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COMMENTS

EMPLOYER'S STATUTORY DUTY TO BARGAIN

The basic labor policy of the United States, as set forth in the National Labor Relations Act,¹ relies upon voluntary collective bargaining as a means of settling disputes and reaching agreement on the basic terms of employment. While the root meaning of the term "voluntary collective bargaining" is self-evident, the law also imposes a statutory duty upon the parties to insure continued effective bargaining on certain fundamental subjects. This duty does not include an obligation to agree to any proposal so long as bargaining is in good faith. In this regard, the specific duties which devolve upon the employer are set forth in sections 8(a)(5) and 8(d) of the act.²

I. BACKGROUND

The employer's duty to bargain collectively is an ever widening concept. It has come a long way from its rather humble beginning in 1935 when Section 8(5) was added to the proposed Wagner Act. In commenting upon the effect of this section, which makes it an unfair labor practice to refuse to bargain with employee representatives, Senator Wagner said:

Most emphatically this provision does not imply governmental supervision of wage or hour agreements. It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met.³

This same interpretation was placed upon the provision by Senator Walsh,⁴ another spokesman for the bill. Apparently Congress felt that the duty imposed by Section 8(5) of the NLRA⁵ was clear, since it did not enlarge upon its language when passing the bill.

1. 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-68 (1958), as amended, 29 U.S.C. §§ 153-64 (Supp. IV, 1963).

2. Section 8(a)(5) declares that an employer's refusal to bargain collectively with the representing union is an unfair labor practice. 61 Stat. 141, 29 U.S.C. § 158(a)(5) (1958), amending 49 Stat. 452 (1935). Section 8(d) describes the bargaining process: "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ." 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

3. 79 Cong. Rec. 7571 (1935).

4. "The bill . . . leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary" 79 Cong. Rec. 7659 (1935).

5. 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958).

In interpreting this language of the act, the National Labor Relations Board and the courts gradually arrived at a working definition of the conduct required of the employer to meet his statutory obligation to bargain. The definition was subjective, based upon the entire course of the employer's conduct, and contained the requirement of "good faith" bargaining, the result being a requirement much like that now imposed by the present section 8(d). In arriving at this definition, the experience of other administrative agencies dealing with similar problems in the labor field⁶ had great influence.

In considering the 1947 Taft-Hartley amendment to the Wagner Act, Congress felt that a definition of the scope of the bargaining duty was necessary.⁷ Therefore, the original bill passed by the House of Representatives defined the term "collective bargaining" and restricted the area of compulsory negotiation to certain specified subjects.⁸ The need for such a provision was explained in the House Report on the bill:

[T]he present Board has gone very far in the guise of determining whether or not employers had bargained in good faith, in setting itself up as judge of what concessions an employer must make and of the proposals and counterproposals he may or may not make. . . . [The report here goes into a discussion of various cases which are criticized.]⁹ These cases show that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements.¹⁰

Although the Senate amended this bill so as to omit the specific list of topics contained in the House bill, the Report of the House Conference Committee¹¹ indicated that it felt that the compromise with the Senate language, which now appears as section 8(d) of the act,¹² would have the effect of curbing the Board's power to interfere unnecessarily with the process of voluntary collective bargaining.

The above reports indicate the concern with which Congress viewed the

6. E.g., decisions of the Railway Labor Board under the Transportation Act of 1920, 41 Stat. 456 (1920), and decisions of the National Labor Board under the National Industrial Recovery Act of 1933, 48 Stat. 195 (1933).

7. "Reference has already been made to liberties the Board has taken with the term 'collective bargaining' due to the absence from the present act of language defining the scope of bargaining." H.R. Rep. No. 245, 80th Cong., 1st Sess. 22 (1947).

8. H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947).

9. Representative of the cases discussed are: General Motors Corp., N.L.R.B. No. 7—R—1496 (Oct. 2, 1946) (Board disregarded evidence of intensive bargaining and accused the company of refusing to bargain); Register Publishing Co., 44 N.L.R.B. 834 (1942) (refusal to agree to arbitration rather than maintaining system of collective bargaining on certain subject held to be refusal to bargain); United Biscuit Co. of America, 38 N.L.R.B. 778 (1942) (demanding "no strike" clause is failure to bargain); International Filter Co., 1 N.L.R.B. 489 (1936) (refusal to require employees to join a union is failure to bargain).

10. H.R. Rep. No. 245, 80th Cong., 1st Sess. 19-20 (1947).

11. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34 (1947).

12. See note 2 *supra*.

growing tendency of the Board to expand its power over the bargaining process, and also congressional intent as to the meaning of section 8(d).

Congress attempted to define the employer's precise mandatory duty to bargain in terms of good faith and with respect to wages, hours and other terms and conditions of employment. The remaining areas of agreement were left to the parties and the voluntary collective bargaining process.

II. POST-TAFT-HARTLEY ERA

In the years since Taft-Hartley, the NLRB and the courts have continued the trend toward governmental control of the bargaining process by requiring the parties to bargain on certain subjects while forbidding them to insist upon bargaining as to others. In 1958 the Supreme Court, in *NLRB v. Wooster Div. of Borg-Warner Corp.*,¹³ recognized three categories of bargaining subjects—mandatory, voluntary and illegal. There has been very little problem with the third category; neither party may bargain about any subject, such as the closed shop,¹⁴ which falls within that area. There have been, however, serious problems with the other categories, since there is no sharp line of demarcation between them. If these categories were mere labels, there would be no difficulty. However, since there is a substantive difference in the treatment of the two classes, it is of utmost importance that anyone dealing with a particular subject know exactly where it falls within the classification scheme.

Any subject falling within the mandatory class may be placed on the bargaining table and insisted upon. This means that the party proposing it may refuse to discuss any other subject until agreement is reached on the mandatory subject. The opposing party may not refuse to bargain about such a subject without being guilty of a violation of section 8(d).¹⁵ The mandatory class contains all those subjects comprehended by the language of section 8(d)¹⁶—“wages, hours and other terms and conditions of employment.” This language has been interpreted to include subjects such as pension and retirement plans,¹⁷ the price of meals supplied by the employer to his employees,¹⁸ plant rules governing lunch and rest periods,¹⁹ and union security and checkoff provisions.²⁰

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

14. “(a) It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization” 73 Stat. 525 (1959), 29 U.S.C. § 158(a)(3) (Supp. IV, 1963).

15. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

16. *Ibid.*

17. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).

18. *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949).

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

20. *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953).

The NLRB has even gone so far as to hold that employee discount²¹ and Christmas bonus²² plans, which had been voluntarily initiated and voluntarily continued over a period of years, were "wages" and could not be unilaterally discontinued without bargaining.²³

Those subjects not falling within the illegal or mandatory classes must be treated as voluntary subjects for bargaining. This means that a party may not insist upon bargaining as to that subject without being guilty of a refusal to bargain about mandatory subjects.²⁴

Among the subjects which fall into the voluntary class are provisions calling for a ballot by all employees on the question of acceptance of the employer's last offer,²⁵ performance bonds,²⁶ indemnity bonds,²⁷ and relations between union and employee, such as those concerning union disciplinary and membership rules.²⁸

III. THE EMPLOYER'S DILEMMA

With things nicely categorized, there should be no great problem as to bargaining; and yet there lies in this apparent order a real dilemma for the employer. The mandatory category is not clearly defined, and therefore the employer cannot be certain that a subject, formerly thought to be a voluntary matter, will not suddenly appear in the mandatory category.²⁹ "Conditions of employment" covers a multitude of things. In *Borg-Warner*³⁰ the Court proposed the test of whether or not a subject deals with the employer-employee relationship, as opposed to relations among employees or between the employee

21. Central Ill. Pub. Serv. Co., 139 N.L.R.B. 1407 (1962).

22. General Tel. Co., 144 N.L.R.B. No. 28 (Aug. 30, 1963).

23. This situation must be distinguished from those in which there has been bargaining on such plans and there was a refusal to continue or initiate such a plan. See, e.g., NLRB v. Nash-Finch Co., 211 F.2d 622 (8th Cir. 1954); NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952).

24. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). "We agree with the Board that such conduct [insistence on a nonmandatory topic] is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects." *Id.* at 349.

25. *Id.* at 349-50.

26. Local 164, Bhd. of Painters v. NLRB, 293 F.2d 133 (D.C. Cir.), cert. denied, 368 U.S. 824 (1961).

27. NLRB v. Davison, 318 F.2d 550 (4th Cir. 1963).

28. NLRB v. Superior Fireproof Door & Sash Co., 289 F.2d 713 (2d Cir. 1961). But cf. Allen Bradley Co. v. NLRB, 286 F.2d 442 (7th Cir. 1961).

29. This is the problem which has arisen in the area of subcontracting and discontinuing certain operations. Such action was formerly thought to be management prerogative, but since Fibreboard Paper Prod. Corp., 130 N.L.R.B. 1558 (1961), rev'd on rehearing, 138 N.L.R.B. 550 (1962), enforced, 322 F.2d 411 (D.C. Cir. 1963), cert. granted, 32 U.S.L. Week 3243 (U.S. Jan. 7, 1964) (No. 610), this is no longer a safe assumption.

30. 356 U.S. at 350.

and the union. Thus, according to the reasoning of the Court, a "no-strike" clause, forbidding a strike by employees during the life of the contract and therefore affecting the employer-employee relationship, is a mandatory subject of bargaining; but a mere ballot clause, requiring employees to accept or reject the employer's last offer, affects only intraunion relations and cannot be a mandatory subject of bargaining.³¹ The usefulness of such a test is questionable in view of the fact that while many actions have a primary effect upon one relationship, they also affect other relationships. Thus, although a ballot clause basically affects the employee-union relation, it has a very definite effect upon the employee-employer relationship, because the practical effect of the ballot clause is the determination of whether the employment relation will continue uninterrupted by a strike. Thus the employer's offer, which is to be voted upon, does affect the employer-employee relationship, and the outcome of the balloting may have the same effect as a no-strike clause. Furthermore, applying the Court's test to other mandatory subjects—do the union security and checkoff provisions³² affect the employer-employee relation any more exclusively than the ballot clause does? It is difficult to see how the effect on the employer-employee relationship of the employer's payment to the union of money deducted from the employee's pay could be much greater than its effect on the employee-union relationship. Although a union security clause in effect makes union membership a condition of employment, it also requires the establishment of the employee-union relationship, which surely is not an insignificant effect of the clause.

In *Allen Bradley Co.*,³³ the NLRB held that a clause insisted upon by the employer, forbidding the union to discipline employees for exercising their rights, including the right to refuse to participate in a strike, was a voluntary subject for bargaining. The Board based this decision mainly on the *Borg-Warner* case,³⁴ drawing an analogy between the ballot clause in *Borg-Warner* and the discipline clause in *Allen Bradley*.

The Court of Appeals for the Seventh Circuit refused to enforce the Board's order,³⁵ stating that *Borg-Warner* did not support the Board's position because the clause here in question was more like the no-strike clause, affecting the employer-employee relationship, and therefore mandatory. In drawing its analogy, the court said:

The purpose of such a clause was to prevent a strike by the employees during the period covered by the agreement so that the employer might retain the benefit of their services. The purpose of the clauses proposed here was to permit employees to work both for their benefit and for that of the employer.³⁶

31. *Id.* at 349-50.

32. See note 20 *supra* and accompanying text.

33. *Allen Bradley Co.*, 127 N.L.R.B. 44 (1960), enforcement denied, 286 F.2d 442 (7th Cir. 1961).

34. 356 U.S. 342 (1958).

35. 286 F.2d 442 (7th Cir. 1961).

36. *Id.* at 445.

Clearly the court was correct, since the clause in question did affect the employer-employee relationship. Obviously the question of union rules has some effect upon the relationship between the union member and the employer. Penalties such as heavy fines imposed by the union for nonobservance of a strike will tend to reduce the likelihood of any union member working during the strike, so that a discipline clause proscribing such penalties would help to promote continued work during a strike. However, the Board's point that a discipline clause is analogous to a ballot clause is also correct. If a ballot clause is in effect and a majority of employees vote to accept the employer's last offer, then there will be no interruption of work and the employees can work "for their benefit and that of the employer." Recognizing that this tends to undermine the union's bargaining authority and is thus somewhat out of line with United States labor policies, it is apparent that both discipline and ballot clauses affect the employer-employee relationship in much the same way; yet one is in the mandatory class and the other in the voluntary.

IV. MAJOR BARGAINING PROBLEMS TODAY

A. *Subcontracting and Automation*

The great confusion engendered by the attempt to categorize bargaining demands was foreseen by Mr. Justice Harlan, who said in his vigorous dissent in *Borg-Warner*:

Preliminarily, I must state that I am unable to grasp a concept of "bargaining" which enables one to "propose" a particular point, but not to "insist" on it as a condition to agreement. The right to bargain becomes illusory if one is not free to press a proposal in good faith to the point of insistence. Surely adoption of so inherently vague and fluid a standard is apt to inhibit the entire bargaining process because of a party's fear that strenuous argument might shade into forbidden insistence. . . . To me all of this adds up to saying that the Act limits *effective* "bargaining" to subjects within the three fields referred to in § 8(d)³⁷

Mr. Justice Harlan also foresaw another danger in the decision:

I fear that the decision may open the door to an intrusion by the Board into the substantive aspects of the bargaining process which goes beyond anything contemplated by the National Labor Relations Act or suggested in this Court's prior decisions under it.³⁸

These fears were well grounded, for there certainly has been confusion in collective bargaining and a continued expansion of the Board's power in the field.

An area of major importance today, which is shrouded with the uncertainty of indefinite classification, is that of automation and subcontracting. In their search for more economy and greater productivity, more and more employers have in recent years turned to automation and subcontracting as a means of

37. 356 U.S. at 352 (separate opinion).

38. *Id.* at 351-52.

increasing production and cutting costs. When labor unions are involved, the employer is confronted with the problem of whether he must first bargain with the union, or whether he may just go ahead and implement his decision unilaterally.

There have been many cases involving the complete elimination of the employer-employee relationship. The results reached, however, are quite inconsistent.

In *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*,³⁹ a case decided under the Railway Labor Act,⁴⁰ but which has been relied upon in many cases under the NLRA,⁴¹ the Supreme Court held that the employer must bargain with the union over a clause that would restrict the management's right to abolish jobs.⁴²

Less than a year after this decision, the *Fibreboard Paper Prods. Corp.* case⁴³ came before the Board. This case involved an employer who, for economic reasons, discontinued the use of employees for its maintenance and powerhouse operations, subcontracting the work to an independent contractor. The employer had been considering this change of operations for some time, but the union and employees were not notified until the decision had been definitely made, four days before expiration of the existing contract covering the jobs which were eliminated. The Board held that since the employer was willing to discuss termination benefits and the decision was based upon economic and not discriminatory motives, the action of the employer was valid. Member Fanning dissented in part; it was his opinion that the case was governed by the *Railroad Telegraphers* case⁴⁴ and that the decision to subcontract is a mandatory subject of bargaining. The majority distinguished *Railroad Telegraphers* on the ground that it involved the abolition of only a part of the jobs, with the result that the union still represented a large number of the remaining employees. The employer therefore had a duty to bargain about its decision, since it necessarily affected the employees remaining in the bargaining unit, whereas here the jobs of all the employees represented by the union were abolished, so that the union no longer represented any employees who were

39. 362 U.S. 330 (1960).

40. 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1958).

41. The language of the two acts being similar, it has been said that they impose similar duties. Compare section 8(a) (see note 2 supra) with the following part of the Railway Labor Act:

"First. Duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce . . ." 44 Stat. 577 (1926), 45 U.S.C. § 152 (1958).

42. 362 U.S. at 336.

43. 130 N.L.R.B. 1558 (1961), rev'd on rehearing, 138 N.L.R.B. 550 (1962), enforced, 322 F.2d 411 (D.C. Cir.), cert. granted, 32 U.S.L. Week 3243 (U.S. Jan. 7, 1964) (No. 610).

44. 362 U.S. 330 (1960).

affected. This was a doubtful distinction which could not long endure under a vigorous assault. Several stronger distinctions were pointed out by the court in *Jays Foods, Inc. v. NLRB*,⁴⁵ a case involving the abolition of the employer's automotive repair department in favor of a policy of sending necessary repair work out to independent garages. The Seventh Circuit set aside the Board's order,⁴⁶ which held that the employer had engaged in unfair labor practices by discriminating against employees who had voted for union representation. The court found that the decision was based upon economic, not discriminatory, motives and therefore was not an unfair labor practice. The question of the duty to bargain over the decision to subcontract was not directly in issue, since there was no pre-existing bargaining agreement. The court did note, however, that the Board's position in this case was inconsistent with its decision in *Fibreboard*.⁴⁷ The court then distinguished the *Railroad Telegraphers* case from the *Fibreboard* situation:

That case [*Railroad Telegraphers*] did not involve a construction of the National Labor Relations Act, but did involve a construction of the Railway Labor Act, and the Interstate Commerce Act, as well as the duty of the Interstate Commerce Commission under 49 U.S.C.A. § 5(2)(f) to require, where combinations and consolidations of railroads might adversely affect the interest of employees, a "fair and equitable arrangement to protect the interest of the railroad employees affected" before approving such consolidations. . . . The brotherhoods' position was buttressed by the bar against injunctive relief in a labor dispute set up by the Norris-LaGuardia Act. . . .⁴⁸

However, upon rehearing of the *Fibreboard* case, the Board reversed⁴⁹ its previous decision, totally ignoring the distinctions drawn by the Seventh Circuit. The Board⁵⁰ said that it was also relying upon its decision in *Town & Country Mfg. Co.*,⁵¹ indicating that it felt that the issues in the two cases were substantially the same, since *Town & Country* was a case of subcontracting for economic reasons.⁵² However, the decision in *Town & Country* was based upon

45. 292 F.2d 317 (7th Cir. 1961).

46. *Jays Foods, Inc.*, 129 N.L.R.B. 690 (1960), enforcement denied, 292 F.2d 317 (7th Cir. 1961).

47. 130 N.L.R.B. 1558 (1961).

48. 292 F.2d at 321.

49. 138 N.L.R.B. 550 (1962).

50. It is interesting to note that this decision was made by a three-member panel of the "New Board," appointed by President Kennedy in 1961, consisting of Chairman McCulloch, who had taken no part in the original decision, Member Rogers of the original majority, who dissented in this decision, and Member Fanning, whose dissent in the original decision was adopted upon the rehearing.

51. "Accordingly, for the reasons and considerations expressed in *Town & Country* [136 N.L.R.B. 1022 (1962), aff'd, 316 F.2d 846 (5th Cir. 1963)], and in the dissenting opinion in the original *Fibreboard* case, we find that Respondent's failure to negotiate . . . its decision . . . constituted a violation of Section 8(a)(5) of the Act." 138 N.L.R.B. at 551.

52. *Ibid.* "A majority of the Board in that case [*Town & Country*] concluded that a management decision to subcontract work out of an existing unit, albeit for economic reasons, was a mandatory bargaining subject." *Ibid.*

the employer's discriminatory actions, as indicated by the Board's findings therein.⁵³ Only after so disposing of the real issues of the case did the Board launch into a discussion of subcontracting for economic motives, stating that even without the discriminatory practices present in this case, and assuming that the decision was made for economic reasons, the result would be the same. The Board then discussed the original *Fibreboard* decision and expressly overruled it,⁵⁴ two members dissenting. The Board did not discuss, however, the many cases cited by the employer and mentioned in the dissent,⁵⁵ which recognized the fact that decisions such as that in question in *Fibreboard* are managerial decisions which are necessary to the proper operation of a business.

In enforcing the Board's order in *Town & Country*, the Fifth Circuit based its order on the violations of the NLRA committed by the employer in discriminating against the employees because of union activity, not on the economic hypothesis stated in the Board's dicta.⁵⁶

The decision of the Board in the second *Fibreboard*⁵⁷ case did not mention another case, *Rochet*⁵⁸—decided shortly after the *Town & Country* case—which dealt with violations of section 8(a)(1) and (5). Two small newspapers, along with three others in the same area, in an effort to combat rising costs, had formed two corporations, one to do all the printing for the five papers and another to perform the type composition necessary for the printing. The corporations were to use modern equipment, making the operations involved much more economical and efficient. The result was that the two newspapers involved in this action closed their composing rooms and discharged the employees. These actions were taken without prior notice to the employees or their union. This was held by the Board to be a violation of the act in line with its interpretation of the employer's duty. However, the Board did not follow its usual procedure of ordering the employer "to restore the *status quo ante* by reinstating its employees with backpay and to bargain with the Union over any future changes in operations."⁵⁹ The Board recognized that the change

53. "1. We find . . . that the Respondent violated Section 8(a)(1) of the Act by threatening employees with discontinuance of operations or with discharge or other reprisals because of their activities on behalf of the Union

"2. The Trial Examiner further found that Respondent did not violate Section 8(a)(3) of the Act by unilaterally terminating its trailer hauling department and discharging its drivers, because Respondent's decision to do so was not discriminatorily motivated. We disagree with this finding. . . . Accordingly, we find that the Respondent discriminatorily discharged its drivers in violation of Section 8(a)(3)

"3. . . . [W]e find that the Respondent thereby sought to disparage and undermine the Union as majority bargaining agent for its drivers and that the termination constituted a violation of Section 8(a)(5) for this reason." 136 N.L.R.B. at 1022-26.

54. *Id.* at 1028.

55. *Id.* at 1033 n.17 (dissenting opinion).

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

57. 138 N.L.R.B. 550 (1962).

58. 136 N.L.R.B. 1294 (1962).

59. *Id.* at 1297.

in operations was forced upon the employers by "compelling economic necessity,"⁶⁰ and that there were other parties in the transactions, not participants in the action, who would be injured by a return to the *status quo ante*. The order, therefore, only required the employers to bargain with the union about the *effects* of termination on the employees affected by the subcontracting.⁶¹ Such recognition by the Board that there may be extrinsic facts, especially economic necessity, which drive employers to change operations, may well be extremely important in the future in determining to what extent it will be necessary to bargain about the *decision* (as distinguished from its *effects*) to subcontract or automate. Although the Board has said:

[T]he duty to bargain about a decision to subcontract work does not impose an undue or unfair burden upon the employer involved. This obligation to bargain in nowise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business . . . ,⁶²

nevertheless it must realize that such an obligation may well become an undue burden, if imposed upon an employer who is in desperate financial condition and must automate or subcontract to avoid the collapse of his business. If an employer in such circumstances is faced with the necessity of bargaining about his decision as a mandatory subject, he may be prevented from implementing the decision until it is too late to save his business. The Board-protected economic weapons available to the union to delay any such move are indeed formidable. Any unilateral implementation of the plan prior to an impasse in bargaining would undoubtedly bring immediate charges of failure to bargain,⁶³ and even if an impasse has been reached the union need only strike to break it,⁶⁴ and thereby forestall unilateral action. In addition, the union may engage in limited economic warfare of the type approved by the Supreme Court in *NLRB v. Insurance Agents' Int'l Union*,⁶⁵ such as refusal to work overtime, failure to attend routine meetings, and other harassing tactics designed to put economic pressure on the employer.⁶⁶ Thus, the recognition of the employer's problem in *Rochet*⁶⁷ may well be an indication that the Board realizes the dangers involved in its orders and will allow implementation of decisions before impasse

60. *Id.* at 1296.

61. *Id.* at 1298. In making this order the Board merely aligned itself with the action of the courts in similar cases. *NLRB v. Adams Dairy, Inc.*, 322 F.2d 553 (8th Cir. 1963), *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961).

62. 136 N.L.R.B. 1022, 1027 (1962).

63. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395 (1952).

64. *Boeing Airplane Co.*, 80 N.L.R.B. 447 (1948), *rev'd on other grounds*, 174 F.2d 988 (D.C. Cir. 1949).

65. 361 U.S. 477 (1960).

66. The dangers involved in the course of action required by *Town & Country* and *Fibreboard* are adequately discussed in *Member Rogers'* dissent in the second *Fibreboard* case. 138 N.L.R.B. 550, 557 (1962).

67. 136 N.L.R.B. 1294 (1962).

has been reached if there has been a good faith attempt to reach agreement; or it may be an indication that the Board will restrict the use of union power in such situations.

Another recent case, *Hawaii Meat Co. v. NLRB*,⁶⁸ dealt with a variation of the subcontracting problem. In this case a wholesale meat processor was engaged in bargaining with the union, which was the representative of the majority of the processor's employees, including the employees of the delivery department. The employer foresaw the possibility of a strike and conducted negotiations with an independent trucking company, with a view toward subcontracting its delivery work in the event of a strike. Bargaining with the union eventually broke down and the union struck for its economic demands. The day the strike commenced the employer signed a contract with the independent trucking contractor covering all of the employer's delivery work. The employer then notified the union and employees for the first time of the action taken and of its decision to remain in full operation. All employees other than those in the delivery department were invited to return to work and were told that all those who did not return would be replaced.

The Board found the employer guilty of violating section 8(a)(5) by reason of a failure to bargain concerning a mandatory subject, *i.e.*, its decision to subcontract.⁶⁹

On appeal the Ninth Circuit set aside the Board's order.⁷⁰ After pointing out that a struck employer has a right to try to keep his business operating,⁷¹ the court said:

We think that a requirement that, upon the occurrence of a strike, and before putting into effect a subcontracting arrangement designed to keep the struck business operating, the employer must offer to bargain about the decision to subcontract, would effectively deprive the employer of this method of meeting the strike. A mere naked offer to bargain would not end the matter. The union could, by accepting the offer, deprive the employer of an effective means of meeting the strike for a period of time that might render it valueless to the struck employer. An employer is under no duty to offer to bargain, after a strike starts, about a decision to hire replacements for strikers, even on a permanent basis.⁷²

The court went on to say that the Board's reliance on the *Railroad Telegraphers* case was not justified, and also that the employer had done nothing which would have the effect of converting the economic strike into an unfair

68. 321 F.2d 397 (9th Cir. 1963).

69. 139 N.L.R.B. 966 (1962). The Board also said that employer's letter to the strikers, informing them of the abolition of the delivery department and the subcontracting of that work, converted the economic strike into an unfair labor practice strike, and therefore the strikers could not be replaced. *Id.* at 969-70.

70. 321 F.2d 397 (9th Cir. 1963).

71. *Id.* at 400.

72. *Ibid.* The court cited *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

labor practice strike, thereby depriving the employer of the right to replace the strikers.⁷³ This decision therefore gives the employer another alternative to consider when studying the possibilities of subcontracting or automation. If he can foresee the possibility of a strike, he may want to wait until the strike to institute a change in operations and thereby avoid the problem of bargaining with the union concerning the decision to make the change.

An employer considering a change in operations must keep in mind that the Board has consistently held that the decision to subcontract or automate is a mandatory subject of bargaining, and that failure to bargain concerning it is an unfair labor practice. However, the courts have been almost as consistent in refusing to find any unfair labor practice in those cases where the subcontracting is done for economic reasons.⁷⁴ However, the decisions do indicate that the employer must bargain with the union about the *effects* of the decision to subcontract or automate.⁷⁵

B. *Total Abandonment of the Business*

An employer's decision to abandon his business entirely has not presented, at least up to this time, the same danger of a charge of unfair labor practice as the decision to subcontract has. When the decision is based upon bona fide economic motives, the courts have indicated that it is an absolute management right. In the case of *NLRB v. New England Web, Inc.*⁷⁶ the court said:

We start with the proposition that a businessman still retains the untrammelled prerogative to close his enterprise when in the exercise of a legitimate and justified business judgment he concludes that such a step is either economically desirable or economically necessary.⁷⁷

Although one recent case has said that an employer may go out of business

73. *Id.* at 401.

74. See, e.g., *Hawaii Meat Co.*, 139 N.L.R.B. 966 (1962), enforcement denied, 321 F.2d 397 (9th Cir. 1963). *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550 (1962), enforced, 322 F.2d 411 (D.C. Cir. 1963); *Adams Dairy, Inc.*, 137 N.L.R.B. 815 (1962), modified, 322 F.2d 553 (8th Cir. 1963); *Rochet*, 136 N.L.R.B. 1294 (1962); *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), enforced on other grounds, 316 F.2d 846 (5th Cir. 1963); *Jays Foods, Inc.*, 129 N.L.R.B. 690 (1960), enforcement denied, 292 F.2d 317 (7th Cir. 1961); *Rapid Bindery, Inc.*, 127 N.L.R.B. 212 (1960), modified, 293 F.2d 170 (2d Cir. 1961); *Lassing*, 126 N.L.R.B. 1041, enforcement denied per curiam, 284 F.2d 781 (6th Cir. 1960), cert. denied, 366 U.S. 909 (1961); *Brown-Dunkin Co.*, 125 N.L.R.B. 1379 (1959), enforced, 287 F.2d 17 (10th Cir. 1961).

75. See note 74 *supra*.

76. 309 F.2d 696 (1st Cir. 1962).

77. *Id.* at 700. Many of the subcontracting and automation cases previously discussed also support this fundamental right of the employer. "A change in operations motivated by financial or economic reasons is not an unfair labor practice under the Act." *NLRB v. Lassing*, 284 F.2d 781, 783 (6th Cir. 1960). See also cases cited in note 74 *supra*.

for any reason, even to avoid his duties under the law,⁷⁸ this is doubtful because the prevailing view does not go that far.⁷⁹ Major emphasis has been placed on the employer's *motives* in discontinuing all or a part of his business.⁸⁰ If the employer's motive is found to be discriminatory or to discourage union membership, he may be found guilty of an unfair labor practice and required to resume operations.⁸¹ Similarly, if the shutdown was merely a device to avoid bargaining with a union, the action may be held unlawful.⁸²

The Board has recently decided two cases, involving abandonment of a business, which indicate an adoption of its position in the subcontracting cases. The first, *Lori-Am, Inc.*,⁸³ involved a contractor in the garment industry who had recognized a union as bargaining agent for its employees. Relations between union and employer were amicable until the union demanded a wage increase which the employer's major customers refused to absorb. The employer finished the work that was in progress, shut down the business and sold all of its equipment. The Board found that the employer had violated its duty to bargain because it went out of business without discussing the decision with the union. The Board did not, however, order the employer to resume business. The *Neiderman* case⁸⁴ involved a similar situation in which the employer, a garment manufacturer, went out of business for reasons which the trial examiner felt were valid economic considerations, although there was some evidence of discriminatory practice. The Board disagreed and found, among other violations, a refusal to bargain. The Board ordered the employer to pay the discharged employees full wages from the date of the termination of the business until such time as they should secure "substantially equivalent" employment.

It is doubtful, in the face of the numerous precedents in this area,⁸⁵ that the courts will uphold this attempt by the Board to include the continuance of business in the mandatory class and thereby bring such vital decisions under the control of the Board.

78. *Darlington Mfg. Co. v. NLRB*, 325 F.2d 682 (4th Cir. 1963). This position was first suggested in dicta in *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1954): "But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business, or to actually dispose of his business to another, for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to a remedial liability under the Labor Management Relations Act . . ." *Id.* at 914.

79. See, e.g., *NLRB v. New England Web, Inc.*, 309 F.2d 696 (1st Cir. 1962); *District 65, Retail, Wholesale & Dep't Store Union v. NLRB*, 294 F.2d 364 (3d Cir. 1961); *NLRB v. R. C. Mahon Co.*, 269 F.2d 44 (6th Cir. 1959); and cases cited note 74 *supra*.

80. See note 77 *supra*.

81. *NLRB v. Cape County Milling Co.*, 140 F.2d 543 (8th Cir. 1944).

82. *Tak Trak, Inc.*, 128 N.L.R.B. 876 (1960), enforced, 293 F.2d 270 (9th Cir.), cert. denied, 368 U.S. 938 (1961).

83. 137 N.L.R.B. 1099 (1962).

84. 140 N.L.R.B. 678 (1963).

85. See, e.g., cases cited notes 74 & 77 *supra*.

C. *Hard Bargaining*

There is one further area of collective bargaining which may involve future danger for employers, namely, the area of "hard" bargaining. Although the theory of the NLRA is voluntary collective bargaining in good faith, the Supreme Court has said:

[I]t is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of *frank statement* and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.⁸⁶

Nevertheless, the Board has been judging the substantive terms of bargaining agreements and has been compelling concessions, and will apparently strike down any attempt at "frank statement bargaining."

In *Radiator Specialty Co.*,⁸⁷ the employer was guilty of violating section 8(a) (1) of the act because of the public and private statements of various officers and foremen concerning the employer's hostility to the union and threats of loss of jobs. Although these violations were sufficient evidence upon which to base a decision, the Board nonetheless went into an exhaustive account of the course of negotiations between the employer and the union. The parties were deadlocked on the issues of wages, overtime, grievance procedures and arbitration, a no-strike clause, and a hospitalization plan, all of which are mandatory subjects. The only disputed clause not clearly mandatory was a liability clause guaranteeing to both the union and the employer their full legal rights in the event of any violation of the contract induced by the other. On the basis of these facts the Board found that the employer had failed to bargain in good faith. Apparently, to meet the Board's standards, the employer would have had to make concessions to the union demands and reach agreement on some issues.

In another recent case, an NLRB trial examiner found that an employer violated his duty to bargain in good faith by insisting upon the inclusion of a no-strike clause in the contract while refusing to accede to a union demand for an arbitration clause.⁸⁸ The trial examiner reasoned that since the union's right to strike is carefully protected by law and the union's bargaining power depends upon this right, the employer's demand, when coupled with its refusal to grant arbitration rights to the union, would result in the employer's having the sole right to make all decisions, with the employees having no right to strike. He therefore concluded as he did because the union's only alternative to granting the employer's contract demands would have been to strike, and he did not feel that Taft-Hartley was not meant to allow a union to be forced to strike in order to secure the right to bargain over the administration of a contract.

86. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). (Emphasis added.)

87. 143 N.L.R.B. No. 42 (1963).

88. *H. K. Porter Co.*, Case No. 5-CA-2344 (Sept. 29, 1963), summarized in *BNA News & Background Information*, 1 Lab. Rel. Rep. (54 L.R.R.) 101 (Sept. 30, 1963).

Despite the logic of the examiner's conclusion, the fact remains that both the matters involved were *mandatory* bargaining subjects, regarding which either party is entitled to insist upon its position. The trial examiner's position was that the employer must make concessions to the union to avoid violating his duty to bargain. Such a requirement, however, is clearly erroneous in view of the statutory pronouncement that "such obligation does not compel either party to agree to a proposal or require the making of a concession . . ." ⁸⁹

There is at the moment a direct attack being made upon the employer's right to make a frank statement of its position. Such an approach to bargaining, used by the General Electric Company, has been under attack for years, and is presently the subject of a trial examiner's intermediate report in the case brought by the International Union of Electrical, Radio and Machine Workers against General Electric.⁹⁰ This report is now awaiting Board action. The trial examiner found G.E. guilty of bad faith bargaining, and his report indicates that he did judge the substantive terms which were bargained. The report also shows that his conclusion as to G.E.'s bad faith was based upon its failure to grant concessions and to agree to union proposals. Such a result was certainly never foreseen by Congress when considering the NLRA.⁹¹

V. CONCLUSION

Certainly there exist serious problems in the field of collective bargaining, with both labor and management having a great deal at stake. For the employee, subcontracting and automation mean a threat to security, and possible unemployment. For the employer it means the power to make the basic decision of when, where and how to expend capital and managerial effort. The public, too, has an interest in the solution of these problems. Further unemployment with its great cost in man-hours may well become intolerable. However, further pre-emption of management prerogatives may be no more acceptable an answer to the problem. It is generally felt that decisions which have such a vital impact on the nation should be seriously considered on both sides, and that there should be bargaining over the *effect* of such decisions. Granting this, we must also recognize that chances for satisfactory and successful bargaining are lessened when automation, subcontracting, or abandonment of a business is presented as a *fait accompli*. Nevertheless, the Board has endeavored to cover a situation for which the NLRA was not designed, and has thereby succeeded only in creating greater confusion. What is needed instead is a definitive pronouncement on this express problem, coming not from the Board but from either the Supreme Court or Congress.

89. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

90. 52 L.R.R. 53 (1963).

91. See notes 3 to 10 *supra* and accompanying text.