

THE DUTY TO BARGAIN BEFORE IMPLEMENTING BUSINESS DECISIONS

The duty to bargain with the union before a business decision is implemented is a source of tension in industry today. Unions' increasing concern for job security squarely conflicts with management's efforts to meet competition by implementing decisions which affect the employee-employer relationship. A business decision that obtains enterprise cost-savings at the expense of an employment pattern established in a collective bargaining agreement is no longer accepted by unions as a proper exercise of managerial prerogative.

This Comment will examine the dimensions of the problems created by midcontractual operating changes which labor and management failed to anticipate during general negotiations. The Supreme Court recently held in *Fibreboard Paper Prod. Corp. v. NLRB*¹ that a midcontractual proposal of management to contract out² work previously performed by their employees had to be submitted to collective bargaining *before* the business decision could be implemented. *Fibreboard* conceded to the union a greater interest in preserving jobs than had previous interpretations of the law³ on that subject, and it cast a shadow of doubt on the continued viability of management's traditional right to exercise independent judgment for the economical and efficient conduct of business operations. It is an open question whether the *Fibreboard* reasoning will be applied to other managerial decision areas, but it could be extended to cover items as diverse as plant removal, automation, sale, merger, and plant closings.

An analysis of the *Fibreboard* decision and the cases preceding and following it suggests several approaches to the problem of midcontractual bargaining on business decisions. Management may ignore the implications of *Fibreboard*, pay lip service to the duty to bargain, and await a retreat by the courts in a swing of the labor-management pendulum. At the opposite extreme, employers may choose to assume greater responsi-

¹ 379 U.S. 203 (1964).

² Subcontracting may be defined as an arrangement made by one company for work to be performed by employees of another company, on or off the first company's premises. Common examples are manufacture of parts, installation of equipment, and performance of services. Few plants are so thoroughly integrated that they are self-sufficient.

³ The National Labor Relations Act of 1935 (Wagner Act), § 8(a) provides: "It shall be an unfair labor practice for an employer— . . . (5) to refuse to bargain collectively with the representatives of his employees . . . (d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment" 49 Stat. 452 (1935), 29 U.S.C. §§ 158(a)(5), 158(d) (1964).

bility for employee job security and thus forestall all conflict with unions. It is the purpose of this Comment to demonstrate the desirability of a third alternative: Parties should make a greater effort in general negotiations to discuss and agree on settlements for contingent changes in the employment relationship occasioned by increased operating efficiency. The problem can be alleviated if the parties reach a prior settlement or agree upon a framework for resolving the issue of implementing a business decision when and if the occasion should arise.⁴ A conscious effort to negotiate on midcontractual contingencies should forestall judicial or administrative determination of the role of collective bargaining in business operations,⁵ and should help achieve industrial stability through peaceful labor relations.

I

BACKGROUND

Investors, as the owners of capital, have traditionally held the power to direct and manage the enterprise;⁶ labor's prerogative to secure for itself better conditions of employment is a product of our national labor laws, and is a relatively recent development in the American economic system.⁷ Before the era of intense federal government concern in labor-management relations, the employer was, in large part, a sovereign in his own establishment. His ability to dictate the terms of employment was a consequence of his superior bargaining position.

⁴ This Comment will not discuss the role of arbitration in labor-management disputes. It should be noted, however, that an arbitration clause is an integral part of a collective bargaining agreement, provided that the parties promise to arbitrate all disputes concerning the application and interpretation of the agreement except certain enumerated matters. Questions of arbitrability—the scope of the specific exclusionary clause—are usually reserved to the courts and not the arbitrator unless the parties specifically provide otherwise. Consequently, while an arbitration clause may forestall a question of negotiability, the parties may eventually have to litigate the issue of arbitrability. See generally, Marshall, *Advanced Arbitration Seminar*, 15 *LAB. L.J.* 577 (1964); Smith & Jones, *The Supreme Court and Labor Dispute Arbitration*, 63 *MICH. L. REV.* 751 (1965).

⁵ The undesirability of confronting the issue of bargaining over the business decision is discussed in another part of this Comment. See text accompanying notes 53-67 *infra*.

⁶ See, e.g., CAL. CORP. CODE § 800: "All corporate powers shall be exercised by or under authority of, and the business and affairs of every corporation shall be controlled by, a board of . . . directors." CAL. CORP. CODE § 805 specifies that directors shall be elected by the shareholders.

⁷ The National Labor Relations Act of 1935 (Wagner Act) established the national policy of encouraging labor union organization. Section 1 of the act states: "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce . . . by restoring equality of bargaining power between employers and employees." 49 Stat. 449 (1935), 29 U.S.C. § 151 (1964).

Congress challenged the autonomy of management in 1935 when it enacted the National Labor Relations Act (Wagner Act) to promote collective bargaining as the means most conducive to industrial peace.⁸ The act creates a legal obligation upon an employer to bargain with the representative of his employees "with respect to wages, hours, and other terms and conditions of employment."⁹ "Conditions of employment" is a more inclusive phrase than "working conditions,"¹⁰ the bargaining language of the Railway Labor Act of 1926.¹¹ The Supreme Court, as early as 1940, held that collective bargaining under the Wagner Act's "conditions of employment" extends to matters involving discharge actions.¹² And in the course of the last thirty years, the phrase has also been interpreted to include pensions,¹³ holiday and vacation pay,¹⁴ bonuses,¹⁵ profit-sharing,¹⁶ work loads and work standards,¹⁷ insurance benefits and health and welfare programs,¹⁸ shop rules,¹⁹ rest periods,²⁰ and merit increases,²¹ to name but a few.

Today, union and management meet periodically to negotiate collective agreements, which, besides establishing the terms and conditions of employment, are intended to prevent interruptions of business operations by labor strife during the life of the contracts. Traditionally, the emphasis in general negotiations was upon settling questions arising out of employment—such as hours, wages, and working conditions. More recently, however, considerable attention has been paid to measures designed to relieve the hardship of unemployment—for example, severance pay and supplemental-unemployment-benefits. A third subject—forestalling unemployment—is still often ignored and avoided by both sides as too controversial or too speculative. While collective bargaining agreements are not intended to freeze business operations totally during the contract

⁸ *Ibid.*

⁹ 49 Stat. 452 (1935), 29 U.S.C. § 158(d) (1964). See note 3 *supra*.

¹⁰ *Inland Steel Co. v. NLRB*, 170 F.2d 247, 255 (7th Cir. 1948), *aff'd*, 339 U.S. 382, *rehearing denied*, 339 U.S. 990 (1950).

¹¹ 44 Stat. 582 (1926), amended by 48 Stat. 1197 (1934), 45 U.S.C. § 156 (1964).

¹² *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940).

¹³ *Retail Clerks Union v. NLRB*, 330 F.2d 210 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 828 (1964); *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950), *rehearing denied*, 339 U.S. 990 (1950).

¹⁴ *NLRB v. Century Cement Mfg. Co.*, 208 F.2d 84 (2d Cir. 1953).

¹⁵ *General Tel. Co. of Fla. v. NLRB*, 337 F.2d 452 (5th Cir. 1964).

¹⁶ *Union Mfg. Co.*, 76 N.L.R.B. 322 (1948).

¹⁷ *Woodside Cotton Mills Co.*, 21 N.L.R.B. 42, 54-55 (1940).

¹⁸ *McLean v. NLRB*, 333 F.2d 84 (6th Cir. 1964).

¹⁹ *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947).

²⁰ *National Grinding Wheel Co.*, 75 N.L.R.B. 905 (1948).

²¹ *Aluminum Ore Co. v. NLRB*, 131 F.2d 485 (7th Cir. 1942), *enforcing* 39 N.L.R.B. 1286 (1942).

period, agreements do create some limitation on unilateral employer action: Not every cost reduction method is open to a company operating under a collective bargaining agreement. The absence of a provision specifying to what extent the employment relationship is expected to be maintained is the cause of the conflict over midcontractual business decisions.

Unless the parties in their agreement anticipate certain changes in business operations, the efficacy of their compromise may be lost if the union should strike, claiming that a midcontractual decision of management substantially changes the employment relationship and, hence, violates the existing collective agreement. The dispute that inevitably arises is whether and to what extent the collective agreement is relevant to the operating change. If the subject of the business decision is a mandatory subject for collective bargaining under the broad terms of the Wagner Act,²² and is not covered by the existing agreement, the employer must bargain with the union before the decision may be given practical effect.²³ In contrast, if the subject is not a mandatory one, the employer need only bargain with the union over consequences resulting from the decision if such consequences are within the mandatory requirement of collective bargaining.²⁴ This difference is crucial since bargaining over the consequences, unlike bargaining over the decision, does not impede management's decision-making process.

A decision to subcontract, made for economic reasons, can substantially change the employment needs of the enterprise; but, until recently, it was not considered a change in the "conditions of employment" unless it was motivated by anti-union animus.²⁵ Absent a restriction in the collective bargaining agreement, it was within management's sole discretion to implement subcontracting decisions in order to achieve competitive economies.²⁶

The motive test—whether a subcontracting decision is a product of good faith economic reasons or of the employer's hostility to organized labor—was recently rejected by the National Labor Relations Board²⁷

²² See note 3 *supra*.

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

²⁴ *E.g.*, *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961), *modifying* 127 N.L.R.B. 212 (1960).

²⁵ *E.g.*, *New England Web, Inc.*, 135 N.L.R.B. 1019 (1962), *enforcement denied*, 309 F.2d 696 (1st Cir. 1962); *Rapid Bindery, Inc.*, 127 N.L.R.B. 212 (1960), *modified*, 293 F.2d 170 (2d Cir. 1961); *Jays Foods, Inc.*, 129 N.L.R.B. 690 (1960), *enforcement denied*, 292 F.2d 317 (7th Cir. 1961); *Brown-Dunkin Co.*, 125 N.L.R.B. 1379 (1959), *enforced*, 287 F.2d 17 (10th Cir. 1961).

²⁶ *Ibid.*

²⁷ Hereinafter referred to in the text and footnotes as "the Board."

after the presence or absence of hostility had been challenged by labor unions as an unrealistic distinction.²⁸ The Supreme Court approved the Board's decision in *Fibreboard Paper Prod. Corp. v. NLRB*²⁹ and declared that a midcontractual proposal to subcontract, though economically motivated and not induced by anti-union sentiment, had to be submitted to collective bargaining before the business decision could be implemented.

II

THE *Fibreboard* DOCTRINE

Fibreboard held that the decision to replace employees with those of an independent contractor to do identical work under similar working conditions is a statutory subject of collective bargaining under the National Labor Relations Act.³⁰ Unions can interpret *Fibreboard* to require that any operational change having the immediate effect of reducing employment must be bargained for. Management, on the other hand, will contend that only those decisions that are motivated by factors which a union could remedy—for example, wage rates—are proper subjects for union-management consultation.

Fibreboard involved a decision over the simplest form of labor economy. The employer replaced his maintenance workers with those of an independent contractor for the purpose of reducing the work force, decreasing fringe benefits, and eliminating overtime payments. While the Supreme Court did not interpret the law to preclude the employer from achieving such labor efficiencies, it recognized that national policy seeks to protect the employees, and therefore required the employer to notify and consult with the union before instituting the change.³¹ The uncompounded nature of the facts in *Fibreboard* convinced the Court of "the propriety of submitting the dispute to collective negotiations."³² The company's decision to subcontract did not alter its basic operations: The work still had to be performed in the plant. Nor did the decision contemplate capital investment: The same work was to be performed under similar conditions of employment by employees of an independent contractor in place of the company's employees. Hence, the Court concluded, "to require the employer to bargain . . . [on the decision] would not significantly abridge his freedom to manage the business."³³

²⁸ *Fibreboard Paper Prod. Corp.*, 138 N.L.R.B. 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

²⁹ 379 U.S. 203 (1964).

³⁰ 379 U.S. 203, 215 (1964). The relevant provisions of the National Labor Relations Act, as amended, are set out in note 3 *supra*.

³¹ 379 U.S. at 214.

³² *Id.* at 213.

³³ *Ibid.*

The *Fibreboard* opinion settled the conflict among previous decisions by the National Labor Relations Board and the circuit courts of appeals as to what extent the traditional "hostility" test³⁴ determined the obligation to bargain.³⁵ The Supreme Court now takes the position that meeting with the union to bargain on the consequences of the business decision, after a subcontracting agreement has been executed, fails to provide a meaningful opportunity for the employees to protect their job rights. The new rationale affords the union the opportunity to offer alternative solutions and compromises which may make it unnecessary to discharge a segment of the work force. The Court apparently feels that intelligent union bargaining on the business decision should increase the likelihood that the needs that prompted the employer to consider an operational change can be met without a reduction in employment.

Strict enforcement of the obligation to bargain in good faith is necessary under a plan of joint participation in the decision-making process and under the entire statutory scheme of collective bargaining. The union must be notified before management implements its decision so that every reasonable effort can be made to reach joint agreement on the change in the working relationship. The collective bargaining process calls for matching proposals with counterproposals, and while it does not compel agreement nor require concession, neither side is entitled to refuse to listen nor may it come with a mind deliberately closed to persuasion.³⁶ The employer can implement his business decision unilaterally only if bargaining has come to an impasse.³⁷

Failure to bargain over a mandatory subject can be costly, as the scope of the remedial order in *Fibreboard* indicates. Unlike past cases, which had required a finding of anti-union animus, *Fibreboard* affirmed the refusal-to-bargain decision of the Board despite the good faith eco-

³⁴ See note 25 *supra*, and accompanying text.

³⁵ *E.g.*, *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1027 (1962) ("The elimination of jobs, albeit for economic reasons . . . is a mandatory subject of collective bargaining . . ."), *enforcement granted*, 316 F.2d 846 (5th Cir. 1963), because the refusal to bargain on the decision was partially based on the employer's determination to rid himself of the union; *Adams Dairy, Inc.*, 137 N.L.R.B. 815 (1962), *enforcement denied in part*, 322 F.2d 553 (8th Cir. 1963), on the grounds that change in operations motivated by financial or economic reasons is not an unfair labor practice, *cert. granted*, 379 U.S. 644 (1965), *judgment vacated, case remanded for reconsideration in light of Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964). (On remand, circuit court reentered its previous order denying enforcement based on a narrow interpretation of *Fibreboard*. 350 F.2d 108 (8th Cir. 1965).)

Cf. NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961), *modifying* 127 N.L.R.B. 212 (1960) (the anti-union animus must be the preponderant motive of an unfair labor practice; a change dictated by economic reasons is not a violation of the act even though accelerated by union activity).

³⁶ *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402 (1952).

³⁷ *Ibid.*

nomic motivation of the employer. The Board ordered resumption of maintenance operations and reinstatement of employees with back pay, and the Supreme Court affirmed; these were harsh sanctions that had previously been reserved for employers demonstrating hostility toward their employees' organizational efforts.

III

THE POTENTIAL REACH OF THE *Fibreboard* RATIONALE

Three pre-*Fibreboard* decisions by the Board can be used to illustrate the potential reach of the *Fibreboard* rationale. In each the Board relied upon reasoning that was subsequently affirmed in *Fibreboard*.

*Winn-Dixie Stores, Inc.*³⁸ involved a decision by management to buy a finished product rather than purchase the raw material and process it. The Board held that the employer violated the Wagner Act by discontinuing processing and packing operations without notifying or bargaining with the union. It reasoned that the union had a statutory right to be notified in advance of the proposed action, and to be given an opportunity to consult and negotiate with the employer about the need for eliminating unit jobs and the possibility of alternative approaches. The Board concluded that an employer is not justified in completely disregarding the duty to bargain, regardless of what may have appeared to be economically desirable.

In a second case, *Brown Transportation Corp.*,³⁹ an employer, for financial reasons, withdrew from an employer bargaining association, closed down and subcontracted its urban pickup and delivery operations. The Board refused to accept the employer's contention that any efforts to bargain would have proved useless, and instead ruled that the employer had failed to test the union's readiness to accept an individual contract and had not bargained to an impasse.⁴⁰

³⁸ 147 N.L.R.B. 788 (1964).

³⁹ 140 N.L.R.B. 954 (1963).

⁴⁰ However, the Supreme Court has refused to extend the obligation-to-bargain doctrine to an employer who closes his entire business. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), held that even when a complete closing is motivated by vindictiveness toward unionism, it does not constitute an unfair labor practice. A partial closing, on the other hand, is an unfair labor practice if motivated by a purpose to discourage unionism in any of the remaining plants of the employer, and if the employer could reasonably have foreseen that such a closing would be likely to have that effect. 380 U.S. at 275.

This leaves a wide area of uncertainty between *Fibreboard* and *Darlington*. It is not entirely logical to hold that an employer must bargain with the union if his subcontracting decision displaces a segment of his working force, but that he need not bargain if all his employees will be dismissed coincident to a termination of the business. The extent to which partial closings are governed by *Fibreboard* or *Darlington* reasoning has been explained in terms of the change in the business' basic operations and its capital structure. See, e.g., *NLRB v. William J. Burns Int'l Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965); *NLRB*

In *Renton News Record*,⁴¹ five newspapers that had joined together to improve production through automation were cited for failing to bargain with the union over the intended change in operations. Noting the compelling economic necessity and lack of any discriminatory motivation, the Board declined to order resumption of the previous operations, but instead, ordered the employer to bargain with reference to the consequences of the economic decision.

Although the facts of the *Fibreboard* case involved only the pure subcontracting of labor, the reasoning of the majority is not so restrictive.⁴² The line is not easily drawn between investment and employment decisions, not to mention the difficulty of separating matters of employment efficiency (more effective utilization of labor) from matters of employment economy (labor at a lesser cost). The range of business decisions to which the *Fibreboard* rationale may apply includes subcontracting of production and service operations, intracompany work transfers from one plant to another, sale and merger decisions, and mechanization opportunities. The common ground these decisions share is their immediate impact upon the employment relationship, especially the displacement of employees caused by eliminating jobs. The Board and court opinions suggest that midcontractual collective bargaining will be required if that seems necessary to achieve the desired employee protection; this will probably result in increased union influence in management's decision-making process.

IV

AN ILLUSTRATION OF THE PROBLEM

A hypothetical case should crystallize the problems that face labor and management in resolving the duty to bargain on implementing business decisions. Assume a multi-plant employer considers integrating his operations: The change will require an increase in employment at one location and a decrease at another; the motivating factors are reducing overhead and increasing operating efficiency; the employees at his plants are covered by separate collective bargaining agreements.

The distinction between bargaining before the decision is implemented and afterwards is critical. The former provides the union with some type of veto or staying power consistent with the obligation to bargain in good

v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965); *NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191 (3d Cir. 1965). The new test under these later cases appears to be whether the economic motivations are attributable to labor or capital.

⁴¹ 136 N.L.R.B. 1294 (1962).

⁴² *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 218 (1964). "But the Court's opinion radiates implications of such disturbing breadth that I am persuaded to file this separate statement of my own views." (Stewart, J., concurring).

faith, and may demand a reevaluation of the decision-making process in the union's presence. On the other hand, bargaining with the union on the consequences of an already effectuated operating change substantially lessens the union's influence in the decision-making process and its leverage for protecting job security.

A. *The Arguments*

Under the hypothetical facts, a union might argue that the opportunity to bargain on the decision to integrate facilities before it is implemented allows the union to present the employment issues alongside the economic factors and hopefully save the jobs of its members.

Management could reply that there is no justification for union participation in a decision-making process which does not turn on employment considerations. The employer's superior knowledge of the technology and economics of the enterprise, management could argue, qualify him to make the relocation decision unilaterally, and apart from the collective effort to resolve subsequent employment issues. Although job security and economy of operations are not mutually exclusive interests, they are not so inherently competitive that they must be reconciled in one decision-making process. Since job security ultimately depends on the ability of the employer to provide profitable jobs, management could contend that the fundamental interests of both sides are best served if these interests are independently evaluated.

However, the worker who loses his job can hardly be blamed if he finds little comfort in the assurance that what has happened to him will benefit the plant or the economy as a whole. Since an employer may foreclose all employment alternatives in the initial decision, as the *Fibreboard* facts illustrate, the employment interests must be asserted before the decision takes effect to protect the worker's employment relationship. Bringing the union into the business decision is not designed to commingle the functions of union and management, but to save the job and the income of the worker. Collective bargaining was not designed to reconcile the viewpoints of the parties into a single perspective, but rather to compel a candid discussion of issues by both sides.

B. *The Practical Aspect of the Arguments*

Management, no doubt, will not eagerly accept the assurance of the Board that submitting the business decision to collective bargaining "does not impose an undue or unfair burden upon the employer."⁴³ Nor will it accept the proposition that "the obligation to bargain in nowise restrains an employer from formulating or effectuating an economic decision to

⁴³ *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1027 (1962).

terminate a phase of his business operations."⁴⁴ To a certain extent, the inconvenience to the employer must be accepted as an incidental effect of the national value judgment which has institutionalized the collective bargaining process as the favored means for obtaining stability in labor-management relations. Nonetheless, some of the consequences of the duty to bargain on the business decision may present serious impediments to business operations as practiced today.

It is generally recognized by management that sound labor relations require notification and consultation with the union over matters affecting employment. Reasonable notice affords an opportunity to present timely counterproposals. But there is a conflict between the union's request for notice and management's concern for secrecy in business negotiations. Management's paramount concern is probably to have a stable relationship with customers and employees. Premature announcement of an operational change lengthens the transitional period during which both customers and employees question the ability of the employer to continue business without interruption. Management is concerned that rumors of impending changes will weaken employment stability and employee morale. Slowdowns and sabotage are manifestations of employee insecurity and resentment, and can be very real factors in production management. When management's plans are in the fact-finding stage and very indefinite, care must be taken to avoid premature notice which might arouse unwarranted suspicions or hostility. As a consequence, the union is often not notified until after a decision has been made. Yet it would not seem feasible to notify the union representatives earlier and ask them to maintain secrecy, since this would, in effect, be asking them to place managerial interests before their responsibility to the membership.

More important perhaps than the issue of timing of notice is the question of what exactly the union will bargain about once it is afforded a role in the decision-making process. The *Fibreboard* "pure" subcontracting of labor situation is not the usual case. The problem will ordinarily be more complex, involving management motivations other than labor costs. The cases are far from clear in indicating whether the employer is excused from bargaining with the union over a decision when labor costs are not a central factor.⁴⁵ Management may understandably be more reluctant to consult with the union when non-labor matters are at issue: where the business decision will turn on questions of corporate tax and financial policies and complex statistical inquiries—factors which are traditionally and peculiarly the subjects of management rather than union concern.

⁴⁴ *Ibid.*

⁴⁵ See *Westinghouse Electric Corp.*, 150 N.L.R.B. 1574 (1965); *New York Mirror-Hearst Corp.*, 151 N.L.R.B. 834 (1965).

V

THE QUALIFIED *Fibreboard* DOCTRINE

The National Labor Relations Board has announced that the Supreme Court did not intend in *Fibreboard* to lay down a hard and fast rule of mechanical application making subcontracting a violation per se, absent consultation with the union or contractual waiver.⁴⁶ Instead, the Board has concluded that the *Fibreboard* rationale is applicable to subcontracting decisions, and perhaps to other operating decisions, only when certain factors are present that make it appropriate to negotiate with the union.⁴⁷

The first factor is the extent of the adverse impact on the employees in the bargaining unit. Unless the effect of a decision significantly impairs job tenure, employment security, or reasonably anticipated work opportunities, it may be exempt from the statutory command since it does not effect a change in the "conditions of employment."⁴⁸

A second factor is the status of union-management relations in the particular case. A long and effective bargaining relationship, evidenced by frequent meetings and fruitful negotiations, indicates that a solution to the issue should have been resolved in contractual negotiations at a prior date.⁴⁹ On this ground the Board may refuse to intervene and extricate the union from the consequences of its unsuccessful or inept bargaining.

Past practices and industry trends are two other factors. They bear heavily upon expected work opportunities, and are therefore proper subjects of collective bargaining at the time of general negotiations; accordingly, there is a strong presumption that the parties contracted with reference to the continuation of past practices and trends.⁵⁰ When

⁴⁶ Westinghouse Electric Corp., *supra* note 45.

⁴⁷ For a thorough development of the Board's criteria and their application to various fact situations, see generally Comment, 18 STAN. L. REV. 256 (1965); Comment, 33 U. CHI. L. REV. 315 (1966).

⁴⁸ Westinghouse Electric Corp., 150 N.L.R.B. 1574 (1965). In *Westinghouse* the employer did not violate the act by making thousands of annual subcontracting decisions that involved bargaining unit work since these decisions did not vary significantly in kind or degree from the employer's established practice, and therefore did not deny the workers any reasonably anticipated work opportunities. In *NLRB v. W. L. Rives Co.*, 328 F.2d 464 (5th Cir. 1964), the court concluded that there was no change in conditions of employment since the work assigned to a new plant was unavailable to the employees of the old shop because of craft-union lines. In *Pure Oil Co.*, 38 Lab. Arb. 1042 (1962), the union's objection to subcontracting was rejected, even though the subcontracting involved work of a type that the company's employees were capable of performing, because the contracting out deprived no employee of work regularly performed.

⁴⁹ See e.g., *New York Mirror-Hearst Corp.*, 151 N.L.R.B. 834 (1965); *Hartmann Luggage Co.*, 145 N.L.R.B. 1572 (1964).

⁵⁰ *Allied Chemical Corp.*, 151 N.L.R.B. 718 (1965) (no violation—the employer had a record of never failing or refusing to meet and bargain with the union, upon request, about changes in existing subcontracting practices).

a union has had an opportunity to bargain at general negotiations and has failed to win a concession, the union should not be given a second chance during the contract period to re-enter into negotiations on the issue.⁵¹

Fibreboard's application to subcontracting has thus been well delineated. But because of the multitude and variety of business decisions apart from subcontracting that affect conditions of employment, the duty to bargain may still be extended to areas which have previously been thought to be within managerial discretion. Without resorting to sheer speculation, there is no way to predict under the *Fibreboard* doctrine which business decisions other than subcontracting will fall within the duty to bargain, and under what conditions that duty will be imposed.

VI

ALTERNATIVE SOLUTIONS

There are three categories into which business decisions fall: matters upon which management makes the final decision, including such subjects as type of product and pricing policy; matters for joint union-management determination, such as the issues of wages, work loads, pensions, seniority, and other recognized subjects of collective bargaining; and matters within the exclusive control of the union, such as the internal affairs of the labor organization and admission to or exclusion from membership. This classification system is not the subject of controversy until the practical effect of implementing a "managerial" decision is the immediate loss of jobs.⁵² Then three important questions arise: Will decisions of this type be made unilaterally or jointly? At what point in the parties' contractual relationship should they be decided? Who is the proper party, or what is the proper forum, for resolving these questions?

The first question is the basic challenge of the labor-management relationship; the purpose of a bargaining relationship is to settle such issues in a peaceful and orderly fashion. The second and third questions are the topics of major concern in this Comment, and the possible solutions will be discussed in the pages that follow.

When the collective bargaining process is regarded by the participants solely as a means for resolving past differences, labor and management unintentionally avoid considering potential problems. By limiting negotiations to the basic subjects of wages, hours, and existing working

⁵¹ Hartmann Luggage Co., 145 N.L.R.B. 1572 (1964). But see discussion of waiver at notes 70 and 72 *infra* and accompanying text.

⁵² See generally Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950).

conditions the parties make the minimum effort to provide for job security and forestall labor strife. In light of the current trend of labor relations, exemplified by the *Fibreboard* decision, the expanding concept of "conditions of employment" compels a broader scope for collective bargaining. The parties must discuss issues beyond the traditional bounds.

Points of potential dispute may also be purposely ignored in negotiations. Few operating changes are so novel or unique that they cannot be foreseen during contract negotiations. In fact, most possible changes are apparent during negotiations, but are summarily dismissed from consideration as too speculative or contingent. The parties prefer to postpone a decision on such an issue and hope the situation that presents the problem will not arise; however, both labor and management are confident that their views would prevail should the situation arise and require submission of the issue to an outside party.

A. *The Adversary Solution*

An outside authority inevitably inherits the task of fixing the responsibilities of labor and management on midcontractual issues when the parties have failed to negotiate a conclusive agreement. The decision will then rest either upon implications from the existing agreement or a rule of law.

If a previous compromise between the parties is relied upon to resolve midcontractual disputes, the outside party must interpret the gap or "ambiguous silence"⁵³ of the agreement. To call this process "interpretation" is actually unrealistic: Explaining a result in terms of the parties' prior contractual intent is resorting to a fiction when their only common intent at the time the agreement was written was to postpone the issue and gamble on a third party's later ruling. The gap in the agreement forces the outside party to write a new compromise for the parties, although he professes he is only extending the old one.

The result is usually explained by either of two "rationales" which are so broad in their application that they state the conclusion and not the reasoning. If the equities favor management, a "reserved rights" argument may sustain the employer's unilateral action.⁵⁴ This approach reflects a belief that unions are able to protect themselves at the bargaining table; the conclusion is that an employer who is not violating any specific clause of his collective agreement may act unilaterally with re-

⁵³ Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 35 (1958).

⁵⁴ E.g., *Pure Oil Co.*, 38 Lab. Arb. 1042 (1962); *American Sugar Refining Co.*, 37 Lab. Arb. 334 (1961).

spect to the operating decision since he has retained all rights not bargained away. On the other hand, an "implied limitations" theory may uphold the union's claim that, even absent a specific prohibition in the collective agreement, the business decision is either one for joint determination or one impliedly prohibited by the very existence of the agreement.⁵⁵ The implied limitation is a covenant of good faith that management will do nothing to render the rewards of the contract illusory; by reason of one or more provisions covering seniority, wage-rate, job classification, or union recognition the employer is said to have committed himself to maintain the *status quo* and is thereby restricted from making the business decision unilaterally.⁵⁶ Both of the above "rationales" give the outside party the flexibility to reach the "desired" result.

Alternatively, a rule of law solution can be used which settles mid-contractual disputes on the basis of precedent. A rigid standard designates which business decisions fall within the statutory duty to bargain and which are left to the discretion of the employer. This approach—applying a single standard uniformly to all employment situations—fails to retain the flexibility Congress intended for the collective bargaining process. The concept of a flexible obligation to bargain is consistent with the policy of encouraging compromise between the parties so that they may control the growth of their own relationship. Congress, in 1947, rejected a proposal to define more explicitly the collective bargaining obligation, and instead, decided to retain the flexible and expandable language of "conditions of employment."⁵⁷ The scope of the bargaining process was left open to enable the parties to agree upon the important issues which arise out of their employment relationship.

A single standard, if extensively applied to the problem of contingent labor relations issues, would be unfair and unworkable in view of the differing complexities of various industries and the existence of large and small employers alongside one another. An employer approaching operational decisions which displace workers is faced with an increasing number of considerations proportional to the size of his activities. What may be a simple plant removal issue for an employer with a single plant,

⁵⁵ *E.g.*, *Crompton & Knowles Corp.*, 40 Lab. Arb. 1333 (1963); *Olin Mathieson Chem. Corp.*, 36 Lab. Arb. 1147 (1961).

⁵⁶ See generally *STONE, MANAGERIAL FREEDOM AND JOB SECURITY* 5-22 (1964).

⁵⁷ "The appropriate scope of collective bargaining cannot be defined in a phrase; it depends upon the industry's customs and history, the previously existing employer-employee relationship, technological problems and demands, and other facts. It may vary with the changes in industrial structure and practice." Statement submitted by Chairman Herzog of the National Labor Relations Board to the Senate Committee on Labor and Public Welfare. *Hearings before Senate Committee on Labor and Public Welfare on S.55 and S.J. Res. 22*, 80th Congress, 1st Session 1914 (1947).

is likely to involve added problems of accretion,⁵⁸ seniority,⁵⁹ and jurisdiction⁶⁰ when a multi-plant employer attempts to make a similar decision. Accordingly, one factor alone—description of a business decision—should not determine an employer's obligation to bargain on that decision. Subjects of negotiation should vary with the industries and with different employers.

The criteria for drawing the line between mandatory and voluntary subjects of collective bargaining should reflect the elasticity intended for the scope of the obligation, and include the following: the existing accord between the employer and the union; the competence and experience of the union in resolving the industry's problems; the technological position of the business, that is, the relation of labor to capital in the operations; and the competitive structure facing the employer in his industry.

An adversary proceeding to settle an employer's obligation to bargain on a business decision is unadvisable for management because the equities weigh in favor of the union. An employer can claim a right to make a profit and run his business, but the union can respond that jobs and incomes should not be subject to arbitrary, unilateral disposition. The Board or a court can always justify its decision that a union should have a role in the decision-making process with the Supreme Court's all-inclusive statement in a case involving the labor consequences of a corporate merger:

The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses . . . be balanced by some protection to the employees from a sudden change in the employment relationship.⁶¹

The union's equities may also be buttressed by assuming that the failure to provide in advance for a contingent business change implies that the party who benefits from the absence of agreement is the party

⁵⁸ Accretion is a subcategory of the union-representation issue. A union representing one class of employees will assert a demand to represent another group of employees on the basis of closely allied craft lines, or geographical proximity of the employer's plants. The phraseology is that the new group is an accretion to the existing bargaining unit.

⁵⁹ Seniority is the principle granting preference to employees in certain phases of employment in accordance with length of service. The aim of a seniority program is to afford maximum security and reward to those who have the longest service. From the workers' standpoint, a definitely established seniority program provides an objective standard of selection, thus eliminating the possibility of favoritism and discrimination in employment relations.

⁶⁰ Jurisdictional disputes are controversies between rival unions over the right to organize the men on, or to supply workers for, particular jobs. Jurisdictional strikes refer to both work-assignment and representation strikes.

⁶¹ *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964).

who avoided the task of bargaining conclusively. Management consequently bears the blame since it, and not the union, stands to benefit from the increased efficiency gained from an operating change.

Employers should also heed the warnings implicit in past Supreme Court opinions. That court has respected the congressional policy to promote industrial stability through collective bargaining agreements,⁶² and has frowned upon parties who are unable to settle disputes by negotiation, mediation, or voluntary arbitration.⁶³ The national concern over unemployment and individual security could give the Board and courts added impetus and social justification for resolving disputes in unions' favor.⁶⁴ In assessing the risk of unilateral decision-making, management should consider the harsh sanctions that the Board may impose if it finds an employer guilty of a refusal-to-bargain. The Supreme Court in *Fibreboard* affirmed an order of the Board which required management to bargain with the union on the decision to subcontract *and* to reinstate its former employees with backpay.⁶⁵ The nature of the remedies and penalties in this area of the law bears little semblance to traditional contract remedies even though the labor-management relationship is basically contractual. Under strict contractual reasoning, a contract has no application to the parties' dispute in the absence of a meeting of the minds on a specific issue. The Supreme Court has directed, however, that in labor-management controversies "the range of judicial inventiveness will be determined by the nature of the problem."⁶⁶ A collective bargaining agreement is regarded as an instrument of government demanding creative administration, and not as a contract of exchange to be narrowly construed.⁶⁷ In summary, the gamble of postponing issues until a controversy actually arises, rather than meeting the problem in negotiations, places a greater risk on management than on the union if the controversy will finally be resolved before the Board or the courts.

B. Confronting Contingent Issues in General Negotiations

The practical advantages of confronting an issue in general negotiations before the specific problem arises outweigh considerations that discourage the introduction of controversial topics in order to renegotiate

⁶² *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453-54 (1957).

⁶³ *Id.* at 456.

⁶⁴ "[I]t is the continuing policy and responsibility of the Federal Government to . . . promote maximum employment, production, and purchasing power." Employment Act of 1946, 60 Stat. 23 (1946), 15 U.S.C. 1021 (1965).

⁶⁵ *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 215, 217 (1964).

⁶⁶ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

⁶⁷ COX, *LAW AND THE NATIONAL LABOR POLICY* 79 (1960).

as quickly as possible. Under a shortsighted collective bargaining agreement which makes no provision for contingent changes in the business environment, any change in the conditions of employment motivated by legitimate business reasons may bring the parties into an adversary struggle. Because of their necessarily continuing relationship, a primary concern of both labor and management should be staying out of court. To succeed their relationship must be based on accommodation and compromise, and not on hostility.

The inevitable disagreements of the labor-management relationship are best resolved in collective bargaining when both sides assume a co-operative and constructive role.⁶⁸ The parties to a labor contract do not share the degree of mutual independence which is associated with simple commercial contracts. Instead, they must strike some kind of bargain. The pressure to agree can create an excuse for generalities, deliberate ambiguities, and gaps in the agreement. In contrast to the single-transaction business contract, the labor agreement must describe a large number of people, a variety of problems, and a wide range of conduct all within a format short and simple enough for the ordinary worker to read and understand. The purpose of the written trade agreement is not to reduce to writing the settlements of past differences, but to establish a framework for governing the relationship in the future.⁶⁹ Consistent with the desire to improve rather than merely sustain good labor-management relations is the need for certain agreed ways of meeting and solving the concrete problems that will arise during the life of the contract. This can only be achieved through imaginative and progressive bargaining by parties whose perspective and judgment has not been narrowed by formal win-lose controversies.

If greater care is taken to confront contingent issues in general negotiations, management should benefit from reduced employee resentment, frustration, and opposition to change—factors which contribute to strike motivation. The major reason unions should take the initiative and discuss potential controversies is to achieve their primary objective, job security, in a more preferable manner. Failing to provide for their members in the event of foreseeable changes in working conditions may eventually discredit the labor organization in the eyes of the rank and file. Lack of advanced planning can place the union in an unfavorable position, as the *Fibreboard* situation illustrates: The alternatives for the maintenance workers' union, if it had been called in to bargain, appear to have been sharing responsibility either for a displacement or for a wage reduction decision.

⁶⁸ See generally Cox, *op. cit. supra* note 67, at 77-80.

⁶⁹ *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 638 (4th Cir. 1940).

In the past, a widely held belief was that silence in the resulting collective bargaining agreement on a matter proposed in negotiations had to be interpreted as a rejection; the rejection was part of the parties' bargain and the matter could not be raised again by the same party during the life of the contract.⁷⁰ This interpretation of the law gave union representatives good reason to refrain, as a tactical matter, from introducing radically new proposals into negotiations. The Board, however, has limited this introduction-rejection rule,⁷¹ perhaps because it was a too harsh and too legalistic approach to what is basically an equitable problem. Under present law an employer may not take unilateral action or refuse to bargain during the contract period on a subject discussed in precontractual negotiations but not specifically covered in the resulting contract unless, from an evaluation of the prior negotiations, two conditions are met: the matter was "fully discussed" or "consciously explored," and the union "consciously yielded" or clearly and unmistakably waived its interest in the matter.⁷²

VII

ESTABLISHING A FRAMEWORK

To avoid an adversary struggle, a fractured relationship, and an unsatisfactory, judicially formulated, labor-management policy both sides should face up to their obligations in contract negotiations. Initially, minimum benefits might be bargained for in anticipation of contingent operational changes that displace workers. A compromise granting severance pay, retraining, reemployment preference, or transfer privileges could embody a provision that the union waive all or some of its rights to bargain on the business decision and offer no resistance when the change is instituted. It is crucial, however, that worker demands be asserted at the time of general negotiations. Once management formulates a decision in the middle of the contract period, union objections made then would appear to challenge the employer's right to make a change. Consequently, management, forced to justify its action, would characterize any concessions subsequently granted as gratuitous, and in no way arising from a prior obligation. Union proposals to cushion the impact of unemployment, offered after management has made its decision, might therefore yield less returns of job security than if the same proposals had been suggested during previous general negotiations.

⁷⁰ See, e.g., *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1228 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952); *Speidel Corp.*, 120 N.L.R.B. 733 (1958).

⁷¹ *Proctor Mfg. Corp.*, 131 N.L.R.B. 1166, 1169 (1961). See also *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953, 956 (1958).

⁷² *Proctor Mfg. Corp.*, *supra* note 69. See generally Comment, 33 U. CHI. L. REV. 315 (1966).

While the advance planning framework may not answer all issues which arise after contract negotiations, it will significantly contribute to providing the machinery for a temporary solution, and aid final settlement when the contract relationship is renegotiated. The following example of subcontracting clauses⁷³ illustrate the degree of compromise and relative sophistication which advanced planning may assume; they are listed in order of increasing union protection and management restriction and, read in the context of a collective agreement, can imply either that the union's interest only extends thus far, or that management action is limited in analogous matters as well.

1. Management promises to inform the union of the status and scope of its subcontracting program.
2. The company agrees not to transfer work for the purpose of discriminating against the union, but reserves the right to sublet work for reasons of economy in production or speed.
3. Final decisions are reserved to the company but the company agrees to consult with the union on past practices.
4. Subcontracting will be guided by past practices.
5. The contracting out of work will be prohibited if that work is ordinarily performed by employees covered by the agreement and if it would become necessary to lay off such workers as a consequence.

These provisions show a concern for the complexity of the problem and an intention to allocate responsibilities in a predetermined pattern; in the case of a controversy arising during the contract period, the previous compromise of the parties, if there is one, should be considered before general equities are applied. One of the objectives of fuller participation in the collective bargaining process is to limit the impact of the Board's or a court's judgment of the equities. This suggested mode of mutual recognition of areas of potential controversy is not limited to subcontracting but applies equally to such subjects as plant removal, technological advancement, consolidations and mergers.⁷⁴

Indications of advance planning have led the Board in recent cases

⁷³ U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 410, SUBCONTRACTING CLAUSES IN MAJOR COLLECTIVE BARGAINING AGREEMENTS (1961), reported that more than 75% of major contracts contain no direct reference to subcontracting.

⁷⁴ Some collective bargaining agreements presently embody provisions for contingent operational change. For example, the International Ladies' Garment Workers' Union (ILGWU) has a policy against shop removal (see that union's standard Northeast Region Agreement, Article XVIII, paragraphs 2 and 3); the San Francisco Retail Clerks Union, Local 648, include in their Grocery and Delicatessen Agreement clauses covering sale of business and subcontracting; the International Longshoremen's and Warehousemen's Union and the Pacific Maritime Association have established a separate agreement, apart from their collective bargaining contract, to provide for changes which occur as a result of automation (see the ULWU-PMA Mechanization and Modernization Agreement).

to forego a complete reevaluation of the decision-making process. For example, the Board determined that a provision awarding severance pay and termination rights upon dismissal indicated prior consideration of the possibility of discharge, and showed that the parties had specified their responsibilities beforehand.⁷⁵ Similarly, relying on a provision ensuring that the contract wage would be paid to subcontractors' employees, the Board determined that the agreement justified the employer in subcontracting occasional projects without consulting the union.⁷⁶ In another proceeding, a provision prohibiting the subcontracting of work for the purpose of curtailing employment was interpreted not only as a curb on vindictiveness, but also as a protection of normal employment; and the union's objection to the company action was upheld.⁷⁷

CONCLUSION

Fuller participation in collective bargaining at the time of general negotiations is the most realistic solution to the midcontractual problem of union participation in management decision-making. To the extent that a midcontractual issue can be resolved through the framework of an existing agreement, the parties have preserved the autonomy of their relationship.

Management should recognize that, in light of *Fibreboard*, failure to achieve mutually satisfactory private solutions may have dire consequences for managerial freedom. Unions must also realize that it is their responsibility to capitalize on the expanding scope of collective bargaining; they must face up to their obligation to bargain more conclusively in negotiations. Not only does advance planning for contingent changes in enterprise operations greatly help to produce a peaceful and productive relationship by avoiding hard-fought court battles, but it also permits the parties to retain control of their relationship and to predict with some certainty the application of their agreement to future problems.

Martin E. Harband

⁷⁵ New York Mirror-Hearst Corp., 151 N.L.R.B. 834 (1965).

⁷⁶ Shell Oil Co., 149 N.L.R.B. 283 (1964).

⁷⁷ General Electric Co., 6 A.A.A. 1, cited in Stone, *op. cit. supra* note 56, at 50.