

LABOR LAW: TERMINATION OF BUSINESS TO AVOID UNIONIZATION—RIGHTS AND REMEDIES

UNDER the provision of the National Labor Relations Act (NLRA) against discriminatory discharges,¹ the National Labor Relations Board has ruled that such actions as a wholesale discharge of employees,² relocation of plant,³ or partial discontinuance of operations,⁴ when discriminatorily motivated are unfair labor practices. In the recent case of *Darlington Mfg. Co.*,⁵ the Board was presented with a somewhat different question, the legality of a permanent discontinuance of operations when the primary reason for such discontinuance is to avoid dealing with the union.

In March of 1956, the Textile Workers Union of America initiated an organizational campaign at the Darlington Manufacturing Company, the majority of whose stock was held by the Milliken family. The Milliken family also held controlling interest in Deering Milliken, Inc. and a number of other textile firms. The campaign, conducted in an atmosphere of management animosity,⁶ culminated in a narrow victory for the union. Immediately thereafter, Darlington's directors, acting on a recommendation of Roger Milliken, the president of Darlington, resolved to liquidate the company, and this resolution was subsequently approved by the stockholders. Within three months the mill was closed and the plant and equipment sold. Thereafter, the union filed a claim of unfair labor practices contending that Darlington had violated sections 8 (a) (1), (3) and (5) of the NLRA.⁷

¹ National Labor Relations Act § 8 (a) (3), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (a) (3) (1958).

² See, e.g., *Waterman S.S. Corp.*, 7 N.L.R.B. 237 (1938), *enforcement denied*, 103 F.2d 157 (5th Cir. 1939), *enforced*, 309 U.S. 206 (1940).

³ See, e.g., *Industrial Fabricating Inc.*, 119 N.L.R.B. 162 (1957); *S & K Knee Pants Co.*, 2 N.L.R.B. 940 (1937). See generally, Note, 37 NOTRE DAME LAW. 357 (1962).

⁴ See, e.g., *Superior Maintenance Co.*, 133 N.L.R.B. 746 (1961); *Missouri Transit Co.*, 116 N.L.R.B. 587 (1956), *enforced*, 250 F.2d 261 (8th Cir. 1957). See generally, Annot., 152 A.L.R. 149 (1944).

⁵ 139 N.L.R.B. No. 23, 4 CCH LAB. L. REP. ¶ 11649 (Oct. 18, 1962). For discussion of the case see Note, 111 U. PA. L. REV. 672 (1963); Johannesen, *Case of the Runaway Mill: Darlington Manufacturing Company*, 12 LAB. L.J. 1189 (1961); Schoemer, *Case of the Runaway Author: Professor Johannesen's Article on the Darlington Case*, 13 LAB. L.J. 356 (1962).

⁶ The record contained evidence of some 20 instances of interrogations and 30 threats made to the employees during the campaign. 4 CCH LAB. L. REP. at 18189 nn. 6 & 7.

⁷ 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (a) (1), (3), (5) (1958).

In October of 1962, after six years of litigation, a majority of the Board found in the instant case that the mill was closed to avoid dealing with the lawfully constituted bargaining agent; and that such closing was in violation of section 8 (a) (3)⁸ of the act in that it constituted discrimination in employment to discourage union activity. Furthermore, determining that both the requirements of common ownership, through the stock holdings of the Milliken family, and common control, primarily through the person of Roger Milliken,⁹ were present, the Board found that Deering Milliken and its affiliated corporations occupied single employer status with Darlington and therefore shared liability for the violations. Formulating an unprecedented remedy, the Board ordered the assessment of back pay against Darlington and Deering Milliken until the employees obtained substantially equivalent employment. Deering Milliken was further ordered to offer reinstatement at its other mills to the extent such positions were available.¹⁰ Those employees who could not be presently reinstated were ordered placed on a preferential hiring list, and Deering Milliken was required to negotiate with the union as to the operation of the hiring list and the terms and conditions of reinstatement.

While agreeing with the majority that Darlington's closing was motivated by a desire to avoid unionization, two members dissented

⁸ 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (a) (3) (1958). This section provides that it shall be an unfair labor practice for an employer "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 . . ." See generally, Sham, *The Discharge for Union Activities*, 12 LAB. L.J. 325 (1961).

The Board also found that the evidence was overwhelming that Darlington was guilty of violating § 8 (a) (1) by: (a) interrogation of employees with respect to their activities in behalf of the union; (b) statements made before the election that the plant would be closed if the union was selected by the employees; (c) statements made after the directors meeting, at which the decision was made to close the plant, connecting the decision to close the plant with the employees' activities in behalf of the union; (d) encouragement of employees to sign a petition disavowing the union after the election. 4 CCH LAB. L. REP. at 18190.

Finally, the Board adopted the Trial Examiner's findings that Darlington's violations of § 8 (a) (3) "were so complete as to discourage and ultimately thwart the union from pursuing its right to bargain" and were *a fortiori* violative of § 8 (a) (5). *Id.* at 18195.

⁹ The Milliken family held, either directly or through the ownership of corporate holding stock, at least 66% of the Darlington stock. They likewise owned a majority of Deering Milliken and from 55% to 88% of the other affiliated corporations. Furthermore Roger Milliken was president of Deering Milliken and all but one of the affiliated corporations. *Id.* at 18197.

¹⁰ The offer of employment was to be without loss of seniority rights and Deering Milliken was further ordered to pay the travel and moving expenses of the employees and their families to the other mills. *Id.* at 18198.

from the holding and adopted the Trial Examiner's finding that Deering Milliken did not occupy a single employer status with Darlington. Member Leedom, while agreeing that the closing was an unfair labor practice, also opposed the extension of the back pay remedy against Darlington beyond the date of closing. Member Rodgers maintained that Darlington had an absolute right to go out of business regardless of motivation and that they were therefore not guilty of an 8 (a) (3) violation.¹¹

The Board, in determining that Darlington's decision to liquidate was discriminatorily motivated found that two of the eight "economic" reasons for closing advanced by Darlington pertained to union activities and held that these therefore could not be classified as economic.¹² Relying heavily upon the fact that Darlington's behavior in the months preceding the election "established . . . the intention to continue on as an operating concern"¹³ despite its poor financial situation, the Board rejected the contention that all eight factors contributed to the closing and held that the decision to close "would not have been made but for the protected organizational activities of the employees."¹⁴ Furthermore, the Board stated that even if the six genuine economic factors as well as the employees' union activities were responsible for the closing, Darlington's action was still unlawful.¹⁵

In reply to Darlington's contention that regardless of motive, there is an absolute right to go out of business, the Board answered that "Congress has taken from the employers the right to discharge employees for engaging in protected activities. The withdrawal of this right is absolute and unequivocal."¹⁶ The Board reasoned that

¹¹ *Id.* at 18199-201.

¹² "When an employer discharges its employees for selecting a union to represent them, then the motivation is not 'economic' in the sense contemplated by the Act—notwithstanding the employer's belief that it could not afford to pay increased wages that the union representative might demand." *Id.* at 18190. The case cited by the Board as authority for this point, *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162 (1957) (plant closed and work transferred to alter ego corporation), implies that had the closing been permanent, the result might have been different. *Id.* at 172.

¹³ 4 CCH LAB. L. REP. at 18191. This was evidence by the fact that Darlington was engaged in an extensive plant improvement program which had already involved an expenditure of \$400,000 in the nine month period preceding the election.

¹⁴ *Id.* at 18197, quoting Trial Examiner.

¹⁵ "A plant shutdown resulting in the discharge of employees that is partly due to employees' union activities constitutes an unfair labor practice." *Id.* at 18,191.

¹⁶ *Id.* at 18,194. Neither the act nor its legislative history explicitly limits the employer's right to go out of business. The remarks of Senator Walsh, 79 CONG. REC. 7673 (1935), and Representative Griswald, 79 CONG. REC. 9682 (1935), cited in Member Rodgers' dissent, to the effect that no one can compel an employer to keep his plant

if a temporary closing of the mill or the discharge of a portion of the employees would be a violation, then the permanent closing of the mill with the resultant discharge of all employees was likewise a violation. Despite publicity to the contrary,¹⁷ the Board's determination on this point does not constitute a revolutionary departure from its previous decisions. Rather, the holding represents a logical extension of the Board's position on a partial discontinuance.¹⁸ Moreover, the instant case is not the first time that a permanent plant closing has been held by the Board to be a violation of section 8 (a) (3).¹⁹

The position of the federal courts on the question of the absolute right of the employer to liquidate his business has not been so clearly determined. As the Board acknowledged, there has been no case "directly dispositive" of the question. While strong dictum may be found to the effect that an employer enjoys the right to go out of business for whatever reason he may choose,²⁰ most recent cases dealing with a partial discontinuance of operations have by inference indicated that no absolute right to terminate business exists.²¹

open, appear to have been made in the context that an employer could not be compelled to make a particular agreement with a union.

¹⁷ See, e.g., Editorial, *Richmond News Leader*, Nov. 2, 1962, p. 12, col. 1.

¹⁸ See, e.g., *Superior Maintenance Co.*, 133 N.L.R.B. 746 (1961); *Missouri Transit Co.*, 116 N.L.R.B. 587 (1956), *enforced*, 250 F.2d 261 (8th Cir. 1957). The reasoning applied in the cases involving a partial termination would seem to be perfectly valid in the case of a permanent closing. Although the remedy may be different, certainly the effect on the employees is the same. Furthermore, there would seem to be only a difference in degree and not in kind in the limitation of managerial prerogative since in neither case is it a question of exchanging union labor for non-union labor, but rather a question of whether the employer will continue to do the work at all.

¹⁹ The question of a permanent discriminatory cessation of operations first arose in *Barbers Iron Foundry*, 126 N.L.R.B. 30 (1960), where the Board stated that "the fact that the plant closing was also permanent does not make it any less discriminatory." *Id.* at 32. The Board reached the same result in two other cases prior to *Darlington*. *New England Web, Inc.*, 135 N.L.R.B. No. 102, *enforcement denied on other grounds*, 309 F.2d 696 (1st Cir. 1962); *M. Yoseph Bag Co.*, 126 N.L.R.B. 211 (1960), *remanded sub nom.*, District 65, *Retail Union v. NLRB*, 294 F.2d 364 (3d Cir. 1961), *question rendered moot on remand*, 139 N.L.R.B. No. 108 (Nov. 26, 1962). For the most recent decision on the question, see *Star Baby Co.*, 140 N.L.R.B. No. 67 (Jan. 18, 1963) (partnership in closing its business and discharging its employees violated § 8 (a) (3)).

²⁰ *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908, 913-14 (8th Cir. 1954); *Phillips v. Burlington Indus. Inc.*, 199 F. Supp. 589 (N.D. Ga. 1961). In the *Phillips* case the Board sought to enjoin the company from liquidating its assets until there was a ruling on the unfair labor practice claim. Although the injunction was denied in this case, this is a form of remedy which the Board may be expected to exploit more fully in the future. See, Address of Chairman McCulloch, American Management Association Mid-Winter Personnel Conference, Chicago, Feb. 15, 1962.

For an example of a federal court's reluctance to handle the question of an absolute right to go out of business, see *District 65, Retail Union v. NLRB*, 294 F.2d 364 (3d Cir. 1961).

²¹ See *NLRB v. Kingsford Motor Car Co.*, 313 F.2d 826 (6th Cir. 1963) (company

In the only judicial decision dealing with the question of a total cessation of business, the court in *NLRB v. New England Web, Inc.*, adopted a similar view.²²

Although the Board and the federal courts are in apparent agreement that the NLRA limits the right of the employer to permanently discontinue his operations, there is a significant difference between them as to whether the advent of the union may in itself constitute a legitimate economic factor to be considered in making the decision to close down. The Board has viewed the permanent termination of operations as being no different from the discharge of a single employee or group of employees, and has therefore applied the same test to determine discriminatory motivation in both instances. Since a single employee may not be discharged partly because he is a union man, it necessarily follows, according to the Board, that "a plant shutdown resulting in the discharge of employees that is partly due to the employees' union activities constitutes an unfair labor practice."²³ Under this line of reasoning, the advent of the union is not an economic factor that the employer may consider in determining future action. Thus, if the facts indicate the employer intended to remain in business prior to the advent of the union, his subsequent shutdown will inevitably be held to be unlawful.

On the other hand, the position of the federal courts is that the advent of the union is an economic factor which may legitimately be considered by the employer "as part of the overall picture per-

may suspend or change operations as long as motivation is not desire to defeat rights guaranteed by the act). *Accord*, *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); *NLRB v. Adkins Transfer Co.*, 226 F.2d 324 (6th Cir. 1955); *NLRB v. Houston Chronicle Publishing Co.*, 211 F.2d 848 (5th Cir. 1954). To the same effect is *NLRB v. Rapid Bindery Inc.*, 293 F.2d 170 (2d Cir. 1961) (runaway shop).

²² 309 F.2d 696 (1st Cir. 1962). The Board had held in this case that the New England Web corporation had violated § 8 (a) (3) by closing down and liquidating to avoid bargaining with the union. The Board further determined that four other corporations occupied single employer status with New England Web and were jointly responsible for the violations. 135 N.L.R.B. No. 102 (Feb. 14, 1962). Although the circuit court reversed the Board's finding that the closing was discriminatory on the ground that the employer was motivated by legitimate economic reasons, the court's reasoning indicates that terminations under certain circumstances will not be justified. In reversing, the court did not reach the single employer question or the scope of the Board's remedial order. For a discussion of the remedy the Board ordered, see *infra* pp. 791-92.

²³ 4 CCH LAB. L. REP. at 18191. The authority cited by the Board for this statement, *NLRB v. Jamestown Sterling Corp.*, 211 F.2d 725 (2d Cir. 1954), involved the discharge of individual employees and not the termination of operations thus indicating the extent to which the Board has equated the two situations.

taining to the costs of operation."²⁴ This approach, first clearly articulated in the cases involving a partial discontinuance of operations²⁵ and the runaway shop,²⁶ has been extended in *NLRB v. New England Web, Inc.*,²⁷ to the situation where the employer has terminated the entire operation. There the court recognized that an employer still "retains the untrammelled prerogative to close his enterprise when in the exercise of a legitimate and justified business judgment he concludes that such a step is . . . necessary. . . . This prerogative exists quite apart from whether there is a union on the scene."²⁸ Furthermore, the fact that the employer has not considered closing prior to advent of the union is not determinative since the unionization of the plant is a new factor to be considered by management in determining a future course of action.²⁹

Thus, it would seem that while acknowledging that there is no absolute right to go out of business, the federal courts are applying a type of reasonable business judgment test to determine whether or not the closing was unlawful. If there is convincing evidence that the advent of the union was considered "objectively and independently"³⁰ as a cost element and that the discontinuance was economically motivated, then the concurrent presence of union animus will not make the closing an unfair labor practice. However, if the evidence indicates that the "predominant"³¹ motive is animosity toward the union then the courts will find a violation of the act. Among the factors that would be relevant in the application of such a test are the financial position of the company, the nature of its relations with the union movement in the past, and the persuasiveness of the evidence advanced to show that unionization would raise costs to a prohibitive level.³²

Having found that Darlington's discontinuance of operations was discriminatory, the Board, in determining the proper remedy,³³

²⁴ *NLRB v. Lassing*, 284 F.2d 781, 783 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961).

²⁵ See, e.g., *NLRB v. Kingsford Motor Car Co.*, 313 F.2d 826 (6th Cir. 1963); *Jay Foods Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961); *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961).

²⁶ See *NLRB v. Rapid Bindery Inc.*, 293 F.2d 170 (2d Cir. 1961).

²⁷ 309 F.2d 696 (1st Cir. 1962). For discussion of the case see note 22 *supra*.

²⁸ *Id.* at 700.

²⁹ *Id.* at 701.

³⁰ *Jay Foods, Inc. v. NLRB*, 292 F.2d 317, 320 (7th Cir. 1961).

³¹ *NLRB v. Kingsford Motor Car Co.*, 313 F.2d 826 (6th Cir. 1963).

³² *NLRB v. New England Web, Inc.*, 309 F.2d 696, 701-02 (1st Cir. 1962).

³³ For discussion of the remedy applied in the instant case, see Note, 111 U. PA. L. REV. 672 (1963).

first treated the problem as if Darlington were the only employer involved. The Board assessed back pay against Darlington to be continued "until the discharged employees are able to obtain substantially equivalent employment."³⁴ This extension of back pay until substantially equivalent employment is obtained departs from previous cases which limited the back pay to the date of shutdown.³⁵

Such an expansion of the back pay remedy would not seem to be an unwarranted extension of the Board's discretionary remedial powers.³⁶ The purpose of the remedy is to encourage the employee to participate in union activity by eliminating the fear of a loss of wages as a result of the legitimate assertions of his right to bargain collectively.³⁷ Moreover, in effectuating the purpose of the act, the Board endeavors to effect a restoration of the situation as nearly as possible "to that which would have obtained but for the illegal discrimination."³⁸ In a case where the closing is itself the violation, this policy demands the extension of the remedy beyond the date of shutdown since the finding necessarily presupposes that the business would otherwise have continued indefinitely. While this remedy differs from the usual back pay remedy in that the employer is not in position to toll the back pay by placing the employees on a

³⁴ 4 CCH LAB. L. REP. at 18196.

³⁵ In *M. Yoseph Bag Co.*, 128 N.L.R.B. 211 (1960), and in *Barbers Iron Foundry*, 126 N.L.R.B. 30 (1960), back pay was limited to the date of permanent cessation of operations. As the dissenters in these cases pointed out, the Board failed to distinguish an illegal discharge followed by a legitimate closing from the case where the closing itself was discriminatory. Thus in these earlier cases the Board created the anomalous situation of determining a violation which had no remedy. However, the Board distinguished the cases where the employer remained in business even though in a much reduced or different form and in these instances they were willing to grant back pay until substantially equivalent employment was obtained. See *St. Cloud Foundry & Mach. Co.*, 130 N.L.R.B. 911 (1961); *Bonnie Lass Mills, Inc.*, 126 N.L.R.B. 1396 (1960). Member Leedom contended in his dissent in the instant case that this distinction should be maintained. 4 CCH LAB. L. REP. at 18199.

³⁶ Section 10 (c) of the act authorizes the Board "to take such affirmative action . . . as will effectuate the policies of this subchapter. . ." 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160 (c) (1958). The Board does not have a penal jurisdiction allowing it to inflict whatever penalties it might think would effectuate the policies of the act. *United Bhd. of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938). Although the extension of this remedy may come under attack as being penal, it is suggested, that on the contrary, it is a necessary correction of the anomaly created in *Barbers Iron Foundry* and *Yoseph Bag Co.* See note 35 *supra*.

³⁷ See *NLRB v. Killoren*, 122 F.2d 609 (8th Cir. 1941) (enforcing back pay against trustee in bankruptcy); Note, 55 HARV. L. REV. 539 (1942). See generally, Daykin, *Back Pay Under The National Labor Relations Act*, 39 IOWA L. REV. 104 (1953).

³⁸ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

preferential hiring list, this is the result of his own wrong and it is better that he should bear the burden than the innocent employee.³⁹

However, the Board did not limit its holding to Darlington. In concluding that Deering Milliken constituted a single employer, and was therefore liable with Darlington, the Board may have taken the initial step in a redetermination of the requisites of single employer status. Both common ownership and common control are necessary to constitute a single employer.⁴⁰ In the past, common control has meant actual control and in particular, actual control of labor relations.⁴¹ However, in the instant case, while seemingly speaking in terms of actual control, the Board may have shifted its standard to potential control.⁴² If this is the case, it marks a distinct departure from the past and has widespread implications for the future.

³⁹ Under the holding of this case back pay could be tolled by Deering Milliken by placing the discharged employees on a preferential hiring list. 4 CCH LAB. L. REP. at 18196 n. 44. However, the Board has since given evidence that this is immaterial and that the same remedy will apply in a case where there is no parent or affiliate to toll back pay. See *Star Baby Co.*, 140 N.L.R.B. No. 67 (Jan. 18, 1963), where the same back pay remedy as in the instant case was assessed against a two man partnership.

⁴⁰ The requirement that both common control and common ownership must exist before the assessment of joint responsibility was established in *Dearborn Oil & Gas Corp.*, 125 N.L.R.B. 645 (1959). For an extensive list of cases dealing with the requisites of single employer status, see cases cited therein.

⁴¹ *J.G. Roy & Sons, Inc. v. NLRB*, 251 F.2d 771 (1st Cir. 1958) (secondary boycott); *NLRB v. Condenser Corp.*, 128 F.2d 67 (3d Cir. 1942) (employer dominated union and illegal discharge); *Knight Newspapers Inc.*, 138 N.L.R.B. No. 137 (October 1, 1962) (secondary boycott).

⁴² The Board began its discussion of labor control by pointing out that Roger Milliken, as President of all the corporations save one, "exercised ultimate control over the labor relations of all the corporations." 4 CCH LAB. L. REP. at 18197. If the Board is going to use ultimate control as a test, then common ownership would suffice. The Board pointed out as further evidence of control by Roger Milliken that he received reports as to the progress of reducing the number of jobs, pay raises given, and hours worked. However, the Board failed to indicate how such reports were used and since they would be an essential element in any cost analysis, it does not follow that they were used in conducting labor relations. Thirdly, the Board pointed to the fact that Roger Milliken made "suggestions" as to hiring, although they admitted that the normal hiring and firing was done at the plant. The Board did not say whether Roger Milliken was acting in an executive or advisory capacity in making these suggestions, although they have previously made this distinction. *Knight Newspapers Inc.*, 138 N.L.R.B. No. 137 (Oct. 1, 1962). Finally, in conjunction with Roger Milliken's influence on collective bargaining, the Board stated that "his pervasive influence was demonstrated by the statement of supervisory employees that Roger Milliken would close the plant rather than permit unionization." 4 CCH LAB. L. REP. at 18197. This seems rather inconsistent with the Board's statement earlier in the case that "we do not adopt or pass upon the Trial Examiner's findings that: (1) Unlawful statements made by Darlington's supervisors did not reflect declarations by Roger Milliken; . . . (3) the supervisors unlawful threats were not proof of such threats by Deering Milliken." *Id.* at 18190 n. 13.

Having found the existence of a single employer status, it would appear that in ordering Deering Milliken to reinstate the employees in other mills and to bargain with the union in regard to this reinstatement, the Board has taken a significant step in terms of a proper remedy. While this remedial order does not extend as far as that in *New England Web, Inc.*,⁴³ where the employer was ordered, in lieu of resuming operations at the liquidated plant, to reinstate the discharged employees as a group and recognize the union as representative of the group on all matters, it nevertheless enhances the protection of the rights of the employee. Back pay and reinstatement alone are often not effective, nor can it be said that they restore the status quo that existed prior to the discrimination since the employee has lost the protection of the union that he elected. In the instant case, the remedy not only makes the employee financially whole, it also recognizes, at least to a limited extent, the right of the employee to be represented by his union in another plant of the same company.

In conclusion, it would seem that the Board and the federal courts, while being in agreement on the legal principle that the NLRA limits the right of the employer to go out of business, are in disagreement on the application of the principle to the facts of a given case. Job security is currently one of the most important goals of the union movement. By indicating that the advent of the union is not an economic factor in and of itself which may be considered by the employer in determining his future course of action, the Board has reiterated its increasing interest in the attainment of this goal.⁴⁴ The federal courts on the other hand, have been re-

⁴³ 135 N.L.R.B. No. 102 (Feb. 14, 1962), *enforcement denied on other grounds*, 309 F.2d 696 (1st Cir. 1962). Probably the factual difference in the two cases accounts for the fact that the *New England Web* remedy was not applied in *Darlington*. In *New England Web* there were only 29 employees involved whereas in *Darlington* there were some 500. To order the reinstatement of this large a number would be to indirectly order the resumption of operations at *Darlington* and the Board is not willing to go that far when the Company has already disposed of its plant and equipment. The Board has however been willing to order the resumption of a discontinued portion of the operations when such resumption does not involve heavy expenditures by management. See *R.C. Mahon Co.*, 118 N.L.R.B. 1537 (1957), *enforcement denied on other grounds*, 269 F.2d 44 (6th Cir. 1959).

⁴⁴ Another example of the Board's increasing interest in job security is its reversal on the question of whether subcontracting for economic reasons is a mandatory subject of collective bargaining. *Fiberboard Paper Prods. Corp.*, 130 N.L.R.B. 1558 (1961), held that subcontracting for economic reason was not a mandatory subject of collective bargaining. This was overruled a year later in *Town & Country Mfg. Co.*, 136 N.L.R.B. No. 111 (April 13, 1962), and *Fiberboard* itself was reversed on rehearing, 138 N.L.R.B. No. 67 (Sept. 13, 1962). See also *NLRB v. Hawaii Meat Co.*, 139 N.L.R.B.

luctant to limit so severely management's prerogative to decide to what extent, if at all, it shall continue to do business. Willing to acknowledge that an employer may violate the act by going out of business, they have been unwilling to say that the advent of the union is not a legitimate economic factor, which, when considered and acted upon in a reasonable manner, might be the determining factor in a decision concerning the future course of the business. Until one of these views yields, it can be expected that close cases are likely to be reversed in the appellate courts on the basis of a different evaluation of the facts.

No. 75 (Nov. 15, 1962); *Adams Dairy, Inc.*, 137 N.L.R.B. No. 87 (June 25, 1962); *Sidle Fashions, Inc.*, 133 N.L.R.B. 547 (1961).

For a discussion of the growing conflict between the employer's interest in job security and the union's interest in job security, see Epstein, *Disengagement From the Labor Contract: the Problem and a Proposal*, 50 CALIF. L. REV. 619 (1962).