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THE DUTY TO BARGAIN ABOUT CHANGES IN OPERATIONS

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A NEW LINE of National Labor Relations Board decisions has extended the obligation of the employer to bargain about changes in operations, such as subcontracting of work or plant shut-down, which were previously considered to be entirely within management discretion. The Board's theory in these cases, which has recently been accepted by one court of appeals and rejected by another, raises some fundamental questions about the extent of the bargaining obligation and the degree of union participation in managerial decision making.

The cases referred to involve situations where a change in operations is made by management purely for economic reasons, without any intent to discriminate against employees because of union membership or to retaliate against the union. In these cases, the legal question concerns the extent of the employer's duty to bargain with the union *in advance* about the *decision* to make a particular change. The cases arise under section 8 (a) (5) of the Labor-Management Relations Act, which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."¹ They also involve section 8 (d) of the act, which provides that "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 employ-

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¹ 61 Stat. 141 (1947), 29 U.S.C. § 158 (a) (5) (1958).

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

I

THE *Town & Country* DOCTRINE

The current philosophy of the NLRB on cases of this type was first expressed in the *Town & Country* case,³ which involved a managerial decision to subcontract the employer's entire hauling operations. This resulted in discharge of all employee truck drivers in the collective bargaining unit, for which a union had been certified as bargaining agent about one month earlier. The decision was made and action taken without any prior notice to or discussion with the union.

The Board's trial examiner found the employer's decision was motivated by a desire to avoid further violation of Interstate Commerce Commission regulations. Consequently, he found no violation of section 8 (a) (3) of the act, which makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"⁴ The Board, however, disagreed and found that the drivers had been discharged for discriminatory reasons in violation of section 8 (a) (3). On this basis, it also found that the termination of hauling operations constituted a refusal to bargain under section 8 (a) (5) because the employer was motivated by opposition to the union and sought to disparage and undermine the union as bargaining agent for the drivers.

The interesting aspect of the decision is that the Board did not stop with this basis for the section 8 (a) (5) violation. It went on to agree with the trial examiner that even if the employer's action had been taken to avoid violation of ICC regulations or because of economic considerations, his unilateral action constituted an unlawful refusal to bargain in violation of section 8 (a) (5) because he was under a statutory obligation to bargain as to his decision to subcontract. In overruling an earlier decision in the *Fibreboard* case,⁵ the

² 61 Stat. 142 (1947), 29 U.S.C. § 158 (d) (1958).

³ *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

⁴ 61 Stat. 140 (1947), 29 U.S.C. § 158 (a) (3) (1958).

⁵ *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558 (1961), *rev'd on rehearing*, 138 N.L.R.B. No. 67 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963).

Board stated 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."⁶

The Court of Appeals for the Fifth Circuit recently enforced the Board's order in the *Town & Country* case⁷ in a decision which upheld the Board's finding of discriminatory motivation of the employer as the basis for a violation of sections 8 (a) (3) and (5). The court expressed no opinion on the issue under discussion here, the obligation to bargain on a decision motivated solely by economic reasons. Thus, the *Town & Country* case is of interest primarily because of its dictum pointing the direction of future Board decisions on subcontracting and other changes in operations.

The *Fibreboard* decision, overruled in the *Town & Country* case, involved facts which presented the issue more squarely; namely, whether an employer, absent any discriminatory motivation, violates section 8 (a) (5) of the act when he fails to notify and negotiate with the union about a decision to subcontract work previously done by bargaining unit employees. That case involved the contracting out of all plant maintenance work and resultant discharge of all employees in a collective bargaining unit of maintenance workers. In this case, unlike the *Town & Country* case, both the trial examiner and the Board found that the employer's motive was economic rather than discriminatory. The employer had considered maintenance costs to be excessive for a long period of time and found that savings of nearly a quarter of a million dollars could be realized by using an independent contractor. Four days prior to the expiration of the existing collective bargaining agreement, the employer arranged a meeting to notify the union of the decision to subcontract the maintenance work. The decision was placed into effect on the termination date of the collective bargaining agreement. The employer and the union had been bargaining collectively since 1937, but the employer refused to discuss the decision to contract out the work.

The Board majority, on the first hearing of the case, found no unlawful refusal to bargain, but on rehearing after the *Town &*

⁶ *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1027 (1962), enforced, 316 F.2d 846 (5th Cir. 1963).

⁷ *Town & Country Mfg. Co. v. NLRB*, 316 F.2d 846 (5th Cir. 1963).

Country decision, the previous decision was expressly reversed.⁸ As a remedy for the refusal to bargain, the Board ordered reinstatement of the maintenance operation and reinstatement of the affected employees with back pay.

The Board's final *Fibreboard* decision was recently affirmed by the Court of Appeals for the District of Columbia.⁹ The court found that there was substantial evidence to support the Board's conclusion that the company had refused to bargain and that the Board was warranted in its determination that the employer violated section 8 (a) (5) "by refusing to bargain before terminating the employment of all the members of its maintenance force."¹⁰ The Board's remedial order was also enforced without qualification. Thus, the *Town & Country* doctrine which began as dictum has found its way into Board holdings supported by at least one court of appeals.

II

IMPLICATIONS OF THE *Town & Country* DOCTRINE

The test emerging from the *Town & Country* line of cases for determining whether a particular change in operations falls within the scope of statutory "terms and conditions of employment," about which the employer must bargain in advance, is simply whether or not the employer's decision affects employment. If it does, there is a duty to bargain about the decision.

Such a test could logically be extended to require bargaining in numerous situations in addition to the subcontracting situation in which it was originally formulated. This becomes apparent when the rationale of the Board's decisions is considered in its most general form:

- (1) Any decision to change operations which would affect employment is within the scope of statutory "conditions of employment."
- (2) Any unilateral change in "conditions of employment" constitutes a refusal to bargain.
- (3) Therefore, any change in operations which would affect employ-

⁸ *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. No. 67 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *cert. granted*, 32 U.S.L. WEEK 3242 (U.S. Jan. 7, 1964).

⁹ *Fibreboard Paper Prods. Corp. v. NLRB.*, 322 F.2d 411 (D.C. Cir. 1963).

¹⁰ *Id.* at 415.

¹¹ *Shamrock Dairy Inc.*, 124 N.L.R.B. 494 (1959). See also *Hillcrest Dairy Co.*, BNA 1963 DAILY LAB. REP. No. 146, at D-1 (case No. 8-CA-2928), where the trial examiner held that the employer must bargain with the union before selling a delivery route to an employee who would become an independent contractor.

ment must be bargained about in advance of reaching a decision to make the change.

Job elimination by contracting out the work of an entire unit, of course, does have an effect on employment which fits into such a rationale very well, as the *Town & Country* and *Fibreboard* cases demonstrate. Where jobs themselves are not eliminated, but employees holding them are converted to independent contractors, similar reasoning has been followed, as illustrated by the *Shamrock Dairy* case,¹¹ which was a forerunner of the *Town & Country* decision. The trend is indicated by the application of the theory to subcontracting of miscellaneous maintenance and construction work which could have been performed by employees on layoff from the bargaining unit, even though the subcontracting was sporadic and did not result in any permanent elimination of jobs.¹²

The Board's enthusiasm for its new doctrine was carried to an extreme in the *Hawaii Meat* case,¹³ where it was held that section 8 (a) (5) prohibited subcontracting of delivery operations during an economic strike without first bargaining with the striking union, even though the subcontracting was undertaken merely to keep the plant in operation. The Ninth Circuit, however, reversed the Board and held that the general right of an employer permanently to replace economic strikers eliminated the necessity to bargain in this situation.

More recently, the entire theory of the Board on subcontracting was rejected by the Eighth Circuit in the *Adams Dairy* case,¹⁴ in which the employer had turned over all routes of its driver-salesmen to independent distributors without discussing the decision with the union. The court in that case met the issue squarely with the following statement:

We hold here that the decision on the part of Adams to terminate a phase of its business and distribute all of its products through independent contractors was not a required subject of collective bargaining.

¹² Shell Oil Co., BNA 1963 DAILY LAB. REP. NO. 127, at A-8 (case No. 15-CA-2143).

¹³ *Hawaii Meat Co. v. NLRB*, 321 F.2d 397 (9th Cir. 1963), denying enforcement of 139 N.L.R.B. No. 75 (1962) (involving permanent subcontracting of delivery operations during an economic strike, thereby eliminating jobs of drivers and helpers). The Board had held that the general right of an employer permanently to replace economic strikers, recognized by the United States Supreme Court in *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), did not apply in such circumstances, but the Ninth Circuit found the *Mackay* case controlling.

¹⁴ *NLRB v. Adams Dairy, Inc.*, 322 F.2d 553 (8th Cir. 1963), modifying 137 N.L.R.B. 815 (1963).

After that decision has been made, however, § 8 (a) (5) did require negotiation with reference to the treatment of the employees who were terminated by the decision¹⁵

Such a clear-cut holding may be somewhat comforting to employers in that circuit, but it is not likely to deter the Board from further expanding the scope of the bargaining theory under discussion, in view of the judicial support of the Board in the *Fibreboard* case. The conflict in the circuits, however, does make a Supreme Court ruling more likely. Until then, employers who decide to subcontract without consulting the union must do so at their peril.

Plant shutdown or liquidation, of course, also affects employment. As might be expected, application of the rationale summarized above resulted in a Board finding of an obligation to bargain in advance of a decision to liquidate a clothing manufacturing business in its entirety in the *Star Baby* case.¹⁶ The theory has been considered by the Board as applicable to the sale of five stores in a chain of six food stores,¹⁷ and Board trial examiners in recent cases have applied it to the sale of two unprofitable plants for purely economic reasons and to a plant shutdown for economic reasons without any sale of the facility.¹⁸

Changing technology in an industry may require changes in operations for an employer's survival. Where such changes affect employment, however, as in the case of a managerial decision to

¹⁵ *Id.* at 562.

¹⁶ *Star Baby Co.*, 140 N.L.R.B. No. 67 (1963). Some doubt has been raised about the validity of this aspect of the doctrine by the recent decision of the Fourth Circuit in *Darlington Mfg. Co. v. NLRB*, 4 CCH LAB. L. REP. ¶ 18585 (4th Cir. 1963). That case held that the employer has an absolute right to cease business operations, in whole or in part, for any reason, including anti-union bias. Although that case arose under § 8 (a) (3) and involved discriminatory motivation, it would seem that a nondiscriminatory situation involving only § 8 (a) (5) would present an a fortiori case.

¹⁷ *Weingarten Food Center, Inc.*, 140 N.L.R.B. No. 25 (1962). No unlawful refusal to bargain concerning the decision to discontinue operations was found because the NLRB General Counsel had failed to argue this violation; the decision, however, made it plain that but for this technicality, the doctrine would have been applicable to this situation.

¹⁸ *Mitchell Boat Co.*, BNA 1963 DAILY LAB REP. No. 156, at A-7 (case No. 13-CA-5484); *United Dairy Co.*, BNA 1963 DAILY LAB REP. No. 107, at D-1 (case No. 6-CA-2551). The trial examiner in the *United Dairy* case stated that "sales, or mergers, or other dispositions of facilities in our rapidly changing economy have such an obvious, direct and devastating impact on the jobs of employees that they fall within the principle relied upon by the Board in subcontracting cases." Among other things, he ordered the employer to furnish the union a copy of the sales agreement. In the *Mitchell Boat* case, the plant shutdown occurred three days after a union request for recognition, but it was found to be for valid economic reasons. The trial examiner, however, held the union should have been consulted concerning the layoff decision.

purchase materials from others which were previously fabricated internally, the duty to bargain in advance of the decision still exists under the Board's present theory. Thus, in the *Renton News* case,¹⁹ the Board found that a refusal to bargain with the union concerning the intended change violated section 8 (a) (5), notwithstanding clear evidence that the change was essential for the employer to remain competitive in the light of technological improvements in the industry. The following observations by the Board in connection with the remedy indicate the lack of significance attached to the degree of economic necessity for the unilateral action:

The change in the method of operations in this case is the result of technological improvements. Obviously, such improvements serve the interest of the economy as a whole and contribute to the wealth of the Nation. Nevertheless, the impact of automation on a special 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.²⁰

Radical changes in traditional functions of management would result if the Board's simple rationale were carried to its logical conclusion in many situations to which it could apply. Such situations could involve not only subcontracting, plant shutdown, plant sale, going out of business, and purchasing rather than making components, but also the transfer of work to a different plant of the same employer, the elimination of an unprofitable product line with resulting job elimination, a corporate merger involving consolidation of operations, the general scheduling of production, and the introduction of laborsaving equipment, materials, or methods. Almost any decision about production has an effect on employment; conceivably even decisions about marketing and finance could be found to have such an effect. The NLRB General Counsel has already stated that the obligation to bargain may extend to decisions involving transfer of work to a different plant or a parallel operation of the same employer.²¹ He has even suggested that

¹⁹ *Renton News Record*, 136 N.L.R.B. 1294 (1962).

²⁰ *Id.* at 1297.

²¹ Address by Stuart Rothman, then NLRB General Counsel, February 15, 1963, before the Wisconsin Bar Ass'n Labor Law Section, BNA 1963 DAILY LAB. REP. No. 33, at D-1. The present General Counsel, Arnold Ordman, was the trial examiner in *Adams Dairy, Inc.*, 137 N.L.R.B. 815 (1962), *modified*, 322 F.2d 553 (8th Cir. 1963).

a decision about operations which would reduce overtime work must be bargained about in advance, stating, "If it is work which can fairly be said to be 'unit work,' unilateral employer action and decision without bargaining discussions may be unprivileged."²²

The Board itself has, of course, attempted to minimize the practical significance of its *Town & Country* doctrine. It has pointed out that the duty to bargain about a decision to subcontract should not involve any undue burden on the employer nor obligate him to yield to the union. The Board has also expressed the view that "candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides."²³ Notwithstanding these disclaimers, the *Town & Country* doctrine is likely to have an impact not only on the procedure but also on the effectiveness of managerial decision making concerning changes in operations.

This impact results, first, simply from the fact that these cases establish for the first time the rule that managerial *decisions* about changes in operations which affect employment, made purely for economic reasons, cannot be made unilaterally. The union must be notified *in advance* of the decision, and the employer must bargain with the union about the decision. This rule is not so clearly in accord with prior Board and court decisions as the Board's recent opinions would indicate, for the weight of prior Board and court authority was to the effect that the duty to bargain was confined to the *effects* of such a decision after it had been reached.²⁴

His intermediate report there would indicate that he would be no less zealous in application of the doctrine. See also note 56 *infra*.

²² *Id.* at D-7.

²³ *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1027 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

²⁴ See, e.g., *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961), holding that "the decision to move was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion"; *Jays Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961), citing first *Fibreboard* decision of the Board with approval; *Phillips v. Burlington Indus., Inc.*, 199 F. Supp. 589 (N.D. Ga. 1961), denying injunction to restrain employer from liquidating plant for economic reasons pending bargaining with union; *Krantz Wire & Mfg. Co.*, 97 N.L.R.B. 971, *other holdings enforced*, 199 F.2d 800 (7th Cir. 1952), involving plant shutdown for legitimate business reasons held not to require consultation with the union; *Celanese Corp.*, 95 N.L.R.B. 664 (1951), involving subcontracting of maintenance work; *Walter Holme & Co.*, 87 N.L.R.B. 1169 (1949), involving conversion of drivers to independent contractors; *Mahoning Mining Co.*, 61 N.L.R.B. 792, 803 (1945), stating that "the Board has never held that . . . an employer may not in good faith, . . . change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected. . . ."; *Brown-McLaren Mfg. Co.*, 34 N.L.R.B. 984 (1941), holding

The difference lies in the much greater degree of practical restriction on management's freedom to maneuver. The requirement of advance notification to and discussion with the union inevitably slows action, and delay itself may block the change. The possibility that confidential plans, like those for a plant relocation, may become public information may make the contemplated action impractical. More important, such advance discussion effectively opens the possibility to the union of blocking, delaying, or modifying the contemplated action by threat or use of economic pressure. This introduces a new factor into the managerial decision. Estimates of cost savings from a contemplated change in operations must now take into account possible losses and uncertainties due to such economic pressure. Concessions and compromises may be made which would not otherwise be made. From the immediate viewpoint of the affected employees and the union, of course, such ability to forestall action is exactly the effect desired, but it must be recognized that it restricts the ability of the individual enterprise to achieve optimum operating results and the ability of the economy as a whole to adjust to changing conditions.

A second reason for the impact of these cases is that the Board's remedy for failure to fulfill the duty to bargain on such managerial decisions is far more drastic than that invoked previously in purely section 8 (a) (5) cases. The Board's order in the second *Fibreboard* decision, compelling the employer to reinstitute the maintenance operations and to reinstate the employees involved with back pay to the date of the Board's decision, has been referred to as restoration of the *status quo ante*. The Board maintains that this approach is necessary to adapt the remedy to the situation and that the more customary order to cease and desist from refusing to bargain while allowing the employer's decision on subcontracting to stand would involve "an exercise in futility." Following this general theory, the Board in the *Star Baby* case,²⁵ which involved a complete shutdown and dissolu-

that refusal to negotiate concerning transfer or removal of operations from one plant to another did not constitute a refusal to bargain. The following cases arise under § 8 (a) (3): *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960); *NLRB v. R. C. Mahon Co.*, 269 F.2d 44 (6th Cir. 1959); *NLRB v. Adkins Transfer Co.*, 226 F.2d 324 (6th Cir. 1955); *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908, 914 (8th Cir. 1954), involving a shutdown and sale of a plant in which the court stated that an employer has "the absolute right, at all times, to permanently close and go out of business, . . . for whatever reason he may choose."; *NLRB v. Houston Chronicle Pub. Co.*, 211 F.2d 848 (5th Cir. 1954).

²⁵ *Star Baby Co.*, 140 N.L.R.B. No. 67 (1963).

tion of the business, while not ordering resumption of operations, did order pay to the discharged employees until such time as they obtained substantially equivalent employment elsewhere. Such back pay awards are so costly that few employers can afford to take the slightest risk in determining whether a decision to make a particular change in operations must be bargained about in advance. One trial examiner has candidly recommended that employers "avoid the peril by resolving any doubts in favor of notifying and bargaining with the union."²⁶

Thus, a union which is interested in fully exploiting the possibilities of the Board's new doctrine may be able to elevate its status to that of a co-manager whose views and proposals must be solicited and considered in connection with every decision which might affect the employment relationship.

III

BASIS FOR THE BOARD'S VIEW OF "CONDITIONS OF EMPLOYMENT"

The Board's decisions in the *Town & Country* and *Fibreboard* cases hinged on its determination that the employer's decision to subcontract involved a matter within the meaning of "other terms and conditions of employment," as that phrase is used in section 8 (d) of the act, and was, therefore, a mandatory subject of bargaining.

This result was not altogether unexpected in view of the Board's earlier decision in *Shamrock Dairy*,²⁷ in which the conversion of certain driver-employees to independent contractors for economic reasons without advance notice to the union was found to be in violation of section 8 (a) (5). That case, however, involved unique facts and had been distinguished in the first *Fibreboard* decision. The Board, consequently, had to strain for authority to support its broad interpretation of a phrase which has been in the statute since 1947.

In the *Town & Country* case, the Board relied primarily on the recent United States Supreme Court decision in *Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co.*²⁸ While the latter case involved an interpretation of the Norris-LaGuardia Act and the Railway Labor Act, rather than the provisions of the Labor-Management Relations Act involved in refusal to bargain cases, there were

²⁶ Shell Oil Co., BNA 1963 DAILY LAB REP. NO. 127, at A-8 (case No. 15-CA-2143).

²⁷ Shamrock Dairy, Inc., 124 N.L.R.B. 494 (1959).

²⁸ 362 U.S. 330 (1960).

some similarities in the statutory language. The Board, therefore, concluded that the same principles must apply.

The basic issue in the *Telegraphers* case was whether the Norris-LaGuardia Act prohibited an injunction against the telegraphers' union to restrain a strike against the Chicago & North Western Railway Company. The strike was threatened in connection with the union's proposal of a prohibition on the elimination of any position in existence on December 3, 1957, without union agreement. The Court held that the district court had no jurisdiction permanently to enjoin the strike because the case involved or grew out of a "labor dispute" within the meaning of the Norris-LaGuardia Act. The Court concluded that the union's proposal related to "conditions of employment," as the term is used in that act, because the employment of many station agents represented by the union inescapably depended upon the number of stations abandoned or consolidated. The NLRB in its *Town & Country* decision apparently relied particularly on the Court's statement concerning the Railway Labor Act that "the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules, and working conditions.'"²⁹

Since under the Railway Labor Act the union's proposal was a proper issue for bargaining, the strike would not have been unlawful and enjoined, the Court concluded, even in the absence of the Norris-LaGuardia Act. The NLRB in *Town & Country* therefore apparently reasoned that since job abolition or discontinuance involve "working conditions" which must be bargained about under the Railway Labor Act, abolition of jobs under a subcontracting arrangement must also involve "conditions of employment" which must be bargained about under the Labor-Management Relations Act.

The Supreme Court in the *Telegraphers* case expressly rejected the reasoning of the Court of Appeals for the Seventh Circuit that the union's effort represented an attempt to usurp legitimate management prerogatives in the exercise of business judgment concerning its operations.

²⁹ *Id.* at 339. It should be noted that the Court was not passing on the legality of a refusal by the employer to negotiate, which was the issue involved in *Town & Country*; rather, it was passing on the legality and enjoynability of a strike to enforce the union's contract demand.

In the second *Fibreboard* decision, the Board also relied to some extent on the decision of the Supreme Court in the case of *Teamsters Union v. Oliver*,³⁰ which arose under Ohio antitrust laws and involved an entirely different issue. The latter decision held that provisions of a collective bargaining agreement fixing minimum rentals and other terms governing leases of motor vehicles involved subject matter within the scope of "wages, hours, and other terms and conditions of employment" under section 8(d) of the act, citing as an example of the scope of this phrase an old Board decision in the case of *Timken Roller Bearing Co.*,³¹ which had been reversed by the Sixth Circuit and which had involved a subcontracting issue. In the *Timken* case, the Board had found the employer's system of subcontracting to be a subject about which he must bargain as requested by the union because it could vitally affect employees "by progressively undermining their tenure of employment."³² The *Timken* case was also cited by the Board in the second *Fibreboard* decision with the note that the Board's decision in that case had been "reversed on other grounds."³³

It thus can be seen that there really was no clear judicial precedent for the Board's new doctrine. It is based primarily on interpretations of "conditions of employment" and "working conditions" under the Norris-LaGuardia Act and Railway Labor Act, respectively, in the *Telegraphers* case, plus an ambiguous citation of the *Timken* case in the *Oliver* decision. Moreover, it is in conflict with a number of prior NLRB and court of appeals decisions.³⁴ This conflict is highlighted by the Eighth Circuit's recent *Adams Dairy* decision, in which a detailed analysis of the authorities resulted in reversal of the Board. By way of contrast, the decision of the Court of Appeals upholding the Board in the *Fibreboard* case (which is disposed of as "unpersuasive" in a footnote to the *Adams Dairy* decision) omits any citation of authority on the relevant legal questions. It merely referred to the broad statutory language concerning bargaining and attributed to the Board the function of giving content to the language.

³⁰ 358 U.S. 283 (1959).

³¹ *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), *order set aside and enforcement denied*, 161 F.2d 949 (6th Cir. 1947).

³² *Id.* at 518.

³³ The Board in that case also cited as precedent *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), discussed at note 62 *infra*.

³⁴ See cases cited note 24 *supra*.

Commentary about conflict with precedent is not likely to change the course of the Board's inclusive view of "other terms and conditions of employment," since the only authority the current Board respects is the Supreme Court; and that body has not yet issued a decision dealing directly with the extent of the duty of employers to bargain collectively about changes in operations under the Labor-Management Relations Act. Yet it does appear that the Board has overgeneralized from the *Telegraphers* case and existing rules concerning unilateral action and Board remedies. It seems doubtful, moreover, that Congress, by its use of the general language in sections 8 (a) (5) and 8 (d), ever intended to eliminate completely the exercise of managerial discretion on all decisions affecting employment.⁸⁵ It therefore seems likely that the Board's far-reaching general theory that "effect on employment" is synonymous with "conditions of employment," if not ultimately rejected by the remaining courts which may be called upon to review it, will be considerably refined or at least limited in determining the results which follow from such an interpretation. Such refinement or limitation could be based upon further analysis of (1) a distinction between a managerial decision to make a change in operations and the effectuation of a change in terms and conditions of employment; (2) the actual effect of unilateral changes in conditions of employment on bargaining relationships in various circumstances; (3) a distinction between the *Town & Country* situations and cases where a collective

⁸⁵ Section 8 (d), as finally enacted in the 1947 amendments, was basically the Senate version of the bargaining obligation. 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 242-44 (1948). The House bill contained a lengthy definition of the term "bargain collectively" which, among other things, would have restricted the subject matter of bargaining to five specific categories. *Id.* at 162-67. The House report by the Committee on Education and Labor stated with respect to the original bill that "the union has no right to bargain with the employer about . . . how he shall manage his business . . ." *Id.* at 313-14. The Senate report by the Committee on Labor and Public Welfare made no comment on the scope of the bargaining obligation in connection with § 8 (d), and the House conference report made no comment concerning the omission of the restriction on the scope of bargaining. *Id.* at 430, 539. None of the reports or discussions on the floor of Congress would indicate that a requirement of advance bargaining concerning changes in operations or a general prohibition on unilateral action was contemplated by the adoption of § 8 (d). In general, this provision was considered to be a provision benefiting employers, and it was opposed by congressmen and senators favoring the union position. In adopting § 8 (5) of the original National Labor Relations Act, the emphasis by Congress was simply on compelling recognition of the bargaining agent, bringing the parties together, and having them make a reasonable effort to reach agreement. See Latham, *Legislative Purpose and Administrative Policy Under the National Labor Relations Act*, 4 GEO. WASH. L. REV. 433, 463-64 (1936); Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1084-89 (1941).

bargaining agreement is in effect; and (4) the propriety of the remedy. Consideration of each of these aspects of the doctrine may provide some guide to its future direction.

IV

THE DISTINCTION BETWEEN THE DECISION AND THE EFFECTUATION OF A CHANGE IN CONDITIONS OF EMPLOYMENT

One of the novel aspects of the *Town & Country* doctrine alluded to earlier is the requirement of consultation and bargaining with the union as an integral part of the decision making process of management. Such a requirement equates, for purposes of determining the bargaining obligation, the process of arriving at an unexecuted *decision* to change with the *effectuation* of the change, treating both as "conditions of employment." This, however, overlooks a significant distinction in determining the point at which the required consultation and bargaining should take place and the extent of the bargaining required.

Actually, a managerial decision may never be effectuated. Unforeseen circumstances may make the decision unnecessary or impractical. A given decision to make a change in operations may affect employment in some circumstances but not in others. For example, a decision to subcontract may apply only to orders beyond current capacity. Thus, it is not the *making* of such a decision which affects employment but its *effectuation*. Therefore, the decision itself is not a "condition of employment."

If such a distinction were recognized by the courts, it would provide a basis for limiting the required subject matter of bargaining to the actual effect on employment—that is, how the implementation of the decision may affect employees, rather than whether a managerial decision shall be made about operations which happens to be accompanied by some incidental effect on employment. It is important to bear in mind that such managerial decisions are not made for the purpose of bringing about a change in conditions of employment, and that effectuation of a given decision about operations may affect employment in a variety of alternative ways. In order to provide an adequate opportunity for bargaining about this effect on employment, however, some notice to the union in advance of effectuating the decision probably should be required where the circumstances make such notice practical.

This requirement of bargaining concerning only the effects of the decision upon employees is essentially the approach followed by the Eighth Circuit in the recent *Adams Dairy* case, in which reliance was placed on the *Rapid Bindery* case.³⁶ In the latter case, the Second Circuit stated that a decision to move a plant for economic reasons was clearly within the realm of management discretion, but that such action also required notice to the union before effectuating the decision so that the treatment of affected employees could be considered by the negotiators. Both the *Adams Dairy* and *Rapid Bindery* decisions recognize the propriety of formulating management decisions unilaterally on certain matters indirectly affecting conditions of employment; the Board does not.

The distinction suggested above, of course, would be disputed by union representatives, many of whom have found the *Town & Country* doctrine a useful tool indeed. They undoubtedly would take the position that bargaining about effect on employment cannot be carried on in good faith if one alternative, namely the reversal of the managerial decision, is foreclosed from bargaining. They would argue that management should not be permitted to hand the union a *fait accompli* in the form of a decision which has been already made.³⁷

It should be noted, however, that the statutory bargaining obligation merely requires the employer to "confer in good faith with respect to . . . conditions of employment."³⁸ If the employer in bar-

³⁶ NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961). Failure to give any notice of plant removal was held to be a violation of § 8(a)(5) in *Lori-Ann, Inc.*, 137 N.L.R.B. 1099 (1962); the Board there relied on *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999, 1000 (1953), in which it had been held that good faith discharge of the bargaining obligation required the employer at least to "advise the Union of the contemplated move [of operations to another plant] and to give the Union the opportunity to bargain with respect to the contemplated move as it affected the employees . . ." To the same effect was *Brown-Dunkin Co.*, 125 N.L.R.B. 1379 (1959), *enforced*, 287 F.2d 17 (10th Cir. 1961), in which notice of a decision to subcontract the work of the bargaining unit was not given to the union until the effective date of the contract. There was a finding that the decision was discriminatorily motivated, for the employer refused to bargain about the incidents of termination. However, no refusal to bargain was found in *NLRB v. Servette, Inc.*, 313 F.2d 67 (9th Cir. 1962), where several months advance notice was given to the union of a decision to switch driver-salesmen to a franchise system.

³⁷ If notice were given to the union before preparations for the change had reached the "point of no return," however, even this argument would be unavailable, since bargaining could then clearly concern not only what the effect would be but also whether there would be any effect. Bargaining at this stage should satisfy even the Board.

³⁸ 61 Stat. 142 (1947), 29 U.S.C. § 158 (d) (1953).

gaining before effectuating the decision demonstrates a willingness to explain the economic basis for its decision and to consider proposals for ameliorating the effects, that should be sufficient to indicate a mind which is not arbitrarily closed but which is merely exercising good faith business judgment not inconsistent with the statutory bargaining obligation.³⁹ Certainly the requirement of conferring about conditions of employment would be met where both advance notice is given and discussions take place concerning the question of whether the employer will continue to provide employees with work, either on other jobs or at a new location, and whether severance allowances or other benefits will be provided. A finding of good faith should not be precluded merely because the managerial decision concerning operations already has been arrived at unilaterally. As a practical matter, the major managerial decisions on subcontracting or plant relocation, about which unions are primarily concerned, involve so many serious direct and indirect consequences that they are normally arrived at only when the economic circumstances are so compelling that there is no real, satisfactory alternative. Where the decision in question is not directly concerned with conditions of employment but is made on the basis of demonstrated economic necessity, good faith would seem to be indicated, unless there are some special circumstances under which the unilateral decision in itself could be said to be evidence of bad faith. To determine whether this is the case, analysis of the general theories surrounding unilateral action is necessary.

V

RESTRICTIONS ON UNILATERAL ACTION

The Board's readiness to broaden the concept of what constitutes "conditions of employment," concerning which a duty to bargain exists, is particularly significant in the light of its premise that *no* change in such conditions can be made unilaterally. The Board has in effect adopted the theory that regardless of the circumstances, motivation, or effect, unilateral action with respect to conditions of employment constitutes per se a refusal to bargain in violation of section 8 (a) (5).

³⁹ A similar point has been made by former NLRB Chairman Guy Farmer based primarily on a concept of good faith and practical considerations rather than a distinction between managerial decision making and effectuation. See Farmer, *Good Faith Bargaining Over Subcontracting*, 51 GEO. L.J. 558 (1963), discussed at note 53 *infra*.

This doctrine goes considerably beyond the court decisions on which it is based. It is, of course, true that there are Board and court decisions holding that in a variety of situations unilateral action by an employer concerning conditions of employment does constitute a refusal to bargain in violation of section 8 (a) (5). Analysis of the decisions involving refusal to bargain based on unilateral action, however, leads to the conclusion that the type of action and the circumstances under which it is taken may make a difference.⁴⁰

The general theory underlying those cases was explained by the Supreme Court in the *May Dep't Stores* case.⁴¹ The Court there stated that unilateral action to bring about changes in wage scales was tantamount to bargaining with individuals or minorities and "minimizes the influence of organized bargaining. It [also] interferes with the right of self-organization by emphasizing to employees that there is no necessity for a collective bargaining agent."⁴² It is noteworthy that in this case the action was taken shortly after the certification of the bargaining agent and as part of a continuing refusal of the employer to deal with the union at all because the employer challenged the propriety of the unit.

In the recent *Katz* case,⁴³ in which the Supreme Court found a refusal to bargain on certain unilateral changes in wages and sick leave, notwithstanding the absence of independent bad faith in negotiations, the Court intimated that unilateral action might not be violative of section 8 (a) (5) under all circumstances, stating:

But the Board is authorized to order the cessation of behavior which is *in effect* a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement. *Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation*, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold

⁴⁰ For an exhaustive analysis of the decisions on unilateral action prior to 1955, see Bowman, *An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 VAND. L. REV. 487 (1956). The author suggests that unilateral action should not be unlawful per se. See also Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

⁴¹ *May Dep't Stores v. NLRB*, 326 U.S. 376 (1945).

⁴² *Id.* at 385. An early Board decision on unilateral action emphasized the blow to union prestige from unilateral action regarding wages during negotiations or shortly after a demand for recognition. *Riverside Mfg. Co.*, 20 N.L.R.B. 394, 407 (1940), *modified*, 119 F.2d 302 (5th Cir. 1941).

⁴³ *NLRB v. Katz*, 369 U.S. 736 (1962).

such unilateral action to be an unfair labor practice in violation of § 8 (a) (5), without also finding the employer guilty of over-all subjective bad faith. While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here. (Emphasis added.)⁴⁴

In that case, the subject matter of the unilateral action was also a primary subject of pending negotiations, namely wages and sick leave. The Court's holding was expressly related to "unilateral change in conditions of employment *under negotiation*."⁴⁵ It is difficult to argue with the Court's conclusion that unilateral action on employee wages during wage negotiations frustrates bargaining in most cases.

Even where the action does involve the subject of current negotiations, there is one well-established situation in which unilateral employer action is permitted. That is the situation where an impasse in negotiations has been reached. The basis for the impasse doctrine, as explained by the Supreme Court, is that a unilateral grant of an increase in pay after the same proposal has been left unaccepted or rejected in negotiations might well carry no disparagement of the collective bargaining proceedings.⁴⁶ Thus, we again have recognition by the Supreme Court that it is not the unilateral action itself which is an evil, but it is the effect of such action on the bargaining process.

A test of the duty to bargain about changes, based on the likelihood of disparaging or undermining the union, was applied in the *Bradley Washfountain* case,⁴⁷ where no refusal to bargain was found in the unilateral institution of wage increases and holiday benefits which the union had rejected, even in the absence of an impasse having been reached. In finding it "impossible to construe the facts as disparaging or undermining the union,"⁴⁸ the Court gave consideration to the long, historically amicable relationship existing between the company and the union and pointed to statements of the trial examiner to the effect that the unilateral action may even have enhanced the union's prestige. While there was evidence of advance

⁴⁴ *Id.* at 747-48.

⁴⁵ *Id.* at 743. (Emphasis added.)

⁴⁶ *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949).

⁴⁷ *NLRB v. Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951). See also *W.W. Cross & Co.*, 77 N.L.R.B. 1162 (1948).

⁴⁸ *NLRB v. Bradley Washfountain Co.*, *supra* note 47, at 151.

notice to and consultation with the union which affected the outcome of that case, its significance here is the emphasis on lack of actual union disparagement.

The Supreme Court in the *American Insurance* case⁴⁹ also gave implied recognition to the principle that unilateral action does not necessarily result in disparagement of the union. There the Court ruled that it was not a refusal to bargain for an employer to insist upon a management functions clause as a condition precedent to signing any contract. The Court rejected the Board's theory that insistence on a clause which would give management initial responsibility for work scheduling and other matters was in derogation of the employees' statutory bargaining rights, even though at least some of the matters covered by such a clause were "conditions of employment" under section 8 (d) of the act. In fact, the Court seemed to reject the whole theory of per se violation of section 8 (a) (5), stating that "the duty to bargain collectively is to be enforced by application of the good faith bargaining standards of section 8 (d) to the facts of each case."⁵⁰ Similarly, in *NLRB v. Lewin-Mathes Co.*,⁵¹ the court held that it was not bad faith bargaining for an employer to insist on a clause giving management the right to make work assignments unilaterally. Since an employer may in bargaining insist on a clause giving it the exclusive control over certain conditions of employment, thereby removing such subjects from bargaining, without it being considered unlawfully disparaging to the union, a practice of taking unilateral action without such a contract provision should, by the same token, not in itself be disparaging in every case. It all depends on the circumstances.

The motivation and effect of an employer's action were considered to be crucial factors by the court in approving the subcontracting in the *Adams Dairy* case. Since that case lacked evidence of any unlawful specific intent, the court stated that the remaining test was "whether the very decision itself had, as its natural consequence, a discouragement of union membership and constituted an encroachment upon the vested rights of the employees."⁵² Finding no such consequence, the court found no violation of section 8 (a) (5). While the court emphasized the necessity for a discouragement of union

⁴⁹ *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

⁵⁰ *Id.* at 409.

⁵¹ 285 F.2d 329 (7th Cir. 1960).

⁵² *NLRB v. Adams Dairy, Inc.*, 322 F.2d 553, 557 (8th Cir. 1963).

membership rather than a disparagement of the bargaining process, the basic approach is the same as suggested here, namely that of relying on the *effect* of management action.

Thus, it appears that since the *May Dep't Stores* case, the courts have followed the reasoning that even when a particular change falls within the scope of "wages, hours, and other terms and conditions of employment," the finding of a refusal to bargain does not follow automatically from the unilateral change. Rather, the possible *effect* on the bargaining relationship must be examined in each case.

Assuming, for example, that a particular change in operations falls within "conditions of employment," unlawful frustration of bargaining might normally be expected to follow from unilateral institution of such change in the midst of actual contract negotiations with respect to it. Even in such a case, however, examination of the circumstances would be in order to determine whether this is a reasonably probable effect. Certain changes made in the ordinary course of managing a business could be so minor and so obviously practical that bargaining discussions could continue without an adverse effect, even though in a technical sense a change in "conditions of employment" might have been made. In other circumstances, however, the action might render further discussions useless and therefore be tantamount to a refusal to confer in good faith as expressly required by the act.⁵³

A clearer case of no disparagement would be presented where bargaining is in progress, but the change does *not* involve a matter under discussion or about which bargaining has been requested—for example, scheduling a layoff due to lack of work during general contract negotiations. The change obviously affects employment and would therefore come within the broadened scope of "conditions of employment." Yet the change, if made in good faith for economic reasons, should not have a tendency to discourage or frustrate bar-

⁵³ Farmer, *supra* note 39, at 569-71 takes the position, with respect to managerial decisions on subcontracting, that the Board should apply a "rule of reason" in circumstances where there is no agreement in effect and negotiations are in progress. Thus, an employer should be left free to conduct his business without the necessity for bargaining so long as he is motivated by business necessity and does not take action of a permanent character which has the effect of removing the subject matter from the bargaining table or foreclosing negotiation of an agreement on the matter. He also suggests that where business necessity requires permanent elimination of all or part of a bargaining unit, notice to the union of the plan may be required along with an explanation of the relevant economic considerations. Negotiation in good faith concerning terminal pay and benefits, of course, would also be required.

gaining, particularly if the parties have had a fairly long prior bargaining history and a practice of such unilateral change. The mere fact that employment is lost should not in itself damage the standing of the union in the eyes of employees because loss of employment for economic reasons is an inherent hazard. Nevertheless, a refusal to bargain would presumably be found under the current philosophy of the Board that "any unilateral change in wages, terms or conditions of employment, which the employer makes while bargaining negotiations are in progress, is itself a wrongful refusal to bargain"⁵⁴ While the authority cited by the Board for this proposition is the *Katz* case, it goes beyond the Supreme Court's statement in that case which was limited to conditions of employment *under negotiation*.

This statement of the Board, however, would still leave room for a finding of no unlawful disparagement if a change were made when there is *no* bargaining in process on this subject or any other subject. That would seem to be the clearest situation of all in which unilateral action might be permitted, particularly if the subject matter of the change has not normally been a subject for bargaining in the past. Such an approach would eliminate the necessity for the ritual of an employer initiating bargaining about a subject on which he does not need union agreement. It should be noted that such a situation is quite different from the one involved in the *Telegraphers* case on which the Board relies so heavily, in which the employer was refusing to bargain about a specific proposal initiated by the union.

Certainly, some unilateral action is not only not harmful to union status but is essential to effective managerial decision making.

Unless the courts are now willing to adopt the Board's *per se* theory of unilateral action, they will have to consider the effect of such action on the bargaining relationship under the facts in each case. In so doing, it would seem they should distinguish between a situation where the particular "condition of employment" is a pending subject of bargaining discussions and one where it is not. In this connection, the existence of a current collective bargaining agreement also deserves special attention.⁵⁵

⁵⁴ *Hawaii Meat Co.*, 139 N.L.R.B. No. 75 (1962), *enforcement denied*, 321 F.2d 397 (9th Cir. 1963).

⁵⁵ Farmer argues with respect to subcontracting that where there is a collective

VI

EFFECT OF A CURRENT COLLECTIVE BARGAINING AGREEMENT

None of the recent cases involving unilateral changes in operations have adequately considered the effect of a current collective bargaining agreement.⁵⁶ The question of this effect may be presented in any one of four possible situations: (1) where the change in operations is expressly permitted or prohibited by the agreement; (2) where the change is permitted or prohibited by some reasonable implication from some general provision of the agreement; (3) where the agreement is completely silent on the subject of such change, but there is an express or implied waiver of bargaining about it; or (4) where the agreement is silent, and there is no basis for a waiver of any kind.

If the agreement expressly permits or prohibits a particular change in operations, that clearly eliminates the necessity for further bargaining in view of the provision of section 8 (d) of the act that the duty to bargain "shall not be construed as requiring either party

bargaining agreement with a general arbitration clause and without any express provision on subcontracting, the bargaining obligation should be limited to processing a grievance through the arbitration process. Farmer, *supra* note 39, at 572.

⁵⁶ The effect of the contract as a possible waiver of bargaining was considered by the trial examiner in Shell Oil Co., BNA 1963 DAILY LAB. REP. No. 127, at A-8 (case No. 15-CA-2143), but no waiver was found. In the *Adams Dairy* case, which involved a change from driver-salesmen to third-party independent distributors during the term of an existing collective bargaining agreement, the Board decision did not consider the effect of the agreement, but the intermediate report of trial examiner Arnold Ordman (now NLRB General Counsel) did. He concluded that this action by the employer amounted to a termination of the collective bargaining agreement, since there was no area left in which it could be operative. Therefore, he found that the employer's failure to comply with the sixty day notice provisions of § 8 (d) of the act, applicable to cases of termination of contracts, constituted a further basis for a violation of § 8 (a) (5). The flaw in this theory is the assumption that termination of employees automatically terminates a collective bargaining agreement for a fixed term. The possible effect of the notice provisions of § 8 (d) is still being urged by the General Counsel in such cases, as indicated by the intermediate report of the trial examiner in Hillcrest Dairy Co., BNA 1963 DAILY LAB. REP. No. 146, at D-1 (case No. 8-CA-2928), where the General Counsel took the position that a change in the working conditions of drivers could be viewed as a change in the terms of the agreement and that the company had therefore modified the agreement unilaterally without complying with the notice requirements of § 8 (a). As the trial examiner pointed out, this argument is tantamount to contending that any violation of a collective bargaining agreement is necessarily an unfair labor practice, a theory which has not yet been sustained. The Board had considered a similar contention in Shamrock Dairy Inc., 124 N.L.R.B. 494 (1959), but only two Board members supported it. However, in Smith's Van & Transp. Co., 126 N.L.R.B. 1059 (1960), a violation of § 8 (d) was found on a similar basis.

to discuss or agree to any modification of the terms or conditions contained in a contract for a fixed period"⁵⁷

The more common situation is where there is no express provision covering the subject of a particular change in operations, but there is a general management clause giving the employer broad powers in areas not expressly restricted by other portions of the agreement.

Some authority for the view that such a contract eliminates the necessity to bargain can be found in the Court of Appeals decision in the *Timken Roller Bearing* case.⁵⁸ The Board decision in that case had held that a refusal to accede to the union's request for bargaining about the company's existing practice of subcontracting unilaterally constituted a violation of section 8 (a) (5). The Board had relied on the general proposition that the obligation to bargain does not end with the signing of a contract. The court held that in view of the existing practice, this was really a dispute as to the interpretation of the management clause which should be settled through the contractual grievance procedure. The court viewed the grievance procedure as a channel for bargaining and concluded that there had been no refusal to bargain.

This reasoning would seem to be even more valid in view of the recent *Warrior & Gulf* decision of the Supreme Court,⁵⁹ where it was held that a grievance concerning subcontracting was subject to the grievance procedure under a collective bargaining agreement, notwithstanding a contract clause which excluded from arbitration matters which were "strictly a function of management." This is not to say that subcontracting is necessarily a contract violation which the grievance procedure must always remedy, but merely that during the term of a contract any bargaining obligation which might otherwise exist should be supplanted by the applicable grievance procedure and arbitration. Since there is clearly a contractual remedy available, the union may properly be required to use it.

The Board itself at one time recognized the validity of such a theory in *McDonnell Aircraft Corp.*⁶⁰ The Board there espoused

⁵⁷ 61 Stat. 142 (1947), 29 U.S.C. § 158 (d) (1958).

⁵⁸ *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949 (6th Cir. 1947). The court reaffirmed this holding in a later case involving a different type of unilateral action. *NLRB v. Standard Oil Co.*, 196 F.2d 892, 894-95 (6th Cir. 1952).

⁵⁹ *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

⁶⁰ *McDonnell Aircraft Corp.*, 109 N.L.R.B. 930 (1954). The Board generally has

the principle maintained earlier in this article that "the vice in such unilateral action is that it undermines the authority of the bargaining representative and indicates a lack of good faith in entering into or pursuing bargaining negotiations."⁶¹ The Board then pointed out that the usual situation in which unilateral action had been found violative of the duty to bargain involved changes during active contract negotiations or while a majority union was seeking bargaining rights, but it suggested that the existence of a contract created an entirely different context. Consequently, the Board regarded a unilateral change in assignment of certain clerical work to non-bargaining unit employees not as a disparagement of the collective bargaining process, but rather as a dispute over the interpretation of the agreement.

In the *McDonnell* case, the union was handicapped by the fact that prior to the unfair labor practice charge a grievance had actually been filed on this matter and processed through the third step. The union thereby in effect conceded the applicability of the contract. A more difficult case would be presented where the union has failed to file a grievance and argues that bargaining is required because there is no provision in the contract covering the change in operations in question.

If the contract contains almost any type of management clause, however, the question for the Board would inevitably be a question of contract interpretation like that presented in the *Timken* case, namely whether the management clause permits the particular change in operations. This is a question which, according to the Supreme Court in the *Warrior & Gulf* case, arbitrators are ideally suited to decide. Therefore, if management's refusal to bargain is based on a good faith claim that the matter is properly the subject of a grievance and a willingness to follow that procedure is demonstrated by management, that claim should be respected by the Board,

followed the rule announced in *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 706 (1943), order amended and enforced, 141 F.2d 785 (9th Cir. 1944), that "it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act." See also *Ass'n of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 443 (1955); *United Tel. Co.*, 112 N.L.R.B. 779 (1955); *Crown Zellerbach Corp.*, 95 N.L.R.B. 753 (1951). The only exception to this rule is in the case of a charge of discrimination under § 8 (a) (3).

⁶¹ *McDonnell Aircraft Corp.*, *supra* note 60, at 934.

as it was in a slightly different refusal to bargain context in *Hercules Motor Corp.*⁶²

If the matter were taken to arbitration and the arbitrator decided that the contract permitted the change in operations, then it would be clear not only that the change was not a contract violation, but also that bargaining outside the grievance procedure would not have been required under existing Board rules because this was one of the terms of an existing collective bargaining agreement which under section 8 (d) is not subject to bargaining for the duration of the agreement. If, on the other hand, the arbitrator found that the contract prohibited the change, this would still indicate that the matter was covered by the contract and, therefore, no bargaining was necessary. The arbitrator's award in such a case might properly require reinstatement with back pay to any employees who lost work, in order that the injured employees could be made whole for the contract violation. The grievance route would thus effectively resolve such a matter and place the question of contract interpretation where it normally belongs by the terms of the contract itself, namely with an arbitrator rather than with the Board.

⁶² *Hercules Motor Corp.*, 136 N.L.R.B. 1648 (1962), in which the employer denied the union's request for data concerning incentives and access of an observer to the plant on the ground that the grievance procedure limited its obligation. The Fifth Circuit in *Sinclair Ref. Co. v. NLRB*, 306 F.2d 569 (5th Cir. 1962), also recognized the effect of the *Warrior & Gulf* decision in this regard by holding that an employer was not guilty of a refusal to bargain in withholding certain information from the union which, under its interpretation of the management clause of the contract, he was not required to furnish; the court held that the question of interpretation of the management clause must be resolved in arbitration. Thus the court was in effect saying that where the question of an unfair labor practice hinges on a matter of contract interpretation, the contract interpretation must first be resolved in the grievance procedure. In reliance on the *Warrior & Gulf* case, the court stated: "Ironically enforcement here of the Board's order to produce data for use in the prosecution of the pending grievance will be to make the grievance proceeding largely superfluous. For enforcement will be a judicial declaration that the Union's, not the Employer's, interpretation of the contract is the correct one. But just as a Court, under the guise of determining arbitrability, may not determine the merits, neither may the Board adjudicate the grievance dispute under the guise of determining relevance and pertinency of the data sought. Because the order under review clashes with the policy of effectual achievement of contractual arbitration, it may not be enforced." *Id.* at 570-71. In this connection, see Cox, *The Duty to Bargain Collectively During the Term of An Existing Agreement*, 63 HARV. L. REV. 1097, 1107 (1950): "Consequently it may fairly be anticipated that when the issue is squarely presented, the NLRB and courts will hold that the duty to bargain collectively, while a contract is in force, is satisfied by offering to handle under the contract procedures any issues to which they apply." Regarding a question of arbitrability, Cox's position was consistent with the *Sinclair* case: "The NLRB should not attempt to resolve a controversy over the arbitrability of a dispute unless the party asserting the applicability of the contract procedure is acting in bad faith." Cox, *supra* at 1108.

If it is conceded by both parties that the change would not be a proper subject for a grievance because it is completely outside the contract, the mere existence of the contract in itself would not under present Board and court doctrines preclude bargaining. The *Jacobs Mfg. Co.* case has established the rule that matters not covered by the contract and not discussed during negotiations are mandatorily bargainable during the contract term.⁶³ The court in that case held that the provisions of section 8 (d) eliminating the obligation to bargain about modifications of the terms and conditions contained in a contract did not apply in such a situation, although it expressly reserved judgment on the situation where the matter had been discussed in contract negotiations. The Board, however, would also find a bargaining obligation in the latter situation unless it could be shown that the subject was fully discussed or consciously explored in prior negotiations and the union had consciously yielded or clearly and unmistakably waived its interest in the matter.⁶⁴ This obviously is a hard test to meet. Just how hard is indicated by the intermediate report of the trial examiner in the recent *Shell Oil* case involving the subcontracting of miscellaneous maintenance work.⁶⁵ A union proposal to restrict subcontracting had been the chief matter in negotiations leading up to the contract in effect at the time of the work in dispute, but that contract merely continued a previously existing clause to the effect that in the event the company let construction work to an outside contractor, the outsider would have to pay his employees not less than the rates for the same work under the collective bargaining agreement in effect for Shell employees. Nevertheless, the trial examiner held that the inclusion of this provision and the previous discussions concerning the union's proposed restrictions did not amount to a clear and unmistakable waiver of bargaining about subcontracting.

If this reasoning is upheld by the Board and the courts, it would appear that little short of a sweeping express waiver of bargaining of the type included in the contract between General Motors and the UAW is likely to suffice.⁶⁶ That clause refers to a waiver of bar-

⁶³ *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952).

⁶⁴ *Proctor Mfg. Corp.*, 131 N.L.R.B. 1166 (1961); *Press Co.*, 121 N.L.R.B. 976 (1958).

⁶⁵ *Shell Oil Co.*, BNA 1963 DAILY LAB. REP. No. 127, at A-8 (case No. 15-CA-2143).

⁶⁶ Agreement between General Motors Corp. and UAW-AFL-CIO, Sept. 20, 1961, BNA COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS 20: 303, 346-47. The clause provides: "The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and

gaining on all subjects covered and not covered by the contract, even though unknown at the time of negotiations, and it should be sufficient to relieve the employer of an obligation to bargain on changes in operations during the contract term. Certainly such a clause would meet the requirement that a waiver of bargaining must be clear and unequivocal.

While some situations are perhaps more clear than others, there appears to be a reasonable basis for concluding that unilateral action on changes in operations should not be an unlawful refusal to bargain where there is a collective bargaining agreement in effect, except possibly in the rare case where the contract contains no management or waiver of bargaining clause.

VII

THE REMEDY

Probably the most disturbing aspect of the Board's new theory to employers has been the *status quo ante* remedy invoked in the *Star Baby* and *Fibreboard* decisions. The Board has taken the position that this was necessary to adapt the remedy to the situation which called for redress. The Board contends that without reinstatement or its equivalent an order to bargain in most cases would be an exercise in futility.

Section 10 (c) of the act does give the Board broad powers not only to issue orders to cease and desist from unfair labor practices, but also "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."⁶⁷ The Supreme Court has recognized that this language does give the Board wide latitude in shaping remedies.⁶⁸ The Court, however, has also held that this broad language does not vest the

proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Therefore, the Corporation and the Union, for the life of this agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement."

⁶⁷ 61 Stat. 147 (1947), 29 U.S.C. § 160 (c) (1958).

⁶⁸ NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943).

Board with unlimited discretion to devise punitive measures or prescribe penalties of the act. It has stated that "the power to command affirmative action is remedial, not punitive."⁶⁹

The implication is that reinstatement should be awarded only to make employees whole. In order to make employees whole, a remedial order should place them in the position they would have been in if the unfair labor practice had not taken place. In refusal to bargain situations of the type under discussion here, the wrong consists solely in the failure to bargain. The terminations of employment, in themselves, were not unlawful, because they could have taken place exactly as they did even if no unfair labor practice had been committed. Since the recent Board orders have awarded employment or back pay to employees which they might not have had, even if the bargaining had taken place, the remedial principle seems to have been violated. These orders seem to overlook the fact that possible loss of employment is inherent in the situation regardless of the extent of bargaining.⁷⁰

Where rights of innocent third parties are involved in changes in operations, the Board has thus far recognized the inequity of attempting to "unscramble the egg" and has stopped short of the *status quo ante* remedy.⁷¹

While the Court of Appeals in the *Fibreboard* case deemed the Board's remedy as appropriate on the basis of the general policy of giving the Board wide latitude in shaping remedies, it would not be surprising if other courts inhibited the use of this unusual remedy on the grounds of its punitive effect, in recognition of a well established limit on the Board's latitude.

VIII

CONCLUSION

The imposition of a legal obligation on employers to bargain with unions concerning wages, hours, and other terms and conditions

⁶⁹ Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940); accord, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235 (1938).

⁷⁰ An interesting statutory point in connection with the remedy was argued in petitioner's brief in the *Fibreboard* case before the Court of Appeals for the District of Columbia but not discussed in the court's opinion. It was argued that § 10 (c) of the act prohibits the Board from ordering reinstatement of any individual "discharged for cause" and that the discharges in this case were for cause. Brief for Petitioner, pp. 45-47, *Fibreboard Paper Prods. Corp. v. NLRB*, 322 F.2d 411 (D.C. Cir. 1963).

⁷¹ United Dairy Co., BNA 1963 DAILY LAB. REP. No. 107, at D-1 (case No. 6-CA-2551); Renton News Record, 136 N.L.R.B. 1294 (1962).

of employment has inevitably resulted in some restriction upon management discretion to make changes in operations. The Board and court decisions in refusal to bargain cases under section 8 (a) (5) are only a partial record of the extent of this restriction, but they do indicate a constantly widening scope of mandatory bargaining and a narrowing scope for free exercise of managerial discretion.

In view of this trend, the shift of subcontracting and plant removal issues into the mandatory bargaining category is not in itself startling. There are, however, three noteworthy aspects of the line of cases under consideration here.

The first is the all-encompassing nature of the Board's test of the type of managerial decisions constituting "conditions of employment" which must be bargained about in advance. Very few managerial decisions lack some effect on employment which a zealous Board could find as the basis for bringing them within this view of the statutory term.

A second is the Board's assumption that any unilateral action with respect to such conditions of employment constitutes a refusal to bargain, regardless of the likely effect on the bargaining relationship. The Board seems determined to ignore circumstances which might justify failure to bargain in advance or render such failure harmless.

The final aspect is the Board's *status quo ante* remedial concept, with its prohibitive potential liability for misinterpreting the bargaining obligation without wrongful motivation. In cases of the slightest doubt, bargaining is effectively compelled.

There can be little question that the practical effect of these Board decisions will be to hamper the ability of management to carry out its primary function of maximizing long run profits. The well-publicized profit squeeze in recent years has increased pressure on management to improve operations. To do this, it needs flexibility to innovate, to improvise, and to adjust to changing conditions. This is precisely what the Board's new doctrine has taken away, to an extent not yet fully determined.

The widespread effect on employees of attempts by management to improve operations, of course, has also generated pressure on unions to resist such changes. Maximization of profits is of little concern to the man whose tenure of employment is in jeopardy.

Collective bargaining is one way of reconciling these conflicting pressures on management and unions. In fact, many unions through collective bargaining have already won contractual restrictions on management's discretion in the area of subcontracting and other changes in operations. These restrictions, however, have been won on the basis of the bargaining ability of the particular union without the aid of novel Board doctrines.

What the Board has now done is to compel employers who have no such contractual restrictions and who do not legally need union consent to take action to nevertheless initiate bargaining with respect to almost any contemplated change. There is something artificial about a concept of bargaining with a party whose agreement is not needed. As a practical matter, such initiation of bargaining amounts to an invitation to restriction.

The injection by the Board of this step into management decision making has perhaps been influenced, consciously or unconsciously, by the Board's awareness of severe economic hardship to employees resulting from plant relocations and technological changes in the past few years. The Board seems to be under the impression that if the parties will just sit down and bargain about these problems, a satisfactory solution will be found. In the *Town & Country* case it announced the optimistic view that as a result of such bargaining "business operations may profitably continue and jobs may be preserved."⁷² Commendable as this social motivation may be, it must be recognized that in attempting to ameliorate this problem by forced bargaining, the Board is introducing new rigidity into a delicate economic mechanism.

Whether this will actually have an adverse effect on the functioning of the economy remains to be seen, but this will depend to some

⁷² *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1027 (1962), *enforced*, 316 F.2d 146 (5th Cir. 1963). The Board at this point in the decision relied upon Cox, *supra* note 40, at 1412. Actually, the portion of the Cox article referred to was merely discussing the general benefit of debate. Later in the article, he questions whether unilateral action should be unlawful per se, pointing out that the answer depends on whether the act "seeks to compel joint participation by law or leaves the joint participation to evolve without additional legal sanctions after it has created opposing concentrations of economic power." *Id.* at 1424. In an earlier article, the same author stated: "The type of product which a company chooses to make, its price policies, the location of its plants, its choice of production processes and the assignment of workers are matters of practical importance to its employees. Nevertheless, it is generally agreed that management should have exclusive responsibility for such matters without the intervention of the union." Cox, *Regulation of Collective Bargaining*, 63 HARV. L. REV. 389, 401 (1950).

extent on the willingness of the Board and the courts to push the implications of the new doctrine to their logical conclusion.

It is submitted that they should not do so. Instead of requiring joint participation in management, the Board and the courts can adequately safeguard the welfare of employees by requiring bargaining only about the *effect* of changes in operations on employees, in accordance with numerous Board and court holdings. Unions which consider such bargaining ineffective are free to bargain for additional protection as part of regular contract negotiations.