the production of garments and another engaged in the marketing of the finished products. For some years prior to 1963, the employer was a member of a multi-employer bargaining unit for purposes of negotiating a labor agreement with the union.

On April 29, 1963, negotiations commenced between the employer association and the union concerning the contract due to expire on June 30, 1963.

On May 10, 1963, Spun-Jee met with the union and requested a one-year extension of the current contract without change since the company was facing severe economic problems. Spun-Jee stated that without an extension the company would have to give up its plant, subcontract the production work, and move out of New York City. The union stated it could not offer one employer a special

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[46] Spun-Jee Corp., et al., and Undergarment and Negligee Workers Union, Local 62, International Ladies' Garment Workers Union, AFL-CIO, 152 NLRB 943 (1965), 385 F2d 379 (1967).

arrangement and that bargaining had to be on an association-wide basis.

By May 17, 1963, the owners of Spun-Jee had decided to subcontract the production work and move the plant. In a letter of that date the owners notified the employer association that they were resigning from the association effective immediately. The association notified the union of this action in a letter dated May 20. No subsequent correspondence took place between the union and the association concerning this matter.

During late May and early June, Spun-Jee was engaged in dismantling its operation, but, when queried on several occasions by representatives of the union, denied that any relocation was taking place.

Finally on June 18, 1963, an owner of Spun-Jee admitted to a union representative that the company was going out of business. On June 20 the union notified Spun-Jee that it intended to hold the company to the terms of the labor agreement then being negotiated with the association. Spun-Jee made no reply and by July 5, 1963, had relocated in new quarters in New Jersey with the marketing operation being handled there and the production work handled by subcontractors.

The new location was immediately picketed and in August, 1963, the union charged the company with refusing to bargain concerning the termination of production activities.

The NLRB Decision

The Trial Examiner recommended dismissal of the complaint on the grounds that during the meeting on May 17, the employer had clearly revealed that he was considering subcontracting and relocation and had evidenced a willingness to discuss the problems. Furthermore, upon receipt of the notice from the association announcing Spun-Jee's resignation, the union knew the company was contemplating termination of production operations and relocation. The Examiner thus concluded that the union had sufficient notice of the employer's plans and had not been foreclosed from bargaining.

The Board, however, overruled the Examiner and in its decision held:

> It is likewise apparent that the Respondents [employers] failed and refused to bargain with the Union concerning the shutdown and removal of their New York plant. At the meeting...on May 17, the Respondents did not more than suggest the possibility of plant closing or removal, using this to buttress their advancement of reasons of economic hardship as the basis of their request for a year's extension of the terms of the existing contract.
>
> After this meeting the Respondents did in fact decide to subcontract their production operations and move the business. The Respondents, nevertheless, withheld from the Union for a period of a month information concerning their determination to close the New York plant, masking their intentions with pretense and denials. And the Respondents never informed the Union of their new business location, leaving that for the Union to discover through its own efforts....
>
> Upon consideration of these facts in particular... we are convinced that the Respondents failed to meet their good-faith bargaining obligation.[47]

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[47] Ibid.

The Circuit Court Decision

The case was appealed to the Second Circuit Court and in its decision of October 30, 1967, the Court supported the views of the Trial Examiner and overruled the Board's decision. The Court noted:

> From May 17 on, even though the Union was on notice that respondents contemplated a move, it never sought arbitration or requested bargaining....
>
> In fact, the Union's first action which could conceivably be construed to constitute a request to bargain about anything was the picketing in New Jersey which happened after the new union-association agreement had been entered into.
>
> Although we in no manner condone Respondents' attempted secretiveness, given the clarity of Pillet's [an owner of Spun-Jee] statement of position on May 17, we hold that the Union was not deprived of notice of Respondents' plans....
>
> Furthermore, even after June 18, when Pillet explicitly stated that Respondents were moving, the Union failed to request bargaining but flatly stated that it would stand on the association contract. In fact, possibly because of the contract provisions relating to serverance pay and pensions, the Union seems not even to have sought negotiation about the effect of discontinuance, about which there is plainly a duty to bargain....
>
> The Union's failure to request bargaining about the cessation of operations, removal, partial shutdown, subcontracting, effects of discontinuance and the transfer of employees constituted a waiver of any rights it may have had.[48]

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48 Ibid.

It therefore seems clear that a union cannot remain completely passive when the opportunity to negotiate the terms of a plant relocation is presented and then later claim that an employer was guilty of a refusal to bargain.

It also seems clear that although the Court overruled the NLRB, its opinion was consistent with its earlier views, expressed in the Rapid Bindery case, concerning the obligation to bargain over the effects of a plant shutdown and relocation. While the court did not explicitly state its position concerning the obligation to bargain over a decision to shut down and relocate, the general tenor of the opinion seems to suggest that this court might have supported the Board in the absence of a union's waiver of rights. If so, this would have represented a change in the views of the Second Circuit Court since the Rapid Bindery case.

The Transmarine Navigation Company Case

A recurring tendency of the National Labor Relations Board to apply the Supreme Court's ruling in the Fibreboard case to other cases involving totally different sets of facts can be illustrated in a review of the Transmarine Navigation Company case.[49]

Facts of the Case

The Transmarine Navigation Company and its wholly owned subsidiary, International Terminals, Inc., was a freight agent, ship broker, steamship agent, and terminal operator in the Los Angeles, California harbor. In the conduct of its business it employed guards represented by the union.

During the summer of 1963, the Japanese government ordered a consolidation of Japanese shipping companies into fewer, larger companies. This order had a significant impact upon Transmarine since its principal customer was a Japanese shipowner. The consolidation created the need for larger shipyard facilities to service the new lines and Transmarine promptly entered in to discussions with two other terminal operators about forming a joint venture to provide enlarged facilities in the Long Beach, California harbor.

On September 5, 1963, Transmarine executed a joint venture agreement which provided that the company would terminate

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[49] Transmarine Navigation Corporation et al., and American Federation of Guards, Local #1, 152 NLRB 998 (1965), 380 F2d 933 (1967).

its operations in Los Angeles and relocate in Long Beach as a minority partner in the new joint venture. Although some mention of the move was made in the press during September, 1963, no formal notification of the company's plans was given to the union until October 28, 1963, when an officer of Transmarine wrote a letter informing the union that the company had ceased business, and that the closing would terminate the employment of the guards.

The union then filed a complaint charging the company with a refusal to bargain.

The NLRB Decision

The Trial Examiner, whose findings were adopted by the Board, concluded that the company failed to comply with the mandate of the Act by executing a contract, without consultation with the union, obligating it to leave its place of business and become a minority party in the joint venture.[50]

The Circuit Court Decision

The case was then appealed, and the Ninth Circuit Court in its decision drew the distinction between the obligation to bargain over the decision to relocate and the duty to bargain over the effects of such a decision. In its ruling the Court held:

> The principal issue...is whether the Company's decision, based solely upon greatly changed economic conditions, to terminate its business

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50 Ibid.

and reinvest its capital in a new joint venture to be located in a different location is a subject of mandatory bargaining within the meaning of section 8 (a) (5) and 8 (d). The Board asserts that it is; the Company urges that it is not....

In support of its argument that the Company's decision to terminate and relocate its operations in a joint venture was a mandatory subject of collective bargaining, the Board relies principally upon the decision in Fibreboard Paper Products Corp. v NLRB et al., 379 U.S. 203....

We do not find that case to be controlling. In Fibreboard, the employer was concerned with the high cost of its maintenance operation.

To achieve economies, the employer decided to replace its existing union employees with those of an independent contractor to do the same work under similar conditions of employment for the same employer in the same plant. In holding this decision to subcontract to be a mandatory subject of collective bargaining, the Supreme Court stated:

> "The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The company's decision to contract out the maintenance work did not alter the company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." 379 U.S. 203....

The Court [U.S. Supreme Court] emphasized that the facts in that case dictated the holding that the decision to subcontract in those circumstances was a mandatory subject of collective bargaining.

> Here, the company, in deciding to join Sierra Terminals_7 the organization formed by the joint venture_7, made fundamental changes in the direction and operation of the corporate enterprise, which greatly affected its capital, assets, and personnel. The company became a minority partner in Sierra. Sierra has three times the former employees of the company, some who work in capacities which did not exist in the company....
>
> The company had $40,000 of working capital at the Los Angeles facility, whereas Sierra has two and one-half times that amount. Sierra has far larger and more modern terminal facilities which service a larger shipping line of approximately ten times the size of the company's former customers. Further, Sierra needs only two guards as a result of its more modern facilities in Long Beach, whereas the company used from four to six guards at the older facility in Los Angeles.
>
> Finally, the decision here brought about a major commitment of capital and a fundamental alteration of the corporate enterprise; unlike Fibreboard, it was not merely a decision to achieve economies by reducing the work force and fringe benefits of the union.[51]

The Court then reviewed the decisions of the Eighth Circuit Court in the Burns Detective Agency case and the Third Circuit Court in the Royal Plating case and noted:

> We feel that the company's decision here, like these managerial decisions involving the abandonment of uneconomical operations in a particular market as in Burns, or a major and basic redirection of an operation through...withdrawal of capital as in...Royal Plating, is in clear contrast to subcontract in Fibreboard....
>
> Hence, we hold that the company's decision, based solely on greatly changed economic conditions, to

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51 Ibid.

> terminate its business and reinvest its captial in a different enterprise in another location as a minority partner, is not a subject of mandatory collective bargaining within the meaning of section 8 (a) (5). A decision of such fundamental importance to the basic direction of the corporate enterprise is not included within the area of mandatory collective bargaining.[52]

The Ninth Circuit Court in this case, however, did not take the same view with respect to the effects of such managerial decisions. Speaking to this point, the Court stated:

> This is not to hold that the employer is absolved of all duty to bargain with a union when he makes such a managerial decision. Once such a decision is made the employer is still under an obligation to notify the union of its decision so that the union may be given the opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision.[53]

In the Transmarine Navigation Company case the Ninth Circuit Court adopted the same position taken by the Third Circuit Court in the Royal Plating and Polishing case, the Eighth Circuit Court in the Adams Dairy case, and the Second Circuit Court in the Rapid Bindery case. In all of the cases the Circuit Courts drew a distinction between the employer's obligation to bargain over the decision as contrasted with the obligation to bargain over the effects of the decision.

The Board's use of the Fibreboard decision as a precedent in cases involving different conditions certainly cannot be said to have won universal support in the circuit courts.

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[52] Ibid.

[53] Ibid.

The Cooper Thermometer Company Case

The evidence indicates that the Board treats as a statutory obligation under section 8 (a) (5) of the Act the need for an employer to bargain over the decision to relocate a plant as well as to bargain over the effects of the relocation decision on employees. But is an employer guilty of a refusal to bargain if he refuses to recognize the existing union as the employees' representative at the new plant? And, if so, would a Board remedy be appropriate if it called for the employer to offer reinstatement of former employees at the new plant? The Cooper Thermometer Company case brings these points under scrutiny.[54]

Facts of the Case

The Cooper Thermometer Company was a manufacturer of commercial and industrial thermometers with approximately 80 production and maintenance employees covered by a collective bargaining agreement scheduled to expire on May 17, 1965.

In September, 1964, the company notified the union that it was closing its plant at Pequabuck, Connecticut, and relocating its operations in a new plant at Middlefield, Connecticut, a distance of 27 miles. At this time the company

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[54] Cooper Thermometer Company and United Electrical Radio and Machine Workers of America, Local 233, 160 NLRB 150 (1966), 376 F2d 684 (1967).

stated that it had not determined its final hiring plan but that it would accept applications for the new plant from present employees and that it would attempt to relocate those employees not transferring.

Following exchanges of correspondence during January and February, 1965, the company and the union met on March 1, 1965. At this meeting the union took the position that both the closing of the old plant and the opening of the new plant were matters to be bargained over. Specifically, the union requested bargaining so as to permit present employees to go to the Middlefield plant under the same employment conditions prevailing at the Pequabuck plant and it also sought recognition as the bargaining representative at the new plant.

The company in turn agreed to furnish information supporting the economic need for the move but refused to supply job information relative to the new plant except that the company stated that hourly rates would average about 40 cents less at the new plant and fringe benefits would be in accord with area practice. The company indicated it would supply applications to the present employees but that neither employment, seniority nor other benefits would automatically transfer to the new plant. The company also denied the union request for recognition at the new plant.

Immediately following this meeting, the company posted a notice that operations would cease at the Pequabuck plant on May 17, 1965 (the date of the expiration of the collective

bargaining agreement) and that applications for employment at the new plant would be available before April 22, 1965.

During March and early April, 1965, further meetings took place between the company and the union with neither party changing the position it had taken in the March 1 meeting. On May 6, 1965, the parties met with a state mediator, but,again, neither changed its position. The next day the union requested the company to furnish the names of employees who had sought and been accepted for employment at the new plant. The company replied that 42 had requested applications, that 29 had filed them, that interviews had thus far been arranged with 21 (eight interviews were still to be scheduled), that only 14 had appeared for their interviews, and that of these 14 only four said they wished to be transferred.

On May 15, 1965, the union submitted 52 form letters from various employees requesting a transfer to the new plant with full recognition of seniority acquired during service at the Pequabuck plant.

The company returned these to the union noting that the company had negotiated at length with the union concerning various demands including the right of transfer and had failed to reach agreement. A final meeting with the mediators was held on June 2, 1965, and produced no change in the position of either party.

The NLRB Decision

The Board, concurring with the decision of the Trial

Examiner, found the employer guilty of a refusal to bargain by refusing to furnish job information at the new plant to the union and by refusing to negotiate conditions of transfer, including the carry-over of seniority, to the new plant.

The Board also cited the court decisions in the Royal Plating and Fibreboard cases in support of its holding that the employer was under an obligation to afford the union an opportunity to bargain with respect to the contemplated relocation and that the employer had failed to do so.

The following rather lengthy excerpt from the Trial Examiner's decision, adopted by the Board, deals with the employer's refusal to recognize the union at the new plant.

> Respondent [the company] takes the position, in effect, that a preexisting obligation is terminated by a plant removal and is not revived unless the union involved establishes a new majority at the new location. However, if as is hereinafter shown, the plant at the new location [Middlefield] is in effect but a continuation of the old plant [Pequabuck] and the employer, by his conduct, precluded an orderly transition of plant personnel to the new plant, I see no necessity for the union to establish a new majority.
>
> On the basis of the entire record, I find that the Middlefield plant is substantially no more than a continuance of the Pequabuck plant. Thus, as I have already found above, Respondent has, at the Middlefield plant, as it had formerly at the Pequabuck plant, the same basic departments,... substantially the same supervisors and supervisory hierarchy, manufactures the same products and has substantially the same number of employees in the production and maintenance unit.
>
> I have also found above that, in this day and age when it is commonplace to spend considerable time

> traveling to and from work, approximately 45 minutes of travel time to work and approximately 27 miles of distance are not so unusual as to be deemed an overriding factor in appraising the desires of the employees...at the Pequabuck plant to transfer to the Middlefield plant.
>
> In addition, I have found on the basis of all the evidence as to employees' desires respecting transfer that a majority of the employees at the Pequabuck plant sought through their Union continuity of employment at the Middlefield plant.
>
> However,...Respondent, by its unlawful refusal to bargain concerning the contemplated move,... precluded any such result. It adhered firmly to its position that "we will talk to the individual...not the Union about employment requirements at Middlefield."
>
> Accordingly, in view of all the foregoing and in the absence of convincing evidence that a majority of the production and maintenance employees at the Pequabuck plant would not have transferred to the Middlefield plant if Respondent had fulfilled its obligation under the Act, it is not unreasonable to infer, and find, that such majority would have transferred.[55]

The Board then ordered the employer to recognize and bargain with the union at the new location and to offer reinstatement to all employees to their former or substantially equivalent positions without prejudice to their seniority and other rights and to compensate them for any loss in income.

The Circuit Court Decision

The case was appealed to the Second Circuit Court which affirmed the Board decision in one important respect and denied

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[55] Ibid.

enforcement in two important respects. The Court found the employer guilty of a refusal to bargain in excluding the union from any discussion relating to the transfer of employees to the new plant when it stated:

> Though we assume that, as Cooper maintains, the existing contract, which in any event it could and did terminate by May 17, 1965, did not apply to the new plant,...the Board may reasonably interpret section 8 (a) (5), as explicated in section 8 (d), as requiring an employer relocating his plant not merely to give reasonable notice to a recognized union and to negotiate the terms of the shutdown,...but also to discuss with it the basis on which employees may transfer and, in that connection, to give information as to jobs in the new plant essential to the intelligent formulation of the union's requests.
>
> The most important interest of workers is in working; the Board may reasonably consider that an employer does not fulfill his obligations under section 8 (a) (5) if he refuses even to discuss with employees' representatives on what basis they may continue to be employed.... While Cooper was not bound to agree to the Union's demand that the Pequabuck employees'"be taken to"Middlefield with everything unchanged or even to less burdensome proposals, the Board could properly fault it for an attitude which, in effect, ousted the Union from any role in negotiating what might be offered to employees desiring to transfer.[56]

The Court, however, refused to agree with the Board's decision that the employer's refusal to recognize the Union at the new plant was a further violation of section 8 (a) (5). Addressing this issue, the Court stated:

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56 Ibid.

The finding of a further section 8 (a) (5) violation in Cooper's refusal to recognize the Union as bargaining agent at the new plant raises a much more difficult issue. The difficulty stems from the hypothetical nature of the question on which the decision turns--would a majority of the Middlefield employees have wished to be represented by the Union if Cooper had not committed the initial violation? While the sole fact firmly known is that only ten Pequabuck employees transferred, the Board might well have been warranted in finding that a majority would have done so if the workers could have brought the Pequabuck contract with them--even though we do not take the problem of traveling 54 miles every day by private car so lightly as the Trial Examiner did.

On the other hand we doubt that we would sustain such a finding based, as the Examiner's apparently was, on the assumption that Cooper would have agreed to the full recognition of seniority stated in the May 7 letters of the 52 employees but only to that even if there were reason to suppose that bargaining might have led to such an agreement on Cooper's part.

The letters were post litem motam, the signers had little to lose by offering to transfer on a condition they knew would not be met, and the geographical facts and the history of the applicants, interviewees, and transferees raise grave question how seriously these letters can be taken. However, we do not need to decide that since section 8 (a) (5) did not require Cooper to recognize the seniority of the Pequabuck employees; its duty was only to talk in good faith, and the evidence makes it fairly plain that such talk would not have that result.[57]

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57 Ibid.

The Court also denied enforcement of the Board order calling for an offer of reinstatement at the same or equivalent position with no loss in seniority or other rights. Since the employer had been found guilty of a refusal to bargain, the Court felt that some remedy concerning a reinstatement offer was appropriate and, accordingly, held as follows:

> Since Cooper violated section 8 (a) (5) by refusing to discuss the terms of transfer with the Union, requiring an offer of preferential reinstatement was proper...
>
> But reinstatement on what basis? The Trial Examiner said that "in accordance with the usual requirements this shall be to the employees' former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges." We are not sure whether or not this means at the Pequabuck rates of pay....
>
> We think the reinstatement offer should be on whatever basis emerges from good faith bargaining between Cooper and the Union; recognizing the likelihood that such bargaining will produce little change from the current practices at Middlefield, we believe this would still be a much closer approximation to what bargaining would have yielded at the proper time.
>
> A sanction for refusal to bargain that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of the sort would give insufficient respect to Congress' direction in section 8 (d) that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession."[58]

It can be concluded then that in a plant relocation situation the representation status of the existing union is not assured at the new location. It would appear that unless the evidence is

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[58] Ibid.

clear that a majority of workers at the new plant would consist of union members from the old plant the union is faced with winning its recognition at the new plant. The other significant point drawn from this case is that wages, hours and working conditions at the new plant shall be determined by bargaining between the parties, and that rights and privileges enjoyed at the old plant do not automatically carry over to the new location.

The Ozark Trailers Company Case

A case decided by the Board in October, 1966, is similar in many respects to the Royal Plating case. However, in the Ozark Trailers Company case, the Board rejected the view of the Third Circuit Court in 1965 that bargaining over the partial shutdown of an employer's operation is limited to bargaining over the effects of the shutdown.[59]

Facts of the Case

Ozark Trailers Inc., operated a plant engaged in the manufacture of refrigerated truck bodies sold principally to a distributing organization owned by the same individuals. In January, 1964, the Board of Directors of Ozark decided to close the Ozark plant permanently since the operation was excessively costly and severe quality problems were present.

By March 1, 1964, all orders in process had been completed and the plant was closed and all employees terminated. The distributing organization remained in operation and thereafter contracted with an unrelated firm for the manufacture of the truck bodies.

Prior to the shutdown of the Ozark plant the employer did not disclose to the union the fact that a decision had been made to close the plant permanently. The union filed a complaint

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59 Ozark Trailers Incorporated et al., and International Union, Allied Industrial Workers of America, Local No. 770, AFL-CIO, 63 LRRM 1264 (1966).

charging that Ozark had violated the Act by failing to give notice or consult concerning the shutdown.

The NLRB Decision

In holding that the employer was guilty of violating his statutory obligation to bargain, the Board commented on an earlier court decision to the contrary in the Royal Plating case as follows:

> With all respect to the Courts of Appeal for the Third and Sixth Circuit, we do not believe that the question whether a particular management decision must be bargained about should turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving "major" or "basic" changes in the nature of the employer's business.
>
> True it is that decisions of this nature are, by definition, of significance for the employer.
>
> It is equally true, however, and ought not to be lost sight of, that an employer's decision to make a "major" change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood...
>
> In short, we see no reason why employees should be denied the right to bargain about a decision directly affecting terms and conditions of employment which is of profound significance

> for them solely because that decision is also a significant one for management.[60]

The Board went on to point out that the United States Supreme Court in the Fibreboard case had upheld the Board's decision that subcontracting was a mandatory subject of bargaining since, among other things, it would promote a fundamental purpose of the Act by:

> bringing a problem vital to management and labor within the framework established by Congress as most conducive to industrial peace.
>
> We think it plain the same may be said about a management decision to terminate a portion of the enterprise--termination, just as contracting out, is a problem of vital concern to both labor and management, and it would promote the fundamental purpose of the Act to bring that problem within the collective bargaining framework set out in the Act.[61]

And the Board in a final rejection of the Third Circuit Court's ruling in Royal Plating concluded:

> ...while meaningful bargaining over the effects of a decision to close one plant may in the circumstances of a particular case be all that the employees' representative can actually achieve, especially where the economic factors guiding the management decision to close or to move or to subcontract are so compelling that employee concessions cannot possibly alter the cost situation, nevertheless in other cases the effects are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a decision which cannot be revised.

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60 Ibid.

61 Ibid.

> An interpretation of the law which carries the obligation to "effects", therefore, cannot well stop short of the decision itself which directly affects "terms and conditions of employment."[62]

In the Ozark Trailers case, the Board relied on the Fibreboard decision to find an employer guilty of a violation of the Act in closing down a manufacturing operation. This would appear to be a departure from the Supreme Court's ruling in the Fibreboard case. It is, in fact, another example of the Board's use of the Fibreboard decision as a precedent in a case which is factually different. The Board's decision also underscores the reluctance of the Board to accept the rulings of circuit courts as controlling in future cases.

It is difficult to understand the employer's failure to appeal this decision since the circuit court decisions in a number of the cases discussed earlier would indicate that the Board's position might not be completely sustained. This presumption seems particularly viable since the Eighth Circuit Court, to which any appeal would have been directed, had earlier held in the Adams Dairy case that the employer's obligation was limited only to bargaining over the effects of such a decision.

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62 Ibid.

The Schnell Tool & Die Company Case

The most recent case in this analysis was decided by the Board in January, 1967. In the Schnell Tool & Die Company case the employer terminated his entire operation under circumstances devoid of union animus.[63]

In the Darlington case decided by the Supreme Court in 1965, the principle seemed to be established that an employer had the right to close his entire business, regardless of the reason, without being in jeopardy of committing an unfair labor practice. The Schnell Tool & Die case presents an interesting test of this principle.

Facts of the Case

The Schnell Tool & Die Company operated two plants at Salem, Ohio until late in 1962. At that time the employer leased Plant No. 2 to another concern not associated with Schnell and, thereafter, continued to maintain operations only in Plant No. 1. In November, 1964, Schnell executed a second lease agreement with this same concern providing for the lease of Plant No. 1. This terminated all operations of the Schnell Corporation. It is not disputed that no notice of the leasing of Plant No. 1 was given to the union. In addition, there were no negotiations concerning either the decision to lease or the effects of such a decision on

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63 Schnell Tool & Die Corp., and United Steelworkers of America, AFL-CIO, 162 NLRB No. 123 (1967).

the employees. Therefore, the union charged the company with a refusal to bargain.

The NLRB Decision

A clause contained in the ten-year lease agreement covering Plant No. 1 proved to be fundamental to the Board's decision finding the employer guilty of violating section 8 (a) (5) of the Act. Article III of the lease was a competition clause which stated:

> While Schnell Tool & Die Corporation may temporarily discontinue the manufacture of tools, dies, and related products for lack for the time being of suitable manufacturing facilities, it is hereby expressly understood and agreed that Schnell Tool & Die Corporation is free to resume said activities at any time, and it is further expressly understood and agreed that each of the parties hereto is free to compete with the other in any and all respects, including the solicitation by each of the other's customers.[64]

Although the Schnell Corporation had without question clearly terminated its operations with the disposition of Plant No. 1 and, according to the principle enunciated by the U. S. Supreme Court in the Darlington case, was under no obligation to bargain with the union, the Board laid great emphasis on this competition clause in holding that Darlington was not applicable in this case. The Board's decision noted:

> We are here faced with the question of whether a decision to go partially out of business is a mandatory subject of bargaining.

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64 Ibid.

> Consequently, we need not, and do not determine the impact on that question of the Supreme Court's holding in the Darlington case "...that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness towards the Union, such action is not an unfair labor practice." For the reasons set forth in Ozark Trailers, Incorporated, et al., and in Royal Plating and Polishing Co., Inc., we find that the Respondent [employer] was required to give notice to and discuss the matter with the Union....
>
> The lease of Plant No. 1 in the instant case contemplates the contingency of a revival of Schnell's business at that Plant No. 1 or elsewhere. Article III of the lease...clearly provides for such a possibility. Under these circumstances, we find it appropriate,...to issue an order preventing the continuance of unfair labor practices on the part of Respondent should such a contingency occur.[65]

The Board then ordered the employer, in the event he resumed any operations, to bargain with the union.

In tying its decision into the Ozark Trailers and Royal Plating and Polishing cases, the Board seems to be holding essentially that the Schnell Tool & Die Company had consummated only a partial shutdown of operations. This seems to be borne out by the Board's reference to the fact that the competition clause in the lease permitted the company to resume its operations at any time. To rely on such a clause which is clearly unrelated to any matter involving current labor relations as the basis for sustaining an unfair labor practice charge seems open to question.

One may surmise that the employer did not elect to appeal this decision because, although the Board found the company in viola-

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[65] Ibid.

tion of the Act, the Board's decision fundamentally did not impose any financial obligation against the company.

CHAPTER VI

CONCLUSIONS

> In my view one of the basic problems with Board practice over the years has been the tendency of the Board to look over the shoulders of the parties at the bargaining table and to tell them what to discuss and what not to discuss.[1]

A total of 28 recent labor relations cases have been examined. Eight involve diverse issues relating to the duty to bargain; three involve partial or total plant shutdowns accompanied by hostility to the union, and 17 involve partial or total plant shutdown, plant relocation, or termination of specific operations due to economic considerations.

The specific question is whether there has been in recent years an erosion of managerial prerogative to shut down or relocate plants by the National Labor Relations Board and the courts (Circuit Courts of Appeal and United States Supreme Court). The presumption is that if the administrative agency (the National Labor Relations Board) or the courts have interpreted federal legislation beyond the intent of Congress and have extended power to the union, an erosion of the right of management to conduct its internal affairs as it deems fit has occurred.

Issues involving plant relocation or shutdown have been emphasized, since these are of current interest and strike at managerial prerogative. Whether the continued

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[1] Livingston, Frederick R., "The Changing Duty to Bargain--Comments," Labor Law Journal, April, 1963, p. 304.

investment of funds in an existing plant is wise; whether a particular plant should be closed or relocated in a more favorable economic climate; whether specific segments of the business should continue to be operated as a part of the total enterprise--surely these are questions for which the management of the firm must be held responsible for providing satisfactory answers.

Did Congress intend, when it passed the National Labor Relations Act or the Labor Management Relations Act, to treat such matters as falling within the scope of "terms and conditions of employment" and thereby subject to collective bargaining? What can be concluded generally about the current state of management rights under present NLRB interpretations of the duty to bargain?

Senator Walsh commented in discussing the provisions of the National Labor Relations Act:

> The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door.[2]

It seems clear that Senator Walsh, Chairman of the Committee on Education and Labor, in making this statement would not have regarded plant relocations, plant shutdowns or partial termination

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[2] II Legislative History, p. 2373.

of operations as mandatory subjects of bargaining. His words seem to imply that section 8 (a) (5) of the Act imposes only an obligation on the part of the employer to recognize the certified union.

This position is given support by Senator Walsh's further remark:

> What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.[3]

Representative Griswold spoke to the issue of plant shutdown when he said, "There is nothing in the bill to keep an operator from closing his plant."[4]

Since such an action would be stronger than a partial shutdown or a termination of certain plant operations, Congressman Griswold might be likely to view these actions in the same light.

Senate Report No. 573 of the Committee on Education and Labor in discussing section 8 (5) of the National Labor Relations Act stated:

> The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms.[5]

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3 Ibid.

4 II Legislative History, p. 3110.

5 II Legislative History, p. 2312.

Yet despite such assurances from members of Congress concerning the intent of the legislation, Board member Rodgers in his dissenting opinion stated in the Barbers Iron Foundry case:

> I cannot agree with my colleagues that the Respondent [company] violated the Act when it permanently closed down its plant and went out of business...
>
> There is nothing contained in the Act which limits an employer's right to go out of business at such time and under such circumstances as he chooses....[6]

The Board decision in the New England Web case found the employer guilty of a refusal to bargain when he unilaterally decided to suspend operations permanently. However, the First Circuit Court refused to uphold the Board and felt constrained to remind the Board:

> We start with the proposition that a businessman still retains the untrammeled prerogative to close his enterprise when in the exercise of a legitimate and justified business judgment he concludes that such a step is either economically desirable or economically necessary.[7]

In the Star Baby Company case, the Board held that the employer violated section 8 (a) (3) of the Act when he permanently closed his entire operation. Here again a Circuit Court refused to enforce the Board order on grounds that the evidence relied upon by the Board in arriving at a finding of discriminatory shutdown was something less than conclusive.[8]

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[6] 126 NLRB 30 (1960).

[7] 309 F2d 696 (1962).

[8] 334 F2d 601 (1964).

Finally, in the Schnell Tool & Die case, the Board concluded, on the basis of a competition clause included in the lease of the plant, that the employer had only partially terminated his operations and that such a decision was a mandatory subject of bargaining.

The Board position in these cases does not appear to reflect the intent of Congress. It would seem that the Board, particularly in recent years, has sought to broaden the scope of bargaining and has, through its interpretations of the matters that are covered by the "terms and conditions of employment," eroded the authority of management in a meaningful sense.

The Supreme Court in the Darlington case acknowledged the right of an employer to terminate his entire business regardless of the reason without violating the Act. With respect to a partial termination of operations the Supreme Court held only that such an action would be a violation of the Act if motivated by a purpose of controlling the spread of unionism in the remaining segments of the enterprise.[9]

With such a guideline available to the Board there appears to be no possible justification for its ruling in the Royal Plating and Polishing case which held the employer in violation of section 8 (a) (5) of the Act for a partial closing predicated solely on economic considerations.

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9 380 U.S. 263 (1965).

By the same token, the action of the employer in the New York Mirror case, in permanently ceasing all operations, clearly was permissible under the Supreme Court ruling in Darlington although the Board found the employer in violation of the Act. In defense of the Board in this case, it should be noted that its decision antedated the Supreme Court's decision by ten days.

However, the First Circuit Court in the New England Web case and the Sixth Circuit Court in the J. M. Lassing case had rendered earlier decisions which would have found the New York Mirror Company free of any violation of the Act.

This disregard of appellate court decisions by the Board certainly lends weight to the view that the Board looks essentially to the Supreme Court for support in the development of its decisions.

The current Board has also been rather free in applying the Supreme Court decision in the Fibreboard case to plant shutdown or plant relocation cases despite the manner in which the Supreme Court limited its decision in the Fibreboard case.

The Supreme Court in Fibreboard specifically stated:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case--the replacement of employees in the existing bargaining unit with those of an independent contractor to do

> the same work under similar conditions of employment--is a statutory subject of collective bargaining under section 8 (d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.[10]

From this statement by the Supreme Court one might conclude that in instances such as occurred in the Fibreboard case, where an employer contracted with an outside firm to perform work, formerly performed by the bargaining unit, on the employer's premises, using the employer's tools and equipment, an obligation to bargain was mandatory prior to coming to such a decision. Although one might doubt that the intent of Congress was to compel bargaining over such decisions, the present argument is with the Board's application of such a ruling in cases which are totally dissimilar in fact.

In the Burns Detective Agency case the Board concluded that an employer who had completely terminated operations in a geographic area had violated the Act by failing to bargain over this decision with the union. In its decision, the Board cited the Fibreboard case as precedent supporting the Board position although there is no similarity factually between the two cases.

The Ninth Circuit Court in the Transmarine Navigation case felt compelled to reject the Board use of the Fibreboard principle as grounds for an 8 (a) (5) violation in a case where an employer terminated completely operations in one location and became party to a joint venture in another location.

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10 379 U.S. 203 (1964).

The Board also cited the Fibreboard case as the basis for finding an employer guilty of a refusal to bargain over plant relocation in the Cooper Thermometer case. Although the Second Circuit Court sustained the Board's finding of a violation, it did limit its holding to an obligation on the part of the employer to discuss the effects on employees of such a move.

The Board also saw fit to apply the Fibreboard decision in the Ozark Trailers case where the employer permanently closed his manufacturing plant because of excessive cost of operation accompanied by poor quality production. In this case the Board again evidenced its unwillingness to follow principles laid down by a circuit court when it specifically declined to apply the precedent established by the Third Circuit Court in the Royal Plating and Polishing case. The Board also apparently took little note of the Eighth Circuit Court's opinion in the Adams Dairy case that the Fibreboard decision was not relevant in a case where an employer had permanently discontinued a segment of his operation, disposed of the assets involved in the operation and substantially restructured his organization.

From the evidence, it would appear that in prescribing a duty to bargain over plant shutdowns, plant relocation or partial termination of specific operations upon the employer, the National Labor Relations Board has expanded the scope of bargaining far beyond the intent of Congress and has clearly entered the area

of unilateral decision power reserved to management which Justice Stewart took pains to spell out in his opinion in the Fibreboard case:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding...managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.[11]

Evidence indicating a tendency for the circuit courts to accept the Board's expanded view of the scope of bargaining can also be found in the Sixth Circuit Court's decision in 1960, in the J. M. Lassing case. In this case the Circuit Court refused to support the Board's finding of a violation of the Act since the employer's action was economically motivated and the right to make fundamental changes in operations without a bargaining obligation was his.

However, this view has changed in more recent years.

In 1961, the Second Circuit Court in the Rapid Bindery case held that although the employer was free to make a decision to relocate his plant on the basis of economic considerations, he was still under an obligation to bargain with the union concerning the effect of his decision on his employees. Simi-

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[11] 379 U. S. 203 (1964).

larly, the Eighth Circuit Court in 1963, in the Adams Dairy case, the Third Circuit Court in 1965, in the Royal Plating and Polishing case, and the Ninth Circuit Court in 1967, in the Transmarine Navigation case held that the employer must bargain concerning the effects of a decision to relocate operations, close down one of several plants, or discontinue specific segments of a business enterprise.

In fact, by 1967, the Second Circuit Court in the Cooper Thermometer case had moved to a point of view where an employer must bargain concerning his decision to relocate a plant.

The scope of mandatory bargaining has apparently been extended. To what extent is a company required to bargain?

The Supreme Court in the American National Insurance case, in sustaining a circuit court's decision against the Board, took the position that Congress did not intend that the Board pass upon the substantive terms of collective bargaining agreements. This 1952 judgment provided an excellent rule governing the Board's role when the Court stated:

> 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....[12]

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12 343 U. S. 395 (1952).

The same can be said for matters such as plant shutdown, plant relocation or termination of specific operations in a business enterprise.

This view of the Board's role in the collective bargaining process received a severe jolt in the Supreme Court's 1958 decision in the Borg-Warner case. The outcome of this case has posed a most serious threat to the freedom of management to conduct many of its internal affairs unilaterally. In this case the Court set up three categories of bargaining subjects: mandatory, permissive, and illegal. The guidelines governing mandatory subjects of bargaining were to be those subjects "which regulate the relations between the employer and the employees."[13]

The classification of such subject matter was clearly to be left to the National Labor Relations Board as the administrative agency of the statute. Such permissiveness has given the Board great latitude in determining what constitutes a mandatory subject of bargaining. Granted that this authority is subject to review and acceptance by the circuit courts and the Supreme Court, it has already been shown that the circuit courts have moved to accept a broadening of the statutory duty to bargain in plant relocation and shutdown cases. The Board has also extended the scope of bargaining in other areas as this general review of cases has shown.

The Board has declared that an employer must provide cost

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[13] 356 U.S. 342 (1958).

data (as opposed to bargaining over benefits) of a non-contributory insurance plan in the Sylvania Electric Products case. In the Houston General Contractors case, the Board declared that bargaining over a union operated hiring hall was mandatory even in a state with a right-to-work law, although prior court decisions in states with a similar law had held that such agreements contravene public policy.

In the Fafnir Bearing case, the Board found an employer guilty of a refusal to bargain because he refused to permit a union to conduct time studies in the plant despite the existence of a contract provision calling for arbitration of grievances over piece rates.

In the Westinghouse Electric case the Board established mandatory bargaining over the prices charged in the cafeteria.

In Dixie Ohio Express, an employer was found guilty of a refusal to bargain when he attempted to unilaterally make several simple changes in work assignments in the interest of a more efficient operation.

But perhaps the most flagrant abuse of Board authority is to be found in the Ador Corporation case where a Trial Examiner found an employer guilty of a refusal to bargain because he proceeded to change a product line without bargaining with the union. Did Congress intend that the management of a company, faced with a disaster such as the continued production of an Edsel, bargain with the union before it could act?

It seems inconceivable that Congress intended such a course of action.

This research has been limited to determining whether management's rights have been eroded in the important areas of plant relocation or shutdown. There are other significant areas of possible erosion which are considered beyond the scope of this analysis.

For example, court decisions occurring in 1960 and later seem to have significantly broadened the authority of arbitrators. It is likely that this will have an impact on managerial discretion. In fact, in an excellent article on this subject Professors Smith and Jones found that chiefly as a result of the 1960 Supreme Court decisions comprising The Steel Trilogy, a majority of firms surveyed felt that they should attempt "through strengthened contractual provisions to safeguard management prerogatives and reduce the risks of arbitral excesses."[14]

This and other possible avenues of research have been left for further inquiry.

What can be suggested as appropriate public policy concerning the employer's obligation to bargain? One possible solution would be to amend the Act so as to provide that bargaining would be restricted to a specific set of subjects. Any subject not included in such

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[14] Smith, R. A. and Jones, D.L. "The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties," Virginia Law Review, Vol. 52, 1966, p. 831. The cases comprising The Steel Trilogy are United Steelworkers of America v. Warrier and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960).

a list would be outside the realm of mandatory bargaining although the parties could voluntarily bargain on the subject provided it was not expressly illegal (e.g., a provision providing for a closed shop).

Such a solution would remove the present discretionary authority which the Board and the courts have assumed to make the determination of mandatory subjects of bargaining. This might be a highly desirable move.

Mr. R. Heath Larry, Administrative Vice-President of the United States Steel Corporation, pointed out a serious drawback in such a solution when he stated:

> The theories of those who would have the law declare specific subjects, such as the matter of plant removal or contracting out..., to be matters outside the realm of mandatory bargaining could, if carried to logical extremes, involve government at some level in detailed and dangerous intervention in what should be left to private reconciliation.[15]

The only other viable alternative might be clearly to legislate the NLRB out of the position of establishing the substantive terms of bargaining (i.e., is a subject of bargaining mandatory or not?). Compelling legislation to restrict the power of the Board would be the first essential ingredient in a redirection of national labor policy. Such legislation should essentially provide that the topics of bargaining be left to the parties themselves.

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[15] Larry, R. Heath "Labor Management Problems--A Management Viewpoint," Virginia Law Review, Vol. 50, 1964, p. 291.

By this it is meant that a virtual unlimited scope of bargaining would be established as a matter of law. To speak metaphorically, during the course of contract negotiations hunting season is open with respect to any subject of bargaining and either side may use any legal economic sanction in support of its position as it deems feasible and wise. In this instance, one would need to rely more on the parties involved in collective bargaining to resolve their differences than to provide mechanisms by which one of the parties may seek government assistance in attaining its objectives.

Through its election procedures, the National Labor Relations Act provides a mechanism for determining the parties to collective bargaining. It is well established that the parties must meet together in a sincere effort to reach agreement and be willing to set forth any agreement in writing. Beyond this the Board should play no substantive role in the bargaining process. If a union attempts to negotiate provisions covering a plant relocation, plant shutdown, or a discontinuance of certain operations, that should be its business; and if such an effort results in a binding agreement which provides limitations upon, or calls forth benefits to be provided in the event of the exercise by the management, the agreement should be clearly enforceable. But if an agreement has been concluded without such provisions, or if no agreement has been reached at all, there should be no place for an administrative agency to set limitations not specifically provided in law or set by contractual agreement. Responsible management seeks no more--but does not demand less.

In the words of R. Heath Larry, an articulate spokesman for American management:

> There has been entirely too much talk over the years about "management rights," as if they were a kind of kingly prerogative. The use of such terms starts any discussion of the subject off on the wrong foot. A management claim of entitlement to "rights" (i.e., legal rights) could make sense in terms of a claim to a right to a climate of freedom in which it may resist what it considers to be unsound union demands with all the backbone and means of persuasion at its command or to a right to have its managerial judgment modified or restricted only to the extent that it has agreed in the course of the collective bargaining process. However, management neither can nor should expect to be legally protected from the need to justify its institutional role vis-a-vis the unions any more than a particular management can or should expect to be freed from the necessity to look to its competitive defenses and achievements in the field of developing and marketing its products.
>
> In the process, management must learn how to make clear that it is one thing for unions to represent the pressures of the labor market in the area of wage determination, it is another for them to try to supersede the responsibilities of operating management--to seek an equal voice in the many operating decisions which must be made if the plant is to have flexibility and efficiency. Asserting the case for the functions of operating management is not a case of trying to ascribe second-class citizenship to unions. It is simply a case of seeking recognition for the fact that there is a logical and necessary place for the responsibility for efficiently operating the plant, and that this is not and cannot be the institutional function of the union.
>
> The line is not easy to draw, so we must expect unions to continue to press for obtaining or retaining a "voice" in the exercise of these so-called operating management functions. But it's up to management to claim, defend, and justify

> its own position--not because of any desire to engage in sterile conflict over assertion of prerogatives--but simply because management has necessary functions which it alone must perform, which it alone can perform. The direction of the work simply cannot be done by popular vote. Nor can it be done by a union. It is for management to manage.
>
> And, in the end, if private management cannot perform the function well or if unions preclude it from doing so by restrictive agreements, we will be inviting the state to perform it. When this has happened elsewhere in the world, there has been no room left for either free labor or free management.[16]

It is also apparent from the many conflicts in thinking among Trial Examiners, the National Labor Relations Board, the Circuit Courts, and the United States Supreme Court that government cannot be presumed to do the job either consistently or well.

Collective bargaining is going through a critical period. Increasingly, it appears necessary for the government to play an active role in the settlement of negotiations affecting the national economy. What is needed to preserve this highly desirable process is less reliance on the government to provide solutions for disputes and a greater sense of awareness on the part of both management and labor that they act in their own best long run interests when they display a spirit of public responsibility and find reasonable solutions to their problems within their own councils.

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16 Ibid.

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APPENDIX

THE NATIONAL LABOR RELATIONS ACT AND THE LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED BY THE REPORTING AND DISCLOSURE ACT OF 1959

AN ACT to amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Short Title and Declaration of Policy

Sec. 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interferences by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I

Amendment of National Labor Relations Act

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

Findings and Policies

Sec. 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Definitions

Sec. 2. When used in this Act--

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment,or concerning the association or representation of persons in negotiating, fixing,maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means--

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental,manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the course of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

National Labor Relations Board

Sec. 3. (a) The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so

provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

Sec. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000* a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

Sec. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Sec. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry

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*Pursuant to Public Law 854, 84th Congress, 2d Session, Title I, approved July 31, 1956, the salary of the Chairman of the Board shall be $20,500 per year and the salaries of the General Counsel and each Board member shall be $20,000 per year.

out the provisions of this Act.

Rights of Employees

Sec. 7. 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor

organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

Providing further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing

any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing; Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c) (1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Providing further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other

publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, delivery or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, 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: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate

disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling,transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process

of production in the apparel and clothing industry: Providing further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a) (3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).*

Representatives and Elections

Sec. 9 (a) Representaives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of

*Section 8 (f) is inserted in the Act by subsection (a) of Section 705 of Public Law 86-257. Section 705 (b) provides:

Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such pruposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable

cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board, by 30 per centum or more

of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), or a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Prevention of Unfair Labor Practices

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give

testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order

shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively,wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing modifying and enforcing as so m odified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its mamber, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdication of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of such petition the court shall cause notice thereof to be served upon such person and thereupon shall have the jurisdication to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenver it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), or section 8 (e) or section 8 (b) (7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8 (b) (7) if a charge against the employer under section 8 (a) (2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members.

The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a) (3) or (b) (2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l).

Investigatory Powers

Sec. 11. For the purpose of all hearings and investigations, whch, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10--

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such

person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

Sec. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

Limitations

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) (1) The Board, in its discretion,may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and assertin g jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

Sec. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U.S.C., title 11, sec. 672),conflicts with the application of the provisions of this Act, this Act shall prevail: Provided, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

Sec. 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to

persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 17. This Act may be cited as the "National Labor Relations Act."

Sec. 18. No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 9 of the National Labor Relations Act, as amended, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 9 (f), (g), or (h) of the aforesaid Act prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 9 (f), (g), or (h) of the aforesaid Act prior to November 7, 1947; Provided, That no liability shall be imposed under any provision of ths Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment; Provided, however, That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10 (e) or (f) and which have become final.

Effective Date of Certain Changes

Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 9 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

Sec. 103. No provisions of this title shall affect any certification or representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

Sec. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

TITLE II

Conciliation of Labor Disputes in Industries Affecting Commerce; National Emergencies

Sec. 201. That it is the policy of the United States that--

(a) sound and stable industrial peace and the advancement of the general welfare, health , and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Sec. 202. There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service", except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred

to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor," approved March 4, 1913 (U.S.C., title 29, sec. 51) and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

Functions of the Service

Sec. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Sec. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall--

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding

in a settlement of the dispute.

Sec. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of manag ement and six of whom shall be selected from among persons outstanding in the field of labor. . . .

(b) It shall be the duty of the panel at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

National Emergencies

Sec. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C. 19, title 15, secs. 49 and 50,as amended), are hereby made applicable to the powers and duties of such board.

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out--

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23,1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 29, secs. 346 and 347).

Sec. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Sec. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

Compilation of Collective Bargaining Agreements, etc.

Sec. 211. (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescirbed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

Exemption of Railway Labor Act

Sec. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

TITLE III

Suits by and against Labor Organizations

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an

industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Restrictions on Payments to Employee Representatives

Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to

influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing: or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever

occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and the employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to

notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

Boycotts and Other Unlawful Combinations

Sec. 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8 (b) (4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Restrictions on Political Contributions

Sec. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U.S.C., 1940 edition, title 2, sec 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

SEC. 313. It is unlawful for any national bank or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political

convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' means any organization of any kind, or an agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Strikes by Government Employees

Sec. 305. It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency.

TITLE IV

Creation of Joint Committee to Study and Report on Basic Problems Affecting Friendly Labor Relations and Productivity * * *

Sec. 401. There is hereby established a joint congressional committee to be known as the Joint Committee on Labor-Management Relations. . . .

TITLE V

Definitions

Sec. 501. When used in this Act--

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

Saving Provision

Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

Separability

Sec. 503. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

BIOGRAPHICAL SKETCH

Richard Charles Einbecker was born in Chicago, Illinois, on August 17, 1924. He was graduated from Thornton Township High School, Harvey, Illinois, in June 1942. He earned a scholarship to the University of Illinois and during his first semester enlisted in the United States Army. He was called to active duty in June, 1943; received an honorable discharge in March, 1946, and returned to the University of Illinois.

In June, 1949, he received his Bachelor of Science Degree in Management with high honors. At the time, his name was inscribed on the University's "Bronze Tablet," an honor reserved for the top three percent of the graduating seniors.

From July, 1949 until December, 1950, he was Manager of Industrial Relations at the Chicago plant of the United States Steel Products Company.

For the next thirteen years he held various managerial positions for "The Lakeside Press"; R. R. Donnelley & Sons Co. He last served as Manager of Price Administration. In this capacity, he was responsible for the pricing and contract administration on the principal accounts of the firm: Time, Inc.; Cowles Magazines and Broadcasting, Inc.; The National Geographic Society; Sears, Roebuck & Co.; Western Electric; The New Yorker, and Encyclopaedia Britannica.

He began graduate study at the University of Florida in

January, 1964, and in August, 1965, received the degree of Master of Business Administration.

In December, 1966, he was admitted to candidacy for the degree of Doctor of Philosophy in Economics and Business Administration. During the course of his graduate work he has served as an instructor in the College of Business Administration.

He is a member of Phi Kappa Phi, Alpha Kappa Psi, Beta Gamma Sigma and the American Management Association.

This dissertation was prepared under the direction of the chairman of the candidate's supervisory committee and has been approved by all members of that committee. It was submitted to the Dean of the College of Business Administration and to the Graduate Council and was approved as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

December 17, 1968

John B. McFerrin
Dean, College of Business Administration

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