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SUBCONTRACTING, PLANT CLOSURES AND PLANT REMOVALS: THE DUTY TO BARGAIN AND ITS PRACTICAL IMPLICATIONS UPON THE EMPLOYMENT RELATIONSHIP

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I. Introduction

With the continued rapid expansion of industrial technology and the current presence of burdensome double-digit inflation and economic recession, American businesses are increasingly faced with the necessity of making major structural changes in their methods of operation in order that their company's products or services may remain competitive in the marketplace. Economic difficulties, as well as computer-age technology and market-

ing techniques, have forced the modern businessman to either refurbish his outmoded production and sales methods or allow his share of potential business profits to fall prey to the eager efforts of his competitors. As a consequence, increasing numbers of employers are utilizing basic operational alterations such as subcontracting, partial plant or division closings, plant relocations and even termination and reorganization of their businesses in an effort to increase their productivity.[1]

Employer attempts to unilaterally invoke such business alterations have had a dramatic impact on the stability of the employment relationship and have produced a wealth of litigation relating to the confusing issue of which types of business alterations constitute mandatory subjects of bargaining under the National Labor Relations Act[2] (hereafter NLRA). While a period of over fifteen years has elapsed since the Supreme Court handed down the seminal decisions of *Fibreboard Paper Products Corp. v. NLRB*[3] and *Darlington Manufacturing Co. v. NLRB*,[4] the law concerning the issue of when an employer is burdened with the mandatory duty to bargain concerning a decision to subcontract unit work, to close a portion of his business facility or to relocate his operation, has remained in a state of uncertainty.[5]

Thus, in order for the practitioner to properly advise his clients concerning this somewhat confusing area of labor relations, a thorough familiarity with the current body of decisional law as well as a clear understanding of the conflicting interests of the parties to the employment relationship and the balancing of those competing interests under the congressionally mandated process of collective bargaining is necessary.

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1. *See generally* Fastiff, *Changes in Business Operations: The Effects of the National Labor Relations Act and Contract Language on Employer Authority*, 14 SANTA CLARA LAW. 281 (1974); Tiballi, *Mandatory Subjects of Bargaining—Operational Changes*, 17 FLA. L. REV. 109 (1964); Note, *The Application of Mandatory Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918 (1974).

2. Section 8(a)(5) of the National Labor Relations Act stipulates that it shall be an unfair labor practice for any employer to "refuse to bargain collectively with the representatives of his employees. . . ." 29 U.S.C. § 158(a)(5) (1976). The topics over which an employer is obligated to bargain with an employee representative are defined in the Act as "wages, hours, and other terms and conditions of employment. . . ." *Id.* § 158(d).

3. 379 U.S. 203 (1964).

4. 380 U.S. 263 (1965).

5. *Compare* Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1039 (8th Cir. 1970); NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967) *and* NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965) *with* NLRB v. First Nat'l Maintenance Corp., 627 F.2d 596 (2d Cir. 1980); Davis v. NLRB, 617 F.2d 1264 (7th Cir. 1980); Midland-Ross Corp. v. NLRB, 617 F.2d 977 (3d Cir. 1980); Production Molded v. NLRB, 604 F.2d 451 (6th Cir. 1979) *and* Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978).

II. The Theory of Collective Bargaining and its Impact upon the Employment Relationship

No theory of negotiation between an employer and his employees has had a more significant impact on the employment relationship than the legislated concept of collective bargaining. Clearly, the statutorily-imposed bargaining structure constituted one of the most substantial additions to the traditional employment relationship through establishment of the concept of egalitarianism or "partnership" in the negotiation process with the enactment in 1947 of the Labor Management Relations Act.[6]

The codification of this concept of partnership marked a successful congressional effort to eliminate, to a certain degree, the disparity in bargaining position between employer and his workforce in an effort to promote industrial peace and harmonious employment relationships.[7] While the basic validity of the theory behind collective bargaining is easily recognized, the bargaining process only culminates in an agreement when the parties are able to successfully compromise their oftentimes fiercely competitive employment interests.

The primary managerial interest may be perhaps characterized most simplistically as that of efficient and cost effective production. In recognizing the employer's significant capital investment and overriding interest in the efficient operation of his business enterprise, the National Labor Relations Board (hereafter Board) had traditionally accorded the employer the right to formulate and implement basic business structural changes on a unilateral basis.[8]

As a consequence, management has zealously guarded its right to exercise its entrepreneurial control in the areas of subcontracting unit work, partial closure or termination of plant facilities, and removal of all or part of its

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6. 29 U.S.C. § 141 (1976). *See generally* Cox, Bok & Gorman, Cases on Labor Law, 750-51 (8th ed. 1977).

7. Section 1 of the Labor Management Relations Act stipulates that "[t]he inequity of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions. . . ." 29 U.S.C. § 151 (1976).

8. *Cf.* NLRB v. Mahoning Mining Co., 61 N.L.R.B. 792, 803 (1945) (where the Board announced unequivocally that it had never held that "an employer may not in good faith . . . change his business structure [or] sell or contract out a portion of his operation . . . without first consulting the bargaining representative . . ."). *See also* Walter Holmes & Co., 87 N.L.R.B. 1169 (1949).

Deference given to the employer's right to manage his enterprise is also noted in the text of statements taken from a debate in the House of Representatives during the formulation of the Labor Management Relations Act of 1947, in which it was noted that "[t]he union has no right to bargain with the employer about . . . how he shall manage his business . . . ." H. Rep. No. 245, 80th Cong., 1st Sess. 22-23 (1947), in 1 LMRA Legislative History 313-14 (1948). *See also* Summerville, *Subcontracting: A Volatile Subdivision of Labor Law*, 7 Washburn L.J. 97 (1967).

business operation to a new location. Decisions to undertake such radical business alterations have traditionally been made only after the employer has undertaken a detailed analysis of the economic conditions which appear to necessitate the alteration.[9]

In stark contrast to the employer's interest in implementing a decision to alter his business operation, the employees are confronted with the threat of the loss of their employment in virtually every instance. It is unquestioned that one of the paramount concerns of any employee is that of job security, and it is often argued that employees have a vested interest in any operational decision which will affect their employment longevity.[10]

The employee representative is also frequently burdened with the arduous chore of cajolling or coercing the employer into collective bargaining concerning the employer's decision to alter the structure of the company, as the union frequently has its very existence threatened by the employer's impending unilateral action. Finally, the American public has a vested interest in the promotion of maximum business productivity through the cultivation of harmonious employment relations and industrial peace.

The collective bargaining process must reconcile management's interests in business autonomy (ultimately society's interest in maximizing output of real goods and services from the limited resources available) with society's concern for the material interests of the employees. The NLRA was purposely codified without precise specification of the mandatory subjects of bargaining in an effort to permit the NLRA to meet the changing conditions of the maturing employment relationship.[11]

However, while Congress studiously avoided formulating an exhaustive laundry list of mandatory subjects of bargaining, both the Board and the

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9. *See generally* Note, *Plant Relocation; Viewed After Denial of Enforcement of Board's "Run Away Shop" Remedy in Garwin*, 20 VAND. L. REV. 1062 (1967). *See also Annot.*, 5 A.L.R.3d 733 (1966). For further discussions regarding the employer's right to consider his relationship with the union as one factor in the context of his survey of the broad economic picture of the cost of his operation, see NLRB v. Rapid Bindery, 293 F.2d 170 (2d Cir. 1961), and NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960).

10. The basic conflict between the employer's interest in business autonomy and the employee's interest in job security has been highlighted in the following manner:

> An employer's decision to make a "major" change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be saleable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.

Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966).

11. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Order of Railroad Telegraphers v. Chicago & N. Ry., 362 U.S. 330 (1960); Railroad Telegraphers v. Railroad Express Agency, 321 U.S. 342, 346 (1944). *See generally* Note, *Through a Looking Glass Darkly: Fibreboard Five Years Later*, 21 LAB. L.J. 755 (1970).

courts have been obliged to assume the burden of defining which types of decisions to alter the structure of a business constitute mandatory subjects of bargaining under section 8(d) of the NLRA. Due to the inherent difficulty in defining such subjects, the frequent lack of uniformity in analysis engaged in by the Board and the courts, and the paucity of consistent direction offered in the decisions of the adjudicating bodies, employers and their legal representatives have been left in a quandry concerning which business changes are mandatory subjects of bargaining.

The following three sections of this Article will focus upon the prevalent business operational changes of subcontracting, plant closure and plant removal, in an effort to analyze under what circumstances the Board and the courts have considered unilateral employer action to constitute a violation of the duty to bargain as set forth in sections 8(a)(5) and 8(d) of the NLRA. The final portion of the Article is devoted to the discussion of a number of pragmatic observations concerning the manner in which the law in this difficult area of labor relations has impacted upon the employment relationship and the promotion of harmonious industrial relations.

III. Subcontracting: Fibreboard and its Progeny Fifteen Years Later

Just as the enumerated list of mandatory subjects of bargaining has increased significantly[12] since the enactment of the NLRA, so also has the definitional scope of subcontracting been broadened to include a wide variety of activities.[13]

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12. The following cases are illustrative of the steadily expanding scope of mandatory subjects of bargaining: Cooper Thermometer Co., 376 F.2d 684 (2d Cir. 1967) (transfer of employees); Houston Chapter, Associated Gen. Contractors, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966) (nondiscriminatory hiring hold clause); Farmers Coop. Compress, 169 N.L.R.B. 290 (1968) (elimination of racial discrimination); Dixie Ohio Express, 167 N.L.R.B. 573 (1967), *rev'd*, 409 F.2d 10 (6th Cir. 1969) (reorganization of operations); Gulf Power Co., 156 N.L.R.B. 622 (1966) (safety rules); Renton News Record, 136 N.L.R.B. 1294 (1962) (automation).

13. The definition of subcontracting is given a broad construction in its application. *See* Updegraff, Arbitration and Labor Relations 324-25 (1970), in which the definitional problem is described as follows:

> Subcontracting or contracting out is used synonymously in labor relations and means making an agreement to have another person (human or corporate) do construction, perform service, or manufacture or assemble products that could be performed by payroll, unit employees. The terms are at times misleadingly used to cover transferring work from unit to nonunit employees or to another plant of the employer. Strictly speaking, these last two meanings or uses of the term are inaccurate, but since the changes to which they apply have the effect of taking work from one group of employees and giving it to others, they are included in the area under discussion. Some awards have been made resting on the conclusion that such work was improperly taken from one worker or group and given to another.

See also Trotta, Arbitration of Labor Management Dispute 317 (1974), where the author states:

> Work subcontracting to outside firms to produce goods or render services that could

From a brief historical analysis of those cases which preceded the Supreme Court's decision in *Fibreboard Paper Products*,[14] and through an assessment of the *Fibreboard* decision and those subsequent cases which have both affirmed and disaffirmed its mode of analysis, it may be possible to glean the present posture of the Board and the courts toward the imposition of a duty to bargain upon an employer invoking a subcontracting business alteration. A cogent grasp of the majority and concurring opinions in *Fibreboard* is also imperative to an understanding of the current posture of the law relating to the issues of partial plant closure and plant removal.

A. *The Historical Foundation for the Fibreboard Decision*

Traditionally, the Board and the courts held that an employer was not obligated to bargain with the union concerning the termination of unit work or the substantial alteration of a business structure.[15] However, in 1946, the Board made one of its initial ventures into the field of management prerogatives concerning the structure of business operations when it decided the case of *Timken Roller Bearing Co.* and held that the employer must bargain with the union over a subcontracting decision.[16]

In cases subsequent to the Board's holding in the *Timken Roller Bearing* case, the Board continued to require bargaining concerning the effects of subcontracting and began to focus more stringently upon employers who were motivated by anti-union animus in their subcontracting decisions.[17]

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be performed by bargaining unit employeees with the company's facilities gives rise to many disputes. The transfer of work from the bargaining unit to nonunit employees or to another plant of the same company is considered subcontracting.

For two excellent reviews on the topic of subcontracting, see Rabin, *Fibreboard and the Termination of the Bargaining Unit Work: The Search For Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 809 (1971); Comment, *Employer's Duty to Bargain About Subcontracting and Other 'Management' Decisions*, 64 COLUM. L. REV. 294 (1964).

14. 379 U.S. 203 (1964).

15. *Cf.* Mahoning Mining Co., 61 N.L.R.B. 792, 803 (1945) (the Board clearly implied that an employer had no duty to bargain over subcontracting or other business changes of similar import, regardless of unionization, even though the changes "might effect the constituency of the appropriate unit").

16. 70 N.L.R.B. 500 (1946) (employer had a duty to bargain concerning the contracting out of work then being performed by unit employees). The Board's ruling was construed by many observers as a substantial threat to employer autonomy because there existed a previous history of subcontracting of unit work by the employer and there was no evidence of anti-union animus. *Id.*

17. *See* NLRB v. Brown-Duncan Co., 287 F.2d 17 (10th Cir. 1961); NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960) (enforcement of Board order denied); Jays Foods, Inc., 129 N.L.R.B. 690 (1961); Houston Chronicle Pub. Co., 101 N.L.R.B. 1208 (1952). In each of the aforementioned cases, the Board found that the employers had utilized subcontracting and the subsequent discharge of the employees as an effective means of combating union representation. *See also* NLRB v. Crompton-Hiland Mills, 337 U.S. 217, 225 (1948); May Dep't Stores v. NLRB, 326 U.S. 376, 385 (1945); NLRB v. Burton Dixie Corp., 210 F.2d 199, 201 (10th Cir. 1954).

In the well known but frequently misinterpreted case of *Shamrock Dairy, Inc.*, 124

In 1962, the Board rendered its decision in *Town & Country Manufacturing Co.*[18] in which it established, through dictum, the basic rationale for the later Supreme Court holding in the *Fibreboard Paper Products*[19] decision that a program of subcontracting constituted a mandatory subject for bargaining.

B. *Fibreboard: The Creation of an Abysm Concerning the Duty to Bargain?*

The decision rendered by the Supreme Court in *Fibreboard Paper Products* has been the subject of numerous articles and commentaries[20] and the importance of the mode of analysis and rationale set forth in the opinion rendered by Chief Justice Warren for the majority and Justice Stewart in his concurring opinion cannot be over-emphasized.

In *Fibreboard*, the employer had undertaken a study of the possibility of effectuating cost savings in its maintenance operation through the institution of a program of subcontracting, with an independent contractor taking over the maintenance work.[21] In communicating its unilateral decision to the union, the employer indicated that its decision was predicated upon the financial burden the company had experienced in handling its own maintenance work.[22] Additionally, the company indicated that it was willing to respond to questions by the union concerning the effects of the decision.[23] The

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N.L.R.B. 494 (1959), the Board held that an employer violated section 8(a)(5) of the NLRA concerning its unilateral economic decision to convert its truck driver-employees into independent contractors. *Id.* at 496. The remedy which was adopted by the Board did not order the company to abrogate the contracts which it had previously codified but did command the company to bargain with the employees concerning the impact of the subcontracting on the implementation of independent distributorship arrangements. *Id.* at 502.

In the later case of *Squirt-Nesbitt Bottling Corp.*, 130 N.L.R.B. 24 (1961), a hearing examiner interpreted the Board's decision in the *Shamrock Dairy* case to require an employer to bargain about the *very decision* to institute an independent contractor system of distribution as well as the necessity of bargaining about the effects of the implementation of such a decision. 130 N.L.R.B. at 33-34.

18. 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963). While the narrow holding of the Board, as affirmed by the Fifth Circuit in the *Town & Country* case, simply prohibited unilateral subcontracting predicated upon anti-union considerations, the broad dictum posited by the Board intimated that an employer was obligated to bargain concerning his decision to contract irrespective of anti-union motivations. 136 N.L.R.B. at 1027. The Board stated that the elimination of unit jobs, albeit for valid economic considerations, was a matter within the "terms and conditions of employment" under section 8(a)(5) of the Act. *Id.*

19. 379 U.S. 203 (1964).

20. *See generally*, Rabin, *Fibreboard and the Termination of the Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 809 (1971); Comment, *Employers' Duty to Bargain about Subcontracting and other 'Management' Decisions*, 64 COLUM. L. REV. 294 (1964).

21. 379 U.S. at 206.

22. *Id.*

23. *Id.*

union reacted to the company's decision by filing unfair labor practice charges against the company alleging that the unilateral decision to subcontract violated sections 8(a)(1), 8(a)(3) and 8(a)(5) of the NLRA.[24]

In its decision rendered upon reconsideration of the case, the Board affirmed the trial examiner's finding that the company was not motivated by anti-union animus in its decision to subcontract out the plant's maintenance work.[25] However, the Board did find that the company had violated section 8(a)(5) of the NLRA through its failure to negotiate with the union with regard to its decision to let out its maintenance work to an independent contractor.[26]

The Board predicated its decision upon the premise, which had begun to evolve out of the dictum in the *Town & Country Manufacturing Co. v. NLRB* case,[27] that collective bargaining should be undertaken concerning any subcontracting decision which affected the "terms and conditions" of employment.[28]

The Court of Appeals for the District of Columbia granted the Board's petition for enforcement.[29] The Supreme Court then granted certiorari and affirmed the Board's finding that the employer had violated sections 8(a)(5) and 8(d) of the Act through its replacement of employees in the existing bargaining unit by employees of an independent contractor performing the same work under substantially similar conditions.[30]

In its "pro-employee rights" analysis, the Court noted that the contracting out of unit work performed by members of the bargaining unit necessarily resulted in the termination of employment which was construed by the Court to be a "condition of employment."[31] In drawing upon the articulated congressional policy which sought to promote industrial peace through collective bargaining, Chief Justice Warren concluded that subcontracting was a mandatory subject of bargaining under section 8(d) of the Act.[32]

The majority opinion found that the facts in the *Fibreboard* case were ideally suited to the process of collective bargaining negotiations inasmuch

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24. *Id.* at 207. *See* note 2 *supra* for the text of 8(a)(5). Section 8(a)(1) states that it shall be an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section seven." 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(3) states that "it shall be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1976).

25. 379 U.S. at 208.

26. *Id.*

27. 316 F.2d 846 (5th Cir. 1963).

28. *Id.* at 847.

29. 379 U.S. at 208. *See* 322 F.2d 441 (D.C. Cir. 1963).

30. 379 U.S. at 215.

31. *Id.* at 210-13; *Cf.* Order of R.R. Telegraphers, Chicago N.W. Ry. Co., 362 U.S. 330 (1960) (containing a discussion detailing a more literal interpretation of the phrase "terms and conditions of employment").

32. 379 U.S. at 214-15.

as the company's decision to contract out maintenance work did not significantly alter the employer's operation nor did it require substantial capital investment or withdrawal.[33] The Court concluded that the employer's freedom to manage its business would not be substantially abridged by virtue of the bargaining requirement and that the scope of the decision was not intended to encompass other factually distinct forms of subcontracting.[34]

1. *Justice Stewart's Concurring Opinion: Concurrence or Dissent?*

Mr. Justice Stewart, who was joined in his well reasoned concurring opinion by Justice Douglas and Justice Harlan, stated that the majority opinion did not decide that every managerial decision which terminates an individual's employment would be necessarily held to be a mandatory subject of bargaining.[35] Nor, in Stewart's view, did the majority of the Court hold that subcontracting decisions generally were subject to the bargaining duty.[36] Rather, he stated that the Court's opinion was strictly limited to the articulated circumstance in which employees in the existing unit were replaced by employees of an independent contractor performing work under substantially similar working conditions.[37]

Turning to the ultimate question of the scope of the duty to bargain, Stewart's opinion stated that several circuit courts had interpreted the statutory phrase "conditions of employment" narrowly, thus excluding many varieties of management decisions which could be construed to have some impact upon an employee's job security.[38]

In rendering the statement which was soon to become the battle cry of those who argued that the strength of the court's decision lay in the concurrence, Justice Stewart remarked:

> Nothing the court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions which lie at the core of entrepreneurial control. Decisions concerning commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.[39]

In concluding his "pro-management" analysis, Justice Stewart stated

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33. *Id.* at 213.
34. *Id.*
35. *Id.* at 218.
36. *Id.*
37. *Id.* at 218.
38. *Id.* at 221-22. *See, e.g.*, NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963); NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962); NLRB v. Rapid Bindery, 293 F.2d 170 (2d Cir. 1961); Jays Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961); NLRB v. Houston Chronicle Pub. Co., 211 F.2d 848 (5th Cir. 1954); Mount Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954).
39. 379 U.S. at 223.

that Congress had the authority and duty to decide whether further inroads were to be made on an employer's prerogative to manage his business.[40] Noting that a broad incursion of a duty to bargain would depart from "the traditional principles of free enterprise economy,"[41] Justice Stewart emphasized that the majority opinion was to be properly limited to its facts.

C. *The Interpretation and Application of the Fibreboard Decision: The Battle Rages On*

In the fifteen years since the Supreme Court rendered its decision in the *Fibreboard Paper Products* case, the impact of the case, through the different methods of analysis utilized by the pro-employee rights majority and pro-management concurrence, has grown rather than diminished in significance. While the decision's influence on mandatory bargaining topics continues, the Court in *Fibreboard* did not succinctly define the proper scope of bargaining concerning business decisions to institute major structural alterations. As a consequence, employers and their legal advisors are still forced to undertake the extremely difficult task of attempting to examine Board and Court holdings to decipher the circumstances under which mandatory bargaining is required. Pertinent case decisions in the area of subcontracting and unilateral alteration of methods of operation may be grouped into cases involving pure economic motivation, and cases involving a mixture of anti-union sentiment and economic motivation.

1. *Pure Economic Motivation and the Duty to Bargain*

The thrust of the NLRB's construction of the *Fibreboard* decision has hinged upon the willingness of the Board to construe the statutory phrase "terms and conditions of employment" as encompassing virtually any decision by an employer which has the ultimate effect of terminating bargaining unit work or demolishing the employment security of those laborers who comprised the effected unit.[42]

In its apparent disregard of the Supreme Court's caveat expressly limiting the scope of the *Fibreboard* decision,[43] the Board has sought to promote the decision as resolving the broad issues concerning management's duty to bargain with regard to basic business alterations and the necessary protections to be afforded employee job security. The apparent rationale for the

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40. *Id.* at 225-26.

41. *Id.* at 226.

42. *See, e.g.*, Town & Country Mfg., Co., 136 N.L.R.B. 1022, 1027 (1962), *aff'd*, 316 F.2d 846 (5th Cir. 1963); Winn-Dixie Stores, Inc., 147 N.L.R.B. 788 (1964). *See generally* Makoul, *Plant Removals, Shutdowns and Subcontracts Under the National Labor Relations Act*, 38 TEMPLE L.Q. 299 (1965); Rabin, *supra* note 21; Note, *Duty to Bargain, Subcontracting, Relocation and Partial Termination*, 55 GEO. L.J. 879 (1967).

43. 379 U.S. at 215 ("We are thus not expanding the scope of mandatory bargaining").

Board's strict adherence to the broad interpretation of the *Fibreboard* decision is founded upon the premise that unilateral employer action which tends to affect employment security threatens to inhibit the employees' exercise of their section seven rights under the NLRA, thus ultimately promoting the destruction of the bargaining unit.[44] As a consequence, even absent the presence of anti-union animus, the Board has generally required the employer to bargain with the union representative, regardless of the purity of the employer's economic motivation, if the decision has a substantial effect on the employment security of the company's employees.[45]

A case which is particularly illustrative of the Board's typical posture with regard to an employer's unilateral decision to subcontract unit work based upon pure economic motives is the case of *Empire Dental Co.*[46] In *Empire Dental,* the Board found that an employer who practiced dentistry and operated a dental laboratory violated section 8(a)(5) of the NLRA where he failed to bargain with the union concerning his decision and the effects of that decision to subcontract unit work.[47]

In the course of its analysis, the Board noted that an employer was not obligated to bargain concerning every decision to contract out work and reiterated the Supreme Court's statement that *Fibreboard* should not be read as "laying down a hard and fast new rule to be mechanically applied regardless of the situation involved."[48] Nevertheless, the Board found that the decision to subcontract in the *Empire Dental* case involved neither a situation in which a decision was so firm that no amount of negotiations could alter it nor a circumstance which involved a significant investment or withdrawal of capital.[49] Instead, according to the Board, the proper test to be utilized should determine that if the considerations attending the decision to subcontract are suitable for resolution through the process of collective bargaining, the union must generally be given the opportunity to negotiate concerning such a decision.[50] Additionally, the Board found that there existed no evidence indicating that the employer had engaged in an established past practice of subcontracting or that the union had been given the opportunity in previous negotiations to bargain over the company's subcontracting practices.[51] Thus, in spite of the fact that the employer was obviously burdened

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44. Section seven of the NLRA stipulates that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157 (1976).

45. *See* Empire Dental Co., 211 N.L.R.B. 860 (1974); Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1027 (1962).

46. 211 N.L.R.B. 860 (1974).

47. *Id.*

48. *Id.* at 867 (quoting Sucesion Mario Mercado & Hijos, 161 N.L.R.B. at 700).

49. *Id.*

50. *Id.*

51. *Id.* at 868.

by long term economic difficulties relating to the expense and quality of its laboratory work, the question of laboratory technician skills and salary levels were not construed to be matters at the core of entrepreneurial control and were held to be squarely within the appropriate framework for treatment through the bargaining process.[52]

The Board's method of analysis has been extended beyond those cases involving subcontracting to other types of unilateral alterations in the method of production. The Board has held that employer decisions to mechanize operations,[53] to consolidate operations,[54] to discontinue production lines and departments,[55] and to transfer unit work traditionally performed by employees,[56] also constitute unlawful unilateral decisions by an employer.

Just as the Board, in the years since the *Fibreboard* case, has sought to extend the majority opinion in *Fibreboard* to its logical extreme, a number of the circuit courts, to the contrary, have adopted a liberal interpretation of Justice Stewart's concurring opinion, while seeking to limit *Fibreboard* to its narrow factual circumstances. As a consequence, the courts have generally tended to give great deference to managerial perogatives, typically scrutinizing unilateral actions from the vantage point of the employer rather than that of the employee.[57] Thus, many of the courts have analyzed an employer's decision to unilaterally subcontract or to alter a method of production in terms of whether the decision:

1. Involved a basic capital investment,
2. Signified a basic alteration of the employer's operation, or
3. Concerned work to be performed outside of the plant of a different character or under different conditions.

In spite of some inconsistencies in application of analysis in some circuits,[58] when an employer's decision reveals a basic operational alteration, the courts have generally been loathe to impose a duty to bargain concerning such a decision.[59]

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52. *Id.*

53. *See* Doug Neal Management Co., 226 N.L.R.B. No. 157 (1976); Renton News Record, 136 N.L.R.B. 1294 (1962).

54. *See, e.g.*, Aero Space Supply, Inc., 238 N.L.R.B. No. 181 (1978).

55. NLRB v. W. R. Grace & Co., 230 N.L.R.B. 617 (1977).

56. Boeing Co. v. NLRB, 581 F.2d 793 (9th Cir. 1978) (denying enforcement of Board order); Brown Co., 243 N.L.R.B. No. 100 (1979); ACF Indus., Inc., 234 N.L.R.B. 1063 (1978).

57. *See* Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976); International Union, United Auto, Aerospace & Agri. Impl. Workers v. NLRB, 470 F.2d 422 (D.C. Cir. 1972).

58. *See, e.g.*, Winn Dixie Stores, Inc., 361 F.2d 512 (5th Cir. 1966); Town & Country Mfg. Co., 136 N.L.R.B. 1022 (1962), *enf'd*, 316 F.2d 846 (5th Cir. 1963).

59. *See* NLRB v. Drapery Mfg. Co., 425 F.2d 1026, 1027-28 (8th Cir. 1970); NLRB v. King Radio Corp., 416 F.2d 569, 572 (10th Cir. 1969); NLRB v. Thompson Transport Co., 406 F.2d 698, 703 (10th Cir. 1969); NLRB v. United Nuclear Corp., 381 F.2d 972, 977 (10th Cir. 1967). *But see* NLRB v. Johnson, 368 F.2d 549, 551 (9th Cir. 1966); NLRB v. Northwestern Publ. Co., 343 F.2d 521, 525-26 (10th Cir. 1969).

Two decisions rendered by circuit courts which tend to highlight the "pro management" method of analysis utilized by some of the courts upon review of Board decisions are the cases of *NLRB v. Adams Dairy, Inc.*,[60] and *Hawaii Meat Co. v. NLRB*.[61] In the *Adams Dairy* decision, the Eighth Circuit engaged in a severely restrictive reading of the *Fibreboard* majority opinion and reversed an order of the Board requiring an employer to notify and to bargain with the union concerning its decision to subcontract work.[62] The court's analysis hinged primarily on the determination that the subcontracting in *Adams* constituted a basic change in the employer's business operation.[63] The economic justifications for the employer's decision were accepted by the court under circumstances in which the employer had liquidated a portion of its business in order to institute the subcontracting arrangement, and had thereby lost a significant measure of control over the goods once they were transferred to the independent contractor.[64] In spite of the Supreme Court's admonition to reconsider the *Adams* decision in light of the *Fibreboard* case,[65] the circuit court subsequently adhered to its original decision, distinguishing *Fibreboard* on the facts and holding that *Adams Dairy* involved a basic operational change and a significant capital investment.[66]

A similar approach was taken by the Ninth Circuit in the *Hawaii Meat* case as the majority opinion refused to enforce the Board order requiring the employer to bargain with the union over subcontracting of unit work during the course of an economic strike.[67] The rationale articulated by the Ninth Circuit again reflects the deference which many of the circuit courts have generally given to managerial exercises of operational autonomy.

The court focused on the fact that the employer's primary concern was the maintenance of his business operation during the projected period of an economic strike.[68] As a consequence, the court refused to impose a duty to bargain upon the employer even when the effect of the employer's decision to permanently subcontract the unit work ultimately had an impact upon the employee's job security.[69]

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60. 322 F.2d 553 (8th Cir.), *vacated*, 379 U.S. 644, *aff'd on rehearing*, 350 F.2d 108 (8th Cir. 1965).

61. 321 F.2d 397 (9th Cir. 1963).

62. 350 F.2d at 109.

63. *Id.* at 111.

64. *Id.*

65. *Id.* at 109. *See* 379 U.S. 644 (1965).

66. 350 F.2d at 109.

67. 321 F.2d at 399.

68. *Id.* at 400.

69. *Id.* at 401. *See also* NLRB v. Abbott Publishing Co., 331 F.2d 209, 213 (7th Cir. 1964); Pittsburgh Die Sinkers v. Pittsburgh Forgings Co., 255 F. Supp. 142, 145 (W.D. Penn. 1966) (quoting Abbott Publishing Co.); Shell Oil Co., 149 N.L.R.B. 283 (1964); Shell Chemical Co., 149 N.L.R.B. 298 (1964). *Cf.* Empire Terminal Warehouse Co., 151 N.L.R.B. 1359, 1365 (1965) (an employer was not obligated to bargain concerning a decision to subcontract unit work dur-

As is illustrated by the *Adams Dairy* and *Hawaii Meat* cases, as a result of the disparate methods of analysis utilized by the NLRB and the circuit courts, a rather significant number of conflicts had arisen in the decisions rendered by each body during the period of the latter 1960's through the middle 1970's.[70]

Recognizing the obvious disjunction between the method of analysis and eventual decisions rendered by the Board and the circuit courts, perhaps the most lucid conclusion to be reached is that the Board, even in cases of pure economic motivation, is likely to impose a duty to bargain if the unilateral action taken by the employer produces some verifiable, adverse effect on the terms and conditions of employment.[71] In contrast, many circuit courts have recognized the employer's right to unilaterally implement an operational change when any evidence substantiates the claim that a basic capital or structural alteration has occurred.[72]

2. *"Mixed" Motivation and the Duty to Bargain*

In an analysis of those cases in which an employer's unilateral decision to subcontract work or to alter methods of production is based upon a mixture of anti-union sentiments and economic factors, the considerations pertaining to which adjudicatory body has decided the case and which mode of analysis is utilized remain extremely important criteria.

While the Board and the circuit courts have generally tended to utilize the majority and concurring opinions in the *Fibreboard* decision as the foundational underpinning for holdings rendered since *Fibreboard,* the balancing of anti-union motivations with the employer-articulated economic concerns serves to distinguish the cases in this section from those decisions dealing purely with economic factors.

Generally, the Board has taken the position that an employer who has manifested discriminatory motivations in effecting unilateral changes in his business, is liable for violations of sections 8(a)(3) and 8(a)(5) of the NLRA irrespective of the existence of valid economic factors.[73] While the holdings rendered by the Board in cases of mixed motivation have been quite consistent, the Board's method of analysis, as derived from the majority opinion

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ing an economic strike where management's intention was to adopt the subcontracting arrangement merely as a temporary measure to continue the business operation).

70. *See, e.g.,* NLRB v. Drapery Mfg. Co., 425 F.2d 1026 (8th Cir. 1970); NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3rd Cir. 1965); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965); Hawaii Meat v. NLRB, 321 F.2d 397 (9th Cir. 1963).

71. *See* text accompanying notes 42-56 *supra.*

72. *See* text accompanying notes 57-65 *supra.*

73. *See, e.g.,* NLRB v. Jackson Farmers, Inc., 457 F.2d 516 (10th Cir. 1972); Syufy Enterprises, 220 N.L.R.B. 738 (1975); Southeastern Envelope Co., 206 N.L.R.B. 933 (1973); Arnold Graphic Indus., 206 N.L.R.B. 327 (1973).

in the *Fibreboard* case, has vacillated to a certain degree in dealing with the difficult question of the type of effect an employer's unilateral decision must have upon the "terms and other conditions of employment."[74] Given the Board's continuous recognition that the threshold concept involved is that of detriment to the employee, Board decisions have tended to analyze whether the unilateral employer conduct significantly or substantially changes the conditions of employment.[75]

Board decisions have further distinguished employer decisions to subcontract or to alter the business operation which have the effect of totally replacing unit employees, as opposed to those decisions which merely cause a diminution in wages or hours of work. The Board has, of course, been much less likely to grant deference to management decisions which have the effect of replacing unit employees rather than merely reducing the amount of work allocated to them.[76] The seemingly stricter scrutiny employed by the Board has apparently been predicated upon the rationale that replacement subcontracting not only has the effect of precluding union negotiations on the employer's decision, but also tends to hinder and to discourage the employees' exercise of their statutory rights to engage in organizational activity.[77]

In contrast, the circuit courts have tended to take a more lenient view

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74. *See* Westinghouse Elec. Corp., 150 N.L.R.B. 1574, 1578 (1965) (in which Chairman McCulloch dissented in an attempt to characterize the point at which the employer's decision impacted upon the employee's job security through utilization of a subjective form of analysis which was eventually captioned the "reasonable anticipation test" as opposed to the "substantial detriment" test utilized by the Board majority).

The difficulties noted with the "reasonable anticipation test" stemmed from the fact that lost work opportunities could frequently be traced only through a rather attenuated change of events, as the analysis frequently depended upon whether the subjective inquiries of the worker's mind could have anticipated a lost work opportunity as a result of the employer's unilateral action. *But see* American Oil, 151 N.L.R.B. 421 (1965); Central Soya, 151 N.L.R.B. 1691 (1964).

75. *Cf.* Jays Foods, Inc., 228 N.L.R.B. 423 (1977) (violations of sections 8(a)(3) and 8(a)(5) for contracting out delivery operations and discharging bargaining unit truck drivers); Valley Oil Co., 210 N.L.R.B. 370 (1974) (substantial decrease in the total hours of unit employees following unilateral employer decision to increase subcontracting gasoline hauling and commence subcontracting of plumbing repair work); Howmet Corp., 197 N.L.R.B. 471 (1972) (violations of sections 8(a)(3) and 8(a)(5) of the NLRA where the employer unilaterally altered its subcontracting practices, increasing its subcontracting twofold).

76. *See, e.g.*, Syufy Enterprises, 220 N.L.R.B. 738 (1975); Hospice of Alverne, 195 N.L.R.B. 313 (1972). *Cf.* Shurtenda Steaks, Inc., 161 N.L.R.B. 957 (1966) (the Board found that the employer altered its past practices in undertaking subcontracting work which had been previously done by the employees, thereby depriving the employees of their employment and job security).

77. Factors frequently focused upon by the Board in diminution cases include (1) significance of the fact of diminution, (2) the existence and scope of the management rights clause, if any, (3) the opportunity for the union to negotiate, and (4) the existence of an established past practice of subcontracting. District 50, UMW v. NLRB, 358 F.2d 234 (4th Cir. 1966). *But see* General Motors Corp., 149 N.L.R.B. 896 (1964); Shell Oil, 149 N.L.R.B. 283 (1964).

of the employer's anti-union motivations under circumstances when substantial economic considerations are also present. The balancing process utilized by the circuit courts in cases of mixed motivation scrutinizes the factual evidence presented at the trial level in an effort to determine whether the employer's predominant motivation for implementing the unilateral decision to subcontract or to alter his business operation was based upon economic considerations or anti-union sentiments.[78]

In some circuit court decisions which preceded the Supreme Court's holding in *Fibreboard*, the balancing analysis was traditionally utilized, as it tended to accord a significant amount of deference to the employer's articulated economic considerations which frequently were clouded by the existence of anti-union sentiment.[79]

While an employer's motivation for the institution of a subcontracting or operational change is necessarily one of the initial focal points for consideration by the Board and the courts,[80] subjective motivations are notoriously susceptible to misunderstanding, thus causing many of the circuit courts to place significantly more emphasis upon economic justifications articulated by the employer than the presence of anti-union sentiments when implementing the balancing process. The Fifth Circuit in *NLRB v. Houston Chronicle Publishing Co.*,[81] through its oft-quoted statement regarding the balancing of union hostility and economic factors stated:

> If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either management or labor would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of genuine substance.[82]

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78. *See, e.g.*, NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963); Jays Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961); NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960); NLRB v. Houston Chronicle Pub. Co., 211 F.2d 848 (5th Cir. 1954).

79. *See, e.g.*, NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961), where the circuit court emphasized the importance of employer motivation in the consideration of the propriety of a business structural alteration as it stated:

> Though there may have been animosity between the union and Rapid, animosity furnishes no basis for the inference that this was the preponderant motive for the move when convincing evidence was received demonstrating business necessity. The deciding cases do not condemn an employer who considers his relationship with the plant's union as only one part of the broad economic picture he must survey when he is faced with determining the desirability of making changes in his operation.

Id. at 175.

80. Westinghouse Elec. Corp., 150 N.L.R.B. 1574 (1965).

81. 211 F.2d 848 (5th Cir. 1954). The Fifth Circuit found that even though some presence of anti-union animus still existed, the employer had sufficiently over-balanced evidence of hostility by showing that the company bargained successfully with other union representatives for a substantial period of time and that significant economic evidence was presented supporting the company's decision to enter into a subcontracting arrangement. *Id.* at 855.

82. *Id.* at 855.

In placing greater emphasis upon the sufficiency of the economic factors articulated by the employer, the circuit courts have generally held that the economic criteria must be at least of sufficient significance to outweigh the level of anti-union animus which is revealed.[83]

The discussion in the preceding section of this Article demonstrates that the Board is not predisposed to engage in a balancing process under circumstances in which an employer has undertaken a unilateral decision to institute subcontracting or another operational alteration while motivated partially by economic concerns and anti-union considerations. While the Board's analysis has matured over the course of the fifteen years since the *Fibreboard* decision, the basic focal point remains the effect which the decision has upon the terms and conditions of employment. On the other hand, the courts have generally accorded considerable deference to employer decisions to alter the methods of operation imposing a duty to bargain only under circumstances in which the employers' economic considerations do not preponderate over evidence of anti-union motivations.[84]

D. *Remedies: Unlawful Subcontracting and Operational Changes*

Entire articles could be written concerning the various remedial sanctions which may be imposed by the Board and the courts when it is found that an employer has violated sections 8(a)(3) and/or 8(a)(5) of the NLRA. While it is not the purpose of this Article to undertake an exhaustive review of the remedies available, an examination of the issues surrounding the scope of mandatory topics of bargaining would not be complete without at least a brief review of those remedies most frequently ordered by the Board and enforced by the courts.

Initially, it may be said that the Board has generally required employers who have taken unlawful unilateral action to restore the status quo through the reinstatement of all terminated employees along with back pay and the complete abrogation of the subcontracts which were entered into prior to negotiations with the union.[85] While the Board has generally been willing to impose the remedial sanctions of reinstatement of the affected employees,[86] back pay inclusive of interest,[87] and even the reestablishment

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83. *See, e.g.*, NLRB v. Big Three Indus. Gas & Equipment Co., 230 N.L.R.B. 392 (1977), *enforced*, 579 F.2d 304, 315 (5th Cir. 1978) (where the Fifth Circuit stated that the threshold of illegality was crossed if the force of the invidious purpose of union discrimination was found to be reasonably equal to the lawful motive prompting the employer's unilateral decision to subcontract the unit work).

84. *See* text accompanying notes 78-79 *supra*.

85. *See, e.g.*, Jays Foods, Inc., 228 N.L.R.B. 423 (1977).

86. *See, e.g.*, Midland Ross Corp. v. NLRB, 617 F.2d 977 (3d Cir. 1980).

87. *See, e.g.*, Florida Steel Corp., 231 N.L.R.B. 651 (1977); F.W. Woolworth Co., 90 N.L.R.B. 289 (1950). *See also* Isis Plumbing & Heating Co., 138 N.L.R.B. 716 (1962).

of employer operations under appropriate circumstances,[88] the circuit courts have been less enthusiastic about ordering reestablishment of the business operation, unless it is shown that resumption is not economically prohibitive or unduly harsh.[89]

While the Board's authority to fashion appropriate remedial sanctions is broad,[90] an order requiring the resumption of operations will not be appropriate where the employer satisfies his burden of showing that a restoration of the status quo would endanger its continued viability.[91]

E. *Conclusion: Subcontracting: Fibreboard and its Progeny Fifteen Years Later*

Any employer in the process of formulating a decision relating to the possibility of subcontracting out a portion of its business operation, or altering its operational methods in some other manner, must carefully consider a number of factors before taking such action on a unilateral basis. The sufficiency of the employer's economic considerations, the existence of the employer anti-union motivation, the likelihood that the employer will increase its productivity through implementation of the decision, the effect of the decision on the employees, and the issue of whether the operational change will constitute a basic capital investment or withdrawal are all factors vital to an informed decision on the part of the company. Furthermore, a pragmatic assessment of the potential ramifications of litigation over the question of the propriety of an employer's decision must also be considered. The adjudicatory body (either the Board or circuit court), its method of analysis of the particular factual circumstances of the case, and the remedies it is

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88. *See, e.g.,* Jays Foods, Inc., 228 N.L.R.B. 423 (1977).

89. *See* NLRB v. Jackson Farmers, Inc., 457 F.2d 516 (10th Cir. 1972). *See also* Frito Lay Co., 232 N.L.R.B. 753 (1977); Richboro Community Health, 228 N.L.R.B. 1198 (1977). *But see* NLRB v. Townhouse T.V. Inc., 213 N.L.R.B. 716 (1974), *modified in part,* 531 F.2d 826 (7th Cir. 1976); NLRB v. Adams Dairy, Inc., 137 N.L.R.B. 814 (1962), *modified,* 322 F.2d 553 (8th Cir. 1963).

90. *See* Fibreboard Paper Products Corp., 379 U.S. 203, 216 (1964) in which the Supreme Court stated that

> [s]ection 10(c) charges the Board with the task of devising remedies to effectuate the policies of the Act. The Board's power is a broad discretionary one, subject to limited judicial review. The Board's order will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.

Id. at 216.

Section 10 of the NLRA stipulates that the Board, upon finding an unfair labor practice has been committed, "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of the Act . . . ." 29 U.S.C. § 160(c) (1976).

91. *See, e.g.,* Hood Indus., 248 N.L.R.B. 597 (1980); Great Chinese Am. Sewing Co., 227 N.L.R.B. 1670 (1977). *See also* Lion Uniform, 247 N.L.R.B. No. 123 (1980).

likely to impose in the event that the employer is found to have violated section 8(a)(5) of the NLRA continue to be criteria of paramount importance.

Consequently, given the fact that the potential economic ramifications which may arise through the imposition of a complete remedial order for status quo ante can be extremely significant, the practitioner and his client should exercise a great deal of caution prior to the implementation of a unilateral decision to subcontract or alter business operations.[92]

IV. Total and Partial Plant Closures: Darlington, Fibreboard and the Void Between Eccentric Circles

The issue of whether an employer may unilaterally close all or a portion of his business facility deals with a number of the same considerations involved in the question of the employer's right to implement business operational alterations, such as subcontracting, on a unilateral basis. As such, factors including the adjudicatory forum called upon to rule on the propriety of the proposed action, the method of analysis utilized in scrutinizing such action by the Board and courts, and the issue of whether anti-union considerations have affected the employer's decision to close or partially close his business remain vital and relevant considerations.

However, in spite of the similarity of the aforementioned issues, a number of rather substantial practical and legal considerations remain which are, to a certain extent, unique to the closure or partial closure of a plant facility, and which tend to heighten the difficulty experienced by the employer in attempting to decide whether bargaining is required.

As a practical matter, the closure of a business facility is a decision of such magnitude that it is likely that such a radical business change will only be undertaken following months of painstaking cost-benefit analysis. Further, the current difficult economic climate has forced substantial numbers of employers to face the reality of the necessity for such a significant operational decision on an increasingly frequent basis. Given the fact that a plant closure or relocation generally involves substantial capital redistribution and an alteration in the methods of production of the company, it may be restating the obvious to claim that there is virtual unanimity among employers that such decisions should remain solely within the entrepreneurial discretion of the employer.

In stark contrast to the employer's concerns are the continuing interests of the employees in the preservation of their employment. While decisions relating to subcontracting of unit employment and other operational changes may impact upon the terms and conditions of employment to the

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92. For a thorough examination of the dramatic effect which the status quo ante remedy may have upon the business direction and economic stability of an employer's operation, see Smyth Mfg. Co., 247 N.L.R.B. 164 (1980).

extent of reducing hours or employee responsibilities, the partial closure or plant removal is more likely to result in the total termination of employment. Thus, while it is clear that the contrasting interests of entrepreneurial freedom and employment security are present in the closure and removal situations as they were in preceding sections of this Article dealing with subcontracting, it is probably safe to say that the intensity of the emotion concerning these interests is heightened in cases dealing with the cessation or removal of a business operation.

From a legal perspective, the partial closure of a plant facility based purely upon economic considerations gives rise to the emergence of a series of cases which fail to fall clearly within the prescribed parameters of the Supreme Court's watershead decisions in *Fibreboard Paper Products*[93] and *Darlington Manufacturing Co.*[94] As a result, the Board and the circuit courts have engaged in a continuous process of attempting to adapt the rationale and holdings of the Supreme Court decisions to the particular and unique factual situations encountered in many of the cases dealing with economically motivated partial closures.[95] Thus, a number of different questions, divergent from the issues encountered in the section of this Article dealing with subcontracting,[96] are present which are likely to influence the ultimate decision of an employer concerning the question of bargaining in a plant closure situation.

A. *Total Plant Closures: The Darlington Manufacturing Company Case*

Historically, decisions to terminate or partially close a plant or business facility had traditionally been reserved as managerial prerogatives.[97] Questions relating to the length of time an employer may choose to engage in business or where that business might be located had not been subjects over which the employees or their union representatives could command bargaining.

However, in as early as 1941, there existed a rather prophetic indication that issues heretofore solely within the discretion of management might become areas subject to the collective bargaining process due to the marked impact such decisions had upon the employee's job security.[98]

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93. 379 U.S. 209 (1964).

94. 380 U.S. 263 (1965). *See* discussion Section IV, subsection A *infra*.

95. *Compare* Holiday Inn of Benton, 237 N.L.R.B. 1042 (1978) *with* NLRB v. Transmarine Navigational Corp., 380 F.2d 933 (9th Cir. 1967).

96. *See* text accompanying notes 12-91 *supra*.

97. *See, e.g.*, Mount Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954); Joint Indus. Bd., 238 N.L.R.B. 196 (1978); Rio Piedras Mfg. Corp., 236 N.L.R.B. 1198 (1978); J-B Enterprises, 237 N.L.R.B. 383 (1978); Precision Casting Co., 233 N.L.R.B. 35 (1977); Westinghouse Elec. Co., 150 N.L.R.B. 1574 (1965).

98. *See* Gerity Whitaker Co., 33 N.L.R.B. 393, 395-96 (1941), in which the Board implied, in dictum, that the severe nature of a plant closure and removal may require collective bargaining negotiations between the employer and his employees.

Numerous decisions have clearly established the existence of a basic dichotomy between the employer's obligation to bargain relating to a decision to close or partially close a facility and the duty to bargain relating to the *effects* of that action upon the employees.[99] The employer's obligation to bargain with the employee representative relating to the effects of a major business operational change is well settled.[100]

In 1965, the Supreme Court rendered its decision in *Darlington Manufacturing Co. v. NLRB*,[101] in which it was held that the total closure of an employer's operational enterprise was a permissible managerial decision independent of any collective bargaining negotiations and without regard to whether anti-union considerations prompted the liquidation process.[102]

The Supreme Court's decision was initially greeted by a sigh of welcome relief by employers across the country, as it was construed to be a "pro management" rights opinion which reaffirmed an employer's prerogative to close the doors of its business when the employer's judgment dictated the necessity for such action. To the contrary, employees and union representatives, encouraged by the dicta set forth in the *Town & Country Manufacturing* decision and the majority opinion in the *Fibreboard Paper Products* case, viewed the Supreme Court's decision as only a minor setback in the war being waged against an employer's right to unilaterally implement decisions which had the effect of infringing upon an employee's job security.

The factual posture of the *Darlington* case indicated that the Textile Workers Union had been elected as an employee representative following an organizational campaign in the Darlington plant which drew vigorous opposition from management.[103] Following the election of the union, the company, through the actions of its board of directors and stockholders, decided to liquidate its operations and sell its plant machinery.[104]

The union filed charges under the NLRA claiming that Darlington had violated sections 8(a)(1) and 8(a)(3) of the NLRA by its decision to close the plant based upon its anti-union hostility and section 8(a)(5) through its re-

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99. *See* General Motors Corp. v. NLRB, 470 F.2d 422 (D.C. Cir. 1972); Royal Plating & Mfg. Co., 350 F.2d 191 (3rd Cir. 1965).

100. *See, e.g.*, NLRB v. Triumph Curing Center, 571 F.2d 462 (9th Cir. 1978); J-B Enterprises, 237 N.L.R.B. 383 (1978); Clark, 237 N.L.R.B. 5 (1978); Rio Piedras Mfg. Co., 236 N.L.R.B. 144 (1978).

Additionally, the remedy frequently imposed for an employer's failure to engage in bargaining relating to the effects of a decision to subcontract unit work, totally close a facility, partially close a plant facility, or remove a portion of its business is set forth in NLRB v. Gray Grimes Tool Co., 557 F.2d 1233 (6th Cir. 1977). In *Gray Grimes*, a back pay order was issued from the date of the union's request to bargain until the earliest of: (a) the reaching of an agreement between the parties; (b) impasse; (c) the union failed to communicate its intent to bargain over the decision; or (d) the union attempted to negotiate in bad faith.

101. 380 U.S. 263 (1965).

102. *Id.* at 274.

103. *Id.* at 266.

104. *Id.*

fusal to bargain with the union following the election.[105] The Board sustained the charges predicated on sections 8(a)(1) and 8(a)(3) of the NLRA and ordered the employer to bargain with the union until substantially equivalent employment could be found for the terminated employees or until the employees were put on preferential hiring lists at the employer's other facilities.[106] The Court of Appeals denied enforcement of the Board's order, stating that the company had an absolute right to terminate a part or all of its business regardless of the presence of anti-union motivation.[107] The Supreme Court concurred with the court of appeals to the extent that it held the employer had the absolute right to terminate its entire business operation for any reason,[108] but refused to extend that holding to partial closings motivated by anti-union hostility.[109]

In dealing with the question of the employer's right to close his business based solely upon anti-union motivations under section 8(a)(3) of the NLRA, the Supreme Court declared in its now celebrated statement, that the

> proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the National Labor Relations Act.[110]

Justice Harlan, in his majority opinion in the *Darlington* case, undertook his analysis of the employer's action in terms of what future benefits might accrue to the employer who terminated his business operation at least partially because he was hostile to union representation of his employees. Noting that an employer might derive personal satisfaction from his refusal to deal with the union, Harlan indicated that such a reason, by itself, was insufficient to require the employer to bargain concerning his decision to close where no future economic benefits were obtained by the employer following the complete liquidation of his entire business.[111]

The majority opinion rendered in the *Darlington* case was specifically limited in scope to cases where the employer terminated his entire business operation. Distinguishing the case of total closure from that of partial plant closure or plant relocation, the Supreme Court noted that the latter two cases frequently involved the accession of benefits to the employer through

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105. *Id.* at 266-67.
106. *Id.* at 267.
107. *Id.* at 268. *Cf.* NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954) (where the court stated that an employer does not have an absolute right to permanently go out of business for any reason without being subject to liability).
108. 380 U.S. at 268.
109. *Id.* at 275-76.
110. *Id.* at 270.
111. *Id.* at 272. *See also* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

the discouragement of union activity at other facilities, thereby infringing upon the employees' section seven organizational rights under the NLRA.[112]

Although the *Darlington* decision has been criticized by employee proponents for failing to focus upon the effects of the employer's decision on the employment security of the laborers, little question exists that the employer may unilaterally liquidate his entire business based upon economic or anti-union motivations. Perhaps the more difficult issues, left at least partially unresolved in the *Darlington* opinion, deal with the proper scope of the mandatory duty to bargain under circumstances in which an employer attempts to partially close his facility based upon either pure economic motivations or economic considerations mixed with anti-union hostilities.

B. *Darlington and Partial Plant Closures: Mixed Motivation and the Duty to Bargain*

The second portion of the majority's opinion in *Darlington* dealt with the question of an employer's right to partially close his plant operation under motivations of anti-union animus. Justice Harlan articulated a three-part test for determining when an employer has violated section 8(a)(3) of the NLRA in implementing a decision to partially close his plant facility. Harlan stated:

> If the persons exercising control over a plant that is being closed for anti-union reasons: (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promptness of their reaping of benefits from the discouragement of unionization of that business; (2) act to close their plant for the purpose of producing such a result; and (3) occupy a relationship to other businesses which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, then an unfair labor practice charge has been established.[113]

The issue of an employer's motivation in unilaterally partially closing a plant facility has remained of paramount importance. Both the Board and the circuit courts have tended to scrutinize the factual background of a case very carefully to decide if the presence of anti-union considerations is significantly strong so as to have the effect of producing a reasonably foreseeable

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112. 380 U.S. at 273.

113. *Id.* at 275. *But see* NLRB v. Savoy Laundry, Inc., 327 F.2d 370, 373-74 (2d Cir. 1963), where the Second Circuit held that an employer had violated sections 8(a)(1), 8(a)(3) and 8(a)(5) of the NLRA when it terminated a laundry facility based primarily upon anti-union considerations. The court noted that the focal point of consideration was not whether the employer's alleged economic considerations were the result of poor or sound business judgments, but rather whether there was an honest invocation of economic considerations with no disguised anti-union animus. *Id.*

"chill" on the employees interest in pursuing union activities.[114] The establishment of the reasonably foreseeable likelihood that an employer's partial closure for anti-union considerations will have the effect of chilling employees in the exercise of their section seven rights under the NLRA may be established through the presentation at the hearing level of circumstantial evidence lending credence to the inference that the employer's motivation in taking such unilateral action was to produce such a "chill."

The Board has rejected the claim that an employer must show actual affirmative evidence of the chilling effect on the remaining plant employees,[115] and has reaffirmed the second requirement of the *Darlington* test, stating that unilateral action of the employer must have been done to accomplish discouragement of employee union activity.

The Board has stressed that the permanent closing of a portion of an employer's business does not constitute an unfair labor practice unless direct or circumstantial evidence establishes that the closing was at least partially motivated by the employer's attempts to chill the union activity at other facilities, and that the employer's action could have reasonably produced that desired effect.[116] The second prong of the *Darlington* test is generally to be inferred from the presence or absence of the following factors:

> 1. contemporaneous union activities at other facilities;
> 2. geographical proximity between the closed facility and other active plants;
> 3. likelihood that other employees would learn of the employer's unlawful conduct through contact with the harmed employees;
> 4. the existence of representations to employees by their supervisors relating to the desired chill effect.[117]

In spite of the seeming clarity of the tests articulated in the *Darlington* decision for ruling upon unlawful partial closures, the Board and the circuit courts have not been in consistent agreement in dealing with cases involving unilateral employer action motivated partially by anti-union considera-

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114. *See, e.g.*, Great Chinese Am. Sewing Co., 578 F.2d 251 (9th Cir. 1978); National Family, 246 N.L.R.B. 84 (1979); Robin Am. Corp., 245 N.L.R.B. 108 (1979); Bob's Motor, 241 N.L.R.B. 200 (1979); Erlich's 814, Inc., 231 N.L.R.B. 1237 (1977); Lloyd Wood Coal Co., 230 N.L.R.B. 234 (1977).

115. *See, e.g.*, George Lithograph Co., 204 N.L.R.B. 431 (1973) (Board held that *Darlington* did not require affirmative proof of actual "chilling effect" on the remaining plant employees inasmuch as such a requirement would require an investigation into the subjective state of mind of the employees; circumstantial evidence sufficient proof of anti-union animus).

116. *Cf.* Bedford Cut Stone Co., 235 N.L.R.B. 629 (1978) (Board held that temporary shutdown or runaway shop allowed inference that such was done because of union activity, and the employer had the burden of establishing legitimate business reasons).

117. *See, e.g.*, Bruce Duncan Co., 233 N.L.R.B. 1243 (1977), *enforced as modified*, 590 F.2d 1304 (4th Cir. 1979). *See also* Motor Repair, Inc., 168 N.L.R.B. 1082 (1968). *But see* George Lithograph Co., 204 N.L.R.B. 431 (1973).

tions.[118] Similar to those cases involving subcontracting, the Board has generally not been receptive to engaging in the balancing process once evidence of anti-union animus has been disclosed. To the contrary, the circuit courts, particularly through the period of the latter sixties and the early and middle seventies, have been much more willing to balance the anti-union considerations against economic factors frequently relieving the employers of liability for failure to bargain where economic considerations predominate.

A recent case which is illustrative of the basic dichotomy in analysis between some Board and court holdings dealing with "mixed motivation" is that of *NLRB v. Rude Carrier Corp.*[119] In the *Rude* decision, *inter alia*, the Board found that the employer had violated sections 8(a)(3) and 8(a)(5) of the NLRA by virtue of its discontinuation of its sugar-linoleum operation.[120] The company had argued that it was free to abolish its sugar-linoleum activity without negotiating with the union as a result of its pure economic considerations.[121]

The Fourth Circuit partially reversed the Board's decision, based upon its finding that substantial evidence to warrant enforcement of the Board's finding of anti-union animus did not exist.[122] Noting that the employer had been contemplating the surrender of the operation for over a year and that no history of anti-union animus existed, the court granted deference to the employer's claim of valid economic consideration, finding that it was virtually inconceivable that the employer would terminate an operation which consumed ten years of time and expense merely to resist the unionization efforts of two company employees.[123] As a consequence, the court found that the economic considerations constituted the predominant motivating factor behind the employer's decision to terminate that portion of its operations.[124]

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118. *See, e.g.*, NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961). *See also* NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960); NLRB v. R.C. Mahon Co., 269 F.2d 44 (6th Cir. 1959); NLRB v. Houston Chronicle Pub. Co., 211 F.2d 848 (5th Cir. 1954). For additional recent decisions which either expressly or impliedly utilized the *Darlington* test concerning partial closures of plant or unit operations based upon anti-union animus, see Crest Door Co., 219 N.L.R.B. 648 (1974); Harper Truck Service, Inc., 196 N.L.R.B. 262 (1972).

119. 215 N.L.R.B. 883 (1974).

120. *Id.* at 889.

121. *Id.* at 890.

122. *Id.* at 889.

123. *Id.* at 890-91.

124. *Id.* For a recent example of the Fourth Circuit's scrutiny of the Board's handling of a partial closure case dealing with mixed motivation, see Bruce Dunkin v. NLRB, 233 N.L.R.B. 1243 (1977), *enforced in part*, 510 F.2d 1304 (4th Cir. 1979). In *Dunkin*, the Fourth Circuit denied the Board's attempt to retain jurisdiction for an unstated period to reconsider and modify its findings in the event that the employer attempted to reopen the business office outlet which it had originally closed. While noting that the Board had been given broad authority to fashion and impose remedies for unlawful conduct, the court refused to allow the Board to retain jurisdiction under circumstances that were contrary to the statutory grant of jurisdiction and followed the expiration of the six month statute of limitations period set forth in section 10(b) of the Act. 29 U.S.C. § 160(b) (1976).

In spite of the existence of scattered inconsistencies in the handling of some decisions by the Board and the courts through the period of the middle seventies, there has been a recent, and rather significant, trend among the circuit courts to grant greater deference to Board decisions dealing with the mandatory scope of bargaining cases involving subcontracting, partial closure and removal of plant facilities.[125]

The increasing tendency of the circuit courts to affirm the holdings and rationale in cases advanced for review from the Board signifies a rather substantial change in the posture of the courts in the handling of such cases, which must be viewed with a certain amount of concern by employers contemplating such business structural alterations.[126]

A case which is somewhat indicative of the circuit courts' current mode of analysis in partial closure cases dealing with anti-union motivation is *Midland-Ross Corp. v. NLRB.*[127] In *Midland-Ross Corp.*, the Board found evidence that the employers' accelerated closure of its plant facility without notification to the union was partially premised upon anti-union considerations. In spite of the presence of evidence tending to establish that the employers' operation was economically unprofitable, the Board held that the accelerated closing was done for the purpose of discouraging union organizational efforts and that such closure would have the reasonably foreseeable effect of chilling union activity.[128]

The Third Circuit affirmed the Board's holding reiterating the general rule that the scope of its review was narrow with Board findings requiring reversal only under circumstances in which they were not supported by substantial evidence.[129] The court refused to engage in what had typically been the process of balancing anti-union considerations with the employer's claim of economic necessity and borrowed from the Ninth Circuit decision in *Great Chinese American Sewing Co.*,[130] stating that "[t]he fact that industry conditions may have changed after the closing and might now provide a business justification for (the employers) decision to subcontract abroad does not alter the fact that anti-union animus motivated the closing and the subcontracting when they occurred."[131]

As is apparent in the discussion set forth in the preceding paragraphs in this section, motivational issues still remain of paramount importance to the

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125. *See, e.g.*, Davis v. NLRB, 617 F.2d 1264 (7th Cir. 1980); Production Molded v. NLRB, 604 F.2d 451 (6th Cir. 1979).

126. *See* text accompanying notes 127-51 *infra*.

127. 617 F.2d 977 (3d Cir. 1980).

128. *Id.* at 982.

129. *Id.* at 987. *Cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (the Supreme Court mandated that it was the duty and the function of the Board to assess credibility of witnesses at hearing with reviewing forums to avoid substituting their judgment under circumstances in which conflicting stories had been presented into evidence at the hearing level).

130. 578 F.2d 251 (9th Cir. 1978).

131. *Id.* at 255.

Board and the courts evaluating the bargaining duties required preliminary to a partial closure action. While the circuit courts have been predisposed toward balancing economic conditions with employer motivation, current case law appears to indicate a trend favoring the Board's rationale in assessing the company's duty to bargain, based upon the effects such contemplated decision may have upon the employees.

C. *Remedies Imposed Following Unlawful Partial Plant Closure*

Under a circumstance in which the Board or a circuit court has found that the employer violated sections 8(a)(3) and 8(a)(5) of the NLRA through its failure to bargain with the union concerning its decision to partially close its business operation, the remedy of status quo ante is generally conceded to be appropriate.[132] In spite of the recognition that the status quo ante remedy is the recommended remedial sanction in a failure to bargain situation, the Board and the court still engage in a balancing process through which they attempt to ascertain whether the imposition of the status quo may be too economically burdensome upon the employer. As a consequence, under circumstances in which substantial financial expenditures would be required of an employer to relocate plant equipment,[133] reestablish his night shift,[134] or suffer substantial economic harm,[135] a complete status quo remedy is generally not imposed. While the adjudicatory forums are generally sensitive to circumstances in which a status quo remedy would constitute an onerous burden for the employer, frequently remedies are fashioned requiring reinstatement of the terminated employees *in the event* that the employer does subsequently reopen the closed portion of his operation.[136]

As was noted in a previous section of this Article dealing with remedies pertaining to subcontracting violations motivated by anti-union considerations, the status quo remedy also imposes a back pay requirement upon the employer, thereby forcing the employer to make the employees whole by compensating them for lost working time resulting from the unlawful unilateral decision to partially close his facility.[137] In computing the back pay re-

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132. *See, e.g.*, Frito-Lay, Inc., 232 N.L.R.B. 753 (1977); Serve-U-Stores, Inc., 225 N.L.R.B. 37 (1976). *See also* Richboro Community Mental Health Council, Inc., 228 N.L.R.B. 1198 (1977), in which the Board stated that "[i]f there is any hardship caused by this remedy [status quo ante] it is only fair that the wrongdoer rather than the wronged should bear it." *Id.* at 1199. *See generally* Transmarine Navigation Corp., 170 N.L.R.B. 389 (1968).

133. *See* Burroughs Corp., 214 N.L.R.B. 571 (1974).

134. *See, e.g.*, Crest Door Co., 219 N.L.R.B. No. 96 (1975).

135. *See, e.g.*, Great Chinese Am. Sewing Co., 578 F.2d 251 (9th Cir. 1978); NLRB v. Townhouse T.V. & Appliances Inc., 531 F.2d 826 (7th Cir. 1976); Donn Products, Inc., 229 N.L.R.B. 116 (1977); Renton News Record, 136 N.L.R.B. 1294 (1962). *See also* NLRB v. Savoy-Laundry Inc., 327 F.2d 370 (2d Cir. 1964).

136. *See, e.g.*, NLRB v. Gray Grimes Tool Co., 557 F.2d 1233 (6th Cir. 1977); Los Angeles Marine Hardware, 235 N.L.R.B. 720 (1978).

137. *See* NLRB v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969); Leeds & Northrup Co.

quirement, the Board has held that the respondent company is required to pay the employees employed on the date of the wrongful closure their normal wage rate from the date of closure until the earliest of the following conditions are met:

> 1. Mutual agreement is reached with the union relating to subjects about which the respondent is required to bargain;
> 2. Good faith bargaining results in a bona fide impasse;
> 3. The union fails to commence negotiations within five (5) days of receipt of the respondent's notice of its desire to bargain with the union; or
> 4. The union refuses to bargain in good faith.[138]

D. *The Tension Between Darlington and Fibreboard: Myth or Reality*

One of the most volatile points of debate and confusion since the mid-sixties, when the Supreme Court rendered its decision in the *Fibreboard Paper Products* and *Darlington Manufacturing Co.* cases, has centered around the appropriate scope and application of the opinions set forth in each of these decisions. The focal point of the controversy has dealt most specifically with the scope of the bargaining obligation under factual circumstances in which a partial plant closure has been motivated purely by economic considerations. The narrow holdings rendered by the Supreme Court in *Darlington* and *Fibreboard* did not purport to govern economically motivated partial closure. As a consequence, the Board and the circuit courts have engaged in the oft-times imperfect process of attempting to apply the Justice Warren and Justice Stewart opinions in *Fibreboard* and Justice Harlan's opinion in *Darlington* to factual circumstances distinct from those confronted in the two Supreme Court cases.

The Board has been consistent in its attempts to utilize the rationale posited by the majority opinion in *Fibreboard* in those cases upon which it has been called to rule dealing with partial closures motivated by economic considerations.[139] The Board's reliance upon the Warren majority opinion is predicated upon the concept that protection of the employment security interests of the employees is consistent with the "spirit" of the Supreme

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v. NLRB, 391 F.2d 874 (3d Cir. 1968).

138. *Cf.* National Family Opinion, 246 N.L.R.B. 84 (1979) (the Board expressly overruled *Brockway Motor Trucks*, 230 N.L.R.B. 1002, 1004 (1977), to the extent that it produced an inconsistent result). *Brockway* allowed an employer to limit its back pay liability from the date of the unlawful termination until the date the respondent commenced bargaining in good faith with the union over the decision to close its plant or offered its employees reinstatement, whichever occurred first. Citing the leading case of *Winn-Dixie Stores, Inc.*, 147 N.L.R.B. 788 (1964), the Board in *National Family Opinion* stated that the effect of the decision in *Brockway Motors* would be to allow an employer to partially close without bargaining with little or no fear of a back pay liability, thus contributing to the subversion of the collective bargaining process which the Board was obligated to encourage. 246 N.L.R.B. at 86-87.

139. *See, e.g.*, Holiday Inn of Benton, 237 N.L.R.B. 1042 (1978).

Court's holding.

Many of the circuit courts, until very recently, have attempted to distinguish the Board's rigid reliance upon the majority opinion in *Fibreboard*. Consequently, the majority of the circuits have granted a considerable amount of deference to the employer's entrepreneurial judgment by analyzing the cases from the "pro management" perspective of the *Darlington* majority opinion and from Justice Stewart's concurrence in *Fibreboard*.[140] The disjunction between the holdings rendered by the Board and the courts, as well as in their independent methods of analysis, have led to a less than satisfactory result for employers attempting to decipher the scope of their bargaining duties when contemplating a plant or departmental closure motivated by economic concerns.

The problematic issue pertaining to the tension between the pro employer and pro employee opinions became apparent as early as 1966 in the Board's decision in the case of *Ozark Trailers, Inc.*[141] The Board quickly expressed its reliance upon Chief Justice Warren's opinion in *Fibreboard* in finding a duty to bargain based upon the fact that unit employees suffered termination of employment as a result of the employer's decision to close his production facility.[142] The Board refused to consider the question of the duty to bargain in terms of whether the decision involved a major or basic change in the nature of the employer's business.[143] Rather, the Board focused upon the employee's job security interests stating that "just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulated seniority, accruing pension rights, and developing skills that may or may not be saleable to another employer."[144]

While the Board has been criticized in decisions subsequent to *Ozark Trailers* for not being entirely consistent in its analysis,[145] a significant number of the decisions rendered by the Board indicate that it has adhered rigidly to its scrutiny of the effect of managerial decisions upon the employment interests of the employees, thus imposing an obligation to bargain

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140. *See, e.g.*, NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969); NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963).

141. 161 N.L.R.B. 561 (1966).

142. *Id.* at 565.

143. *Id.*

144. *Id.* at 566. The Board in *Ozark Trailers* also took issue with the decisions rendered by the circuit courts in the cases of *NLRB v. Adams Dairy, Inc.*, 322 F.2d 533 (8th Cir. 1963), and *NLRB v. Royal Plating & Pub. Co.*, 350 F.2d 191 (3d Cir. 1965). *See also* McLoughlin Mfg. Corp., 182 N.L.R.B. 958 (1970) (supportive of the Board's decision in *Ozark Trailers*).

145. *See, e.g.*, General Motors Corp., 191 N.L.R.B. 951 (1971) (Member Fanning, dissenting, criticized the majority opinion for failing to focus sufficiently upon the effects which the employer's closure of its sales facility would have upon the employment interests of the unit employees affected by what the majority opinion termed to be a "sale" of assets constituting a sufficient withdrawal of capital such that the employer was exempted from the duty to bargain concerning the decision).

where employment security is adversely affected.[146]

From a historical prospective, the contrast in the mode of analysis and application of the rationale set forth in the *Darlington* and *Fibreboard* decisions by the circuit courts has been rather dramatic. Traditionally, many of the circuit courts have focused upon employer decisions to alter or partially close their business operations in terms of the sufficiency of the employer's rationale for unilaterally implementing such structural changes.[147] Thus, many of the circuit courts have tended to relieve the employer of the obligation to bargain concerning a partial closure motivated by economic considerations[148] through reliance upon Stewart's *Fibreboard* concurrence and the strong pro management tenor of portions of Justice Harlan's majority opinion in the *Darlington Manufacturing Co.* case.[149]

A substantial trend away from the positive protection of employer rights to an adoption of the majority rationale set forth in the *Fibreboard* opinion has taken place in decisions recently rendered by the circuit courts. The current circuit court decisions are significant because an employer contemplating a major business structural change such as subcontracting, partial closure or plant removal is now confronted with a disjunction in analysis between many of the circuit courts as well as between the Board and some circuit decisions.

The seminal circuit court case which adopted significant portions of the *Fibreboard* majority rationale is *Brockway Motor Trucks v. NLRB.*[150] In the *Brockway* decision, the parties had engaged in fruitless labor negotiations over a new collective bargaining contract. When it became apparent that no contract would be codified, the employees went on strike. Approximately two months following the date of strike, the employer closed its plant facility based purely upon economic considerations. The Board found violations of sections 8(a)(1) and 8(a)(5) of the NLRA while the employer claimed that it had no obligation to bargain, absent the presence of anti-union animus,

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146. *See, e.g.*, Holiday Inn of Benton, 237 N.L.R.B. 1042 (1978), in which the Board found the imposition of a bargaining obligation upon the employer appropriate under circumstances in which unit employees were terminated by the closure. *Id.* at 1043. The Board found no basic business alteration or reinvestment of capital; in addition, the question of high labor costs was held to be clearly amenable to the bargaining process, so that the requirement of bargaining would not significantly abridge the employer's freedom to manage its business, and that the delay in the employer's ability to implement a decision was offset by the impact on the employee's job security as well as public interest in industrial peace. *Id. See also* Brockway Motor Trucks v. NLRB, 230 N.L.R.B. 1002 (1977); Stone & Thomas, 221 N.L.R.B. 573 (1975).

147. *See, e.g.*, Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976); NLRB v. Dixie Ohio Express Co., 409 F.2d 10 (6th Cir. 1969); NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969); NLRB v. Transmarine Navigational Corp., 380 F.2d 933 (9th Cir. 1967).

148. *See, e.g.*, NLRB v. Drapery Mfg. Co., 425 F.2d 1020 (8th Cir. 1970).

149. *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 272 (1965); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 218 (1964).

150. 582 F.2d 720 (3d Cir. 1978).

relating to any decision which had a major impact upon the structure of the firm.[151]

Upon review, the Third Circuit upheld the Board's finding of a refusal to bargain relating to the partial closure based upon economic considerations. However, the court refused to enforce the cease and desist order rendered by the Board based upon lack of sufficient knowledge of the particular circumstances which allegedly prompted Brockway's decision to close.[152]

The essence of the analysis utilized by the Third Circuit in the *Brockway* case hinged upon the majority's willingness to begin with an *initial presumption,* based upon its construction of the language and purpose of the NLRA, that a partial closing based upon economic considerations constituted a mandatory subject of bargaining.[153] The court refused to adopt what it termed the "per se" rule of the Board which obligated an employer to bargain over *any* decision which had a detrimental affect on the employment interest of the employees.[154] Rather, the Third Circuit's approach was the placement of a burden upon the employer to refute the initial presumption by establishing that the particular factual circumstances of the case did not warrant the imposition of an obligatory duty to bargain.[155]

Balancing the interests of the employees and their continued employment security with the employers' countervailing interests relating to the impingement upon his freedom to ultimately close his facility, the court attempted to distinguish previous circuit decisions as illustrative of circumstances in which severe economic considerations were present which thus exempted the employer from the duty to bargain.[156] In support of its imposition of a presumption of a duty to bargain, the Third Circuit placed a rather heavy emphasis for its decision upon the expressed purposes of the NLRA and the promotion of industrial peace[157] as articulated in the *Fibreboard Paper Products* decision.[158]

In decisions rendered subsequent to *Brockway Motor Trucks,* the Board, as well as the Second, Sixth and Seventh Circuit Courts, have reinforced the Third Circuit's emphasis upon the necessity for collective bar-

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151. *Id.* at 724.
152. *Id.* at 741.
153. *Id.* at 735.
154. *Id.* at 734.
155. *Id.* at 735.
156. *Id.* at 727.
157. *Id.* at 734-35.
158. 379 U.S. at 209-15. *See also* The NLRA *Declaration of Policy* which states:

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

29 U.S.C. § 151 (1976).

gaining over economically motivated decisions to partially close a plant operation as promotive of the basic goals and purposes of the NLRA.[159]

In stressing the importance of furthering harmonious employment relationships, the recent decisions adhering to the *Fibreboard* rationale have consistently focused upon a number of criteria deemed to be supportive of the obligation to bargain under the particular facts of each case.[160] While the articulated mode of analysis in each decision may differ,[161] in those case decisions which adhere to the rationale advanced in the majority opinion of *Fibreboard*, the burden placed upon the employer to establish the existence of significant business or capital alterations is, in reality, essentially the same. Regardless of whether the burden is identified as a "presumptive burden" or a "per se" obligation to bargain, the employer may only be relieved of that obligation by establishing (1) the existence of a major capital expenditure or withdrawal, (2) exigent financial circumstances, (3) the significant abridgement of the employer's freedom to manage, (4) a substantial impairment of negotiations with a third party, (5) a showing that the express purposes of the statute are not advanced by bargaining, (6) industry custom does not require bargaining or (7) that bargaining threatens the liability of the employer's entire operation.[162]

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159. *See, e.g.*, First Nat'l Maintenance Corp., 627 F.2d 596, 601 (2d Cir. 1980); Davis v. NLRB, 617 F.2d 1264 (7th Cir. 1980); Holiday Inn of Benton, 237 N.L.R.B. 1042 (1978).

160. *See* note 159 *supra*. The cases listed in that note address many of the following criteria in a positive fashion, thus finding the imposition of a duty to bargain appropriate under the particular factual circumstances of each case: (1) Are the employment interests of the employees affected adversely? (2) Is the subject matter requiring bargaining (frequently, high economic costs) a topic particularly amenable to the bargaining process? (3) Is the employer only required to bargain with the union and not agree to any particular proposals? (4) Is the employer free to implement a decision in the event that bargaining does not produce a satisfactory alternative? (5) Will the attendant delay to the employer in effectuating its decision be offset by public interest in favor of avoidance of labor disputes and strife? (6) Will the bargaining process provide information and facts to the employees to which they had not previously had access relating to the employer's prospective decision? (7) Do the facts fail to reveal a situation involving a major capital expenditure or withdrawal? (8) Would the bargaining process not substantially impair negotiations with a third party? (9) Does the effect of the employer's decision, absent bargaining, impinge upon the "terms and conditions of employment"?

161. *Cf.* First Nat'l Maintenance Corp., 627 F.2d 596, 601 (2d Cir. 1980) (avoidance of "per se" obligation to bargain with implementation of presumption of a duty to bargain based exclusively upon the articulated purposes of the NLRA); Production Molded v. NLRB, 604 F.2d 451 (6th Cir. 1979) (employment interests of the employees, no major capital expenditures on the part of the employer and grant of significant deference to the judgment of the Board in review of the factual circumstances of each case); Brockway Motor Trucks v. NLRB, 582 F.2d 720, 734-35 (3d Cir. 1978) (initial presumption of a duty to bargain premised upon the interests of the employees and the articulated purposes of the NLRA); Holiday Inn of Benton, 237 N.L.R.B. 1042 (1978) (per se obligation to bargain, absent substantial capital withdrawal or investment). *See also* Davis v. NLRB, 617 F.2d 1264 (7th Cir. 1980); Midland Ross Corp. v. NLRB, 617 F.2d 977 (3d Cir. 1980).

162. *See, e.g.*, National Maintenance Corp., 627 F.2d 596 (2d Cir. 1980); Davis v. NLRB, 617 F.2d 1264 (7th Cir. 1980); Production Molded v. NLRB, 604 F.2d 451 (6th Cir. 1979).

The dissenting opinions in the case of *Brockway Motor Trucks v. NLRB*[163] and *First National Maintenance Corp. v. NLRB*[164] refused to adhere to the imposition of the duty to bargain posited by the majority opinions in both cases, preferring instead to rely upon the position taken by many of the circuit courts in utilizing Justice Stewart's concurrence in the *Fibreboard* opinion.

Judge Rosenn, in his articulate dissenting opinion in the *Brockway Motor Trucks* decision, argued that the majority had adopted a "per se" rule of its own through the establishment of a presumptive duty upon the employer to bargain about a partial closure motivated by economics.[165] Noting that no other circuit courts to that point in time had held a partial closing to be a mandatory subject of bargaining,[166] Judge Rosenn criticized the majority for abandoning the "balancing" method commonly utilized in assessing the propriety of an employer's action for implementing, on a unilateral basis, an economic decision to partially close the plant facility.[167]

A number of circuit courts in recent years have adopted positions construed to be more consistent with the posture taken by the Board concerning the scope of bargaining on partial closure issues. In spite of this trend toward uniformity, a significant number of questions continue to arise concerning the validity of the arguments utilized in supporting the stance of the Board on the bargaining issue.

The Board has consistently stated that economic items are particularly amenable to resolution through the bargaining process. Furthermore, the Board and some of the circuit courts have adopted union arguments that collective bargaining does not force an employer to agree to any negotiation proposals and that the bargaining process does not infringe significantly upon the employer's managerial freedom.

From the employer's perspective, however, it is exceedingly difficult to conceive of prevalent business circumstances frequently capable of prompting partial closure which are not, at least collaterally, related to economics. Virtually every major business structural change is predicated upon the need to acquire more cost-effective production. Further, the union argument that an employer need not agree to a union proposal is seemingly without

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163. 582 F.2d 720 (3d Cir. 1978).

164. 627 F.2d 596 (2d Cir. 1980).

165. 582 F.2d at 727.

166. *Cf.* Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1039 (8th Cir. 1976) (dicta) (no duty to bargain over partial closure for "economic reasons" absent anti-union animus); International Union, United Auto, Aerospace & Agri. Impl. Workers v. NLRB, 470 F.2d 422, 424 (D.C. Cir. 1972) (change in ownership from manufacturer to independent franchise involved change of entrepreneurial control, no duty to bargain in absence of anti-union animus); NLRB v. Transmarine Navigational Corp., 380 F.2d 933 (9th Cir. 1967) (significantly changed economic conditions for its considerations, absent anti-union animus, no duty to bargain regarding partial closure).

167. 582 F.2d at 727.

substance, as the law provides that employers are *never* forced to agree to any proposals, regardless of whether the topic constituted a mandatory or permissive subject of bargaining.[168]

It is also questionable whether negotiations with the union may always be considered as a fruitful tool for compromise when the origin of the economic cause is not related to labor expenses. Frequently, radical employer changes are prompted by circumstances such as difficulties encountered in attempting to comply with rigorous environmental or occupational safety and health requirements which mandate operational or structural alterations of such magnitude that even moderate labor financial concessions do not provide a viable solution to the problem.

In an analysis of some of the recent circuit court decisions supporting the Board's position, pertinent questions can be raised concerning the scope and general applicability of circuit majority holdings. Was the Third Circuit in the *Brockway Motor Trucks v. NLRB*[169] case more willing to impose the presumption of a bargaining obligation upon the employer because the factual circumstances of the case revealed the existence of an economic strike which posed an immediate threat to the industrial peace which the NLRA was purportedly drafted to protect?[170]

Did the Second Circuit in the *NLRB v. First National Maintenance Corp.*[171] case intend to provide some real substantive loopholes for an employer to free himself of the duty to bargain when it set forth exceptions providing relief from bargaining where industry practice exhibited an exemption from bargaining over such decisions, or where the employer established that the purposes of the NLRA were not advanced through the imposition of a bargaining duty under the particular factual circumstances of the case?[172] Unfortunately, no definitive responses to these inquiries are available in either case. As a result of the differing modes of analysis and disparate holdings rendered by the Board and various circuit courts, confusing questions in this difficult area of labor law are more prevalent than reasoned responses.

Absent definitive Supreme Court decisions which address specifically the potential myriad of business structural changes falling outside the narrow holdings of *Fibreboard* and *Darlington,* it is likely that litigation will continue to be generated interpreting the proper scope of an employer's obligation to bargain. The case law rendered in this area of labor relations must begin to reflect more uniformity in analysis and result in order that the parties in the employment relationship may become aware of their respective rights and obligations. Presently, however, it remains incumbent

168. *See* NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960).
169. 582 F.2d 720 (3d Cir. 1978).
170. *Id.* at 723.
171. 629 F.2d 596 (2d Cir. 1980).
172. *Id.* at 601-02.

upon the employer and legal advisor to be knowledgeable about the current status of the law and the various factors which tend to influence the Board and the circuit courts in their respective determinations pertaining to the duty to bargain.

V. Plant Relocation: A Further Extension of Fibreboard and Related Issues

The legal issues which arise relating to the scope of bargaining under circumstances of plant removal do not materially differ from those considerations presented in situations involving subcontracting and partial plant closure. One apparent distinction stems from the fact that plant relocation essentially involves a termination of a plant facility or unit operation (total or partial closure) as well as the reassignment of unit jobs to other employees (the subcontracting of unit work). As a consequence, an employer's liability evolving out of a decision to relocate a plant facility may seemingly arise under two separate circumstances. The unilateral decision to remove a facility may constitute a violation partially distinct from the charge which may arise if the employer also allocates the performance of the work to nonunit company employees or the employees of a third party.

However, given the virtual identity of issues between plant removal cases and those involving partial closure and subcontracting, this section of the Article shall deal only briefly with employer motivations for plant removal and the applicable remedies imposed when an employer is found to have violated sections 8(a)(3) and 8(a)(5) of the Act.

A. *Plant Relocations and Questions of Mixed Motivation*

The motivational issues discussed in preceding sections of this Article are also relevant to issues of plant relocation as the law has long established that an employer may not unilaterally relocate his plant facilities simply to rid himself of a bothersome union.[173] Prior to the Supreme Court's decisions in *Fibreboard* and *Darlington*, the Board and Second Circuit rendered a decision *NLRB v. Rapid Bindery, Inc.*[174] which served to highlight the importance of an employer's motivational impetus for plant removal and the existence of the occasional disjunction in holdings between the Board and the circuit courts.[175]

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173. *See, e.g.*, Local 57 Int'l Ladies Garment Workers Union v. NLRB, 374 F.2d 295, 298 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 980 (1967); NLRB v. Preston Feed Corp., 309 F.2d 346, 350 (4th Cir. 1962); NLRB v. Wallick, 198 F.2d 477, 484 (3d Cir. 1952); Rome Product Co., 77 N.L.R.B. 1220 (1948).

174. 293 F.2d 170 (2d Cir. 1961).

175. *Id.* The Second Circuit reversed the Board's holding that the employer had violated section 8(a)(3) of the NLRA based upon the Board's finding that the employer had accelerated his removal of his plant operation due to contemporaneous difficulties with the union. Noting that there existed some animosity between the union and the employer, the Second Circuit

While it is conceded that the questions involving anti-union motivation in plant removals are controlled by the general tests for anti-union hostility evolving from section 8(a)(3) of the NLRA rather than the *Darlington* partial closure test, it is also recognized that the *Darlington* case left its mark upon the issue of plant relocation.[176] The pro-management tenor of the *Darlington* decision and Justice Stewart's concurrence in *Fibreboard* encouraged a more lenient attitude on the part of the circuit courts with regard to balancing the economic justifications advanced by the employer against the existance of hostility against the union.[177]

While the Board and courts have made it clear that the finding of a motivation to chill union adherence is not an element of a failure to bargain case under section 8(a)(5) of the NLRA,[178] numerous cases exist in which anti-union considerations are noted in Board holdings finding a failure to bargain relating to the decision and the effects of a plant relocation.[179] The cases dealing with relocation of plant facilities have not generated the volume of litigation presented by those cases dealing with partial closure and subcontracting. Nevertheless, the prevalent stature of those issues which evolved out of the *Fibreboard* and *Darlington* cases have been laterally transferred to cases involving business relocation.[180]

In a recent Ninth Circuit decision, *NLRB v. Triumph Curing Center*,[181] an employer claimed that its closure of one of its plant facilities and relocation fell within the parameters of the *Darlington* decision, thus allowing the employer to shut down permanently all or part of its business, regardless of its motivation. The Board and the Ninth Circuit both rejected the company's argument, noting that the Supreme Court in *Darlington* had distinguished factual circumstances governing runaway shops from the cases of

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stated that:

> [A]nimosity furnishes no basis for the inference that this was the predominant motive for the move when convincing evidence was received demonstrating business necessity. The decided cases do not condemn an employer who considers his relationship with his plant's union as only one part of a broad economic picture which he must survey when he is faced with determining the desirability of making changes in his operation.

Id. at 175.

176. ABA Section of Labor Relations Law, The Developing Labor Law 2118-22 (1971).

177. *See, e.g.*, NLRB v. Die Supply Corp., 393 F.2d 462 (1st Cir. 1968); Cooper Thermometer Co. v. NLRB, 376 F.2d 684 (2d Cir. 1967).

178. *See, e.g.*, NLRB v. Triumph Curing Center, 571 F.2d 462, 474 (9th Cir. 1978).

179. *See, e.g.*, Los Angeles Marine Hardware, 235 N.L.R.B. 720 (1978); Lloyd Wood Coal, 230 N.L.R.B. 234 (1977); Royal Horton Mfg. Co., 189 N.L.R.B. 489 (1971).

180. *Cf.* Coated Products, 237 N.L.R.B. 159 (1978) (illustrating the Board's examination of the economic factors involved in an employer's relocation in an effort to assess whether the employer is exempt from bargaining by virtue of the existence of a basic change in capital investment).

181. 571 F.2d 462 (9th Cir. 1978).

complete shutdown and termination of an employer's operation.[182] Finding that the facts in the *Triumph Curing* case revealed a closure and relocation of the same business, the circuit court rejected the employer's argument and found a failure to bargain under section 8(a)(5) of the NLRA.[183]

B. *Relocation Based upon Pure Economic Considerations*

The issue concerning when an employer is required to bargain with union representatives concerning a contemplated economic decision to relocate its facilities is unfortunately plagued by many of the same uncertainties which were discussed in previous sections of this Article concerning subcontracting and partial closures. As a consequence, the employer and his legal representative must remain mindful of the various factors articulated in the preceding sections of this Article and their bearing upon the potential obligation of mandatory bargaining concerning relocation decisions.

While the predominate issues pertaining to relocation questions revolve around the *Fibreboard* majority/concurrence dichotomy, a number of other relevant questions have surfaced in relocation cases. For example, it has been held that an employer's duty to bargain concerning a relocation decision arises at the point in time in which the employer has begun to think seriously about altering the location of the plant facility if it is shown that relocation will have the effect of substantially impairing the employment security interests of the labor force.[184]

The Board and circuit courts have also examined the employer's history of collective bargaining with the union to ascertain whether the existence of any anti-union animus has influenced the employer's decision. The Board has further sought to ascertain whether the refusal to bargain was predicated upon a good faith belief that bargaining over the effects of the relocation was sufficient to protect the employment interests of the employees.[185] Additionally, the final factor frequently noted in relocation cases examines the extent to which the relocation or transfer is practically calculated to cure the economic difficulties which have allegedly plagued the employer.[186]

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182. *Id.* at 473.

183. *Id.* at 474. *See also* NLRB v. Die Supply Corp., 293 F.2d 462 (1st Cir. 1968). *Cf.* NLRB v. Transmarine Navigational Corp., 380 F.2d 933 (9th Cir. 1967) (illustrating the obligation of the employer to negotiate relating to the decision and/or effects of relocation).

184. *See, e.g.*, Weltronic Co. v. NLRB, 419 F.2d 1120, 1123 (6th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970); McLaughlin Mfg. Co., 164 N.L.R.B. 140, 141 (1967); Ozark Trailers, Inc., 161 N.L.R.B. 566, 569 (1966).

185. *See, e.g.*, Ohio Brake & Clutch Corp., 244 N.L.R.B. 5 (1979); Pierce Governor, Inc., 164 N.L.R.B. 97 (1967).

186. Local 57, Int'l Ladies' Garment Workers' Union v. NLRB, 374 F.2d 295, 299 (D.C. Cir.), *cert. denied*, 395 U.S. 980 (1967).

C. *Remedies for Failure to Bargain Over Relocation*

The basic remedial sanctions for cases involving unlawful relocation of plant facilities are virtually identical to those cases involving a failure to bargain over partial closure.[187] In cases in which the employer is found to have harbored anti-union sentiments, the Board is frequently disposed to utilize the *"Garwin"* remedy.[188] Other common remedies frequently imposed in cases of unlawful relocation include enforcement of Board cease and desist orders,[189] reinstatement of discharged employees with back pay from the date of the unlawful decision to relocate,[190] and placement of affected employees on preferential hiring lists if reinstatement to equivalent jobs is not feasible.[191]

VI. Practical Considerations Surrounding the Duty to Bargain

The preceding sections of this Article have analyzed the current status of the law with regard to an employer's duty to bargain about the major business operational alterations of subcontracting, total and partial plant closure and plant removal. Given the somewhat confusing and fluctuating state of the decisional law in this area, this portion of the Article will focus upon some pragmatic factors and considerations, common to each of the aforementioned types of business structural changes, which may help define management's obligation to bargain under the NLRA.

From an employer's perspective, decisions rendered by the Board and

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187. *Cf.* Ohio Brake & Clutch Corp., 244 N.L.R.B. 5 (1979) (Board ordered the employer to bargain over the decision and effects of relocation).

188. *See* Local 57, Int'l Ladies' Garment Workers' Union v. NLRB, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 395 U.S. 980 (1967). The Board in the *Ladies Garment Workers* case (*Garwin*) ordered full reinstatement of plan workers, compensation for all lost earnings, and employer bargaining at either location, irrespective of union majority, following the company's unlawful plant relocation. The Circuit Court reversed the portion of the Board's order requiring bargaining irrespective of union majority status, holding such a requirement violative of the employees' freedom to independently elect a bargaining agent. *Compare* Royal Norton Mfg. Co., 189 N.L.R.B. 489, 494 (1971) (where the Board ordered that an employer, motivated by anti-union hostilities, (1) offer reinstatement to all those employees who had been terminated by reason of the removal and reimburse for all necessary traveling and moving expenses to the new plant facility and (2) bargain at the new plant with the union which represented the employees at the old facility) *with* Coated Products, Inc., 237 N.L.R.B. 159, 171 (1978) (employer ordered to reinstate employees and bargain with union upon request).

189. *See*, NLRB v. Mackneish, 272 F.2d 184 (6th Cir. 1959); NLRB v. Schieber, 116 F.2d 281 (8th Cir. 1940).

190. Local 57, Int'l Ladies' Garment Workers' Union v. NLRB, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 395 U.S. 980 (1967).

191. *See, e.g.*, Southeastern Envelope Co., 206 N.L.R.B. 932 (1973). *See also* Bridgeford Distrib. Co., 229 N.L.R.B. 678 (1977). *But see* NLRB v. Townhouse T.V., Inc., 531 F.2d 826, 832 (7th Cir. 1976) (Board avoidance of the remedy of status quo ante where such an award constitutes an unduly burdensome financial load for an employer who previously relocated his plant operation).

the courts may be characterized as classifying the utility and lawfulness of employer conduct in the following three distinct ways: (1) Conduct which is *offensive* to the NLRA;[192] (2) conduct which is *not violative* of the NLRA and which may relieve an employer of the obligation to bargain with the union;[193] and (3) conduct which the NLRA mandates as *necessary* if an employer is to avoid liability and the imposition of remedial sanctions.[194]

In order to appreciate the practical significance of engaging in each of the aforementioned types of conduct, the remainder of the Article shall briefly review the manner in which employers typically respond when facing decisions on major business structural changes and the relation of those types of conduct to the question of the employer's potential liability under the NLRA.

A. Conduct Which is Offensive to the NLRA

1. *Sham Bargaining*

When an employer has made the decision that he will, in fact, bargain with the union concerning his decision to implement a business change or the effects of that decision, he is obligated under section 8(a)(5) of the NLRA to negotiate with the union in good faith concerning his proposed action.[195] Thus, an employer may not engage in sham bargaining with the union while simultaneously commencing a transfer of its business operations to another location.[196] A determination of the extent to which the employer has engaged in sham bargaining is made by the Board by drawing inferences from conduct of the parties as a whole.[197]

Just as an employer must bargain in good faith with the union at a time when such negotiations may have the possibility of producing a change in the employer's proposed decision, similarly, an employer must render substantive proposals for the union's consideration.[198] An employer's conduct will be held to violate the NLRA when the bargaining process clearly indicates that management has offered meaningless proposals in an attempt to placate the union and to satisfy the duty to bargain in good faith under section 8(a)(5) of the NLRA.[199]

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192. *See* text accompanying notes 196-210 *infra*.

193. *See* text accompanying notes 211-43 *infra*.

194. *See* text accompanying notes 244-52 *infra*.

195. *See* 29 U.S.C. § 158 (1976).

196. *See* NLRB v. Triumph Curing Center, Inc., 571 F.2d 462 (9th Cir. 1978). *See also* B.F. Goodrich General Prod. Co., 221 N.L.R.B. 288, 290 (1975).

197. *See, e.g.*, NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 486 (1960). *See generally* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

198. *See* note 199 *infra*.

199. *See, e.g.*, NLRB v. Columbia Tribune Pub. Co., 495 F.2d 1384 (8th Cir. 1974); Stagg Zipper Corp., 222 N.L.R.B. 1249 (1976).

2. *Acceleration of the Implementation of a Decision to Alter the Operational Structure of a Business*

The employer's timing in the implementation of a decision to substantially alter plant operation is often times a crucial factor upon review by the NLRB. While an early circuit court decision had indicated that the business alteration dictated by sound financial reasons would not violate section 8(a)(3) even when the employer accelerated his action due to union activity,[200] the fact of acceleration as an indicia of an employer's anti-union motivation may encourage the Board or circuit courts to balance in favor of finding a violation of the duty to bargain in good faith under section 8(a)(5) as well as a breach of section 8(a)(3).[201]

As a practical matter, a determination by the Board and the circuit courts of an 8(a)(3) violation and, potentially, an 8(a)(5) violation, may ultimately turn upon the question of whether the acceleration by the employer was an attempt to anticipate economic exigencies or whether the employer was actually attempting to avoid the obligation to bargain.[202]

Under circumstances in which valid economic motivations served as a foundation for the employer's decision to undertake a business structural change and anti-union motivation is only present to the extent that it may have encouraged acceleration of the employer's decision, the Board and the courts are not as likely to impose a complete status quo ante remedy upon the employer for statutory violations. Thus, employee back pay awards, as opposed to reestablishment of a closed department or facility, are more frequently imposed as remedial orders in such cases.[203]

3. *Employer Alter Egos*

The third form of offensive employer conduct in this context is the creation of a dummy or straw corporation to serve as the alter ego for the employer's company.[204] While a variety of business structures are utilized in this method of bargaining avoidance, two primary corporate forms are implemented with some frequency in an effort to avoid the bargaining obligation.

Initially, an employer may form a second corporation, incorporating general structural changes which essentially preserve intact the business operation itself and selecting managerial personnel so that portions of the administrative and financial structure are left unaltered. These changes are

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200. *See, e.g.*, NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960).

201. *See* Midland Ross Corp. v. NLRB, 617 F.2d 977 (3d Cir. 1980); Bridgeford Distrib. Co., 229 N.L.R.B. 678 (1977).

202. *See, e.g.*, Midland Ross Corp. v. NLRB, 617 F.2d 977 (3d Cir. 1980); Preston Feed Corp. v. NLRB, 309 F.2d 346 (4th Cir. 1962).

203. *See, e.g.*, Bridgeford Distrib. Co., 229 N.L.R.B. 678 (1977).

204. *See, e.g.*, Triumph Curing Center v. NLRB, 571 F.2d 462 (9th Cir. 1978).

designed to have the effect of eliminating the union or avoiding the duty to bargain while allowing the employer to continue in some "disguised" form.[205] The second general method involves an employer leasing his facility or partially transferring assets from one corporation to a dummy or straw corporation after unionization, with corporate profits and earnings paid back to the employer's original corporation as rental monies or as a return of capital.[206]

Generally, both the Board and the courts focus upon a number of distinct factors in evaluating the extent to which a second business may be held to be an alter ego of the employer's original operation. Some of those factors are (1) whether the companies carry on the same type of business, (2) the extent to which equipment and facilities are exchanged and interchangeable, (3) whether all or portions of the administration of one company also manage the operation of the second, (4) the percentage of the same customers who frequent both establishments, (5) stockholder or ownership identity, (6) similarity in the labor force in the handling of labor relations policies, and (7) the extent to which product integration exists between the operations of the two companies.[207] In evaluating the extent to which two seemingly separate entities may be treated as a joint employer, the Board has generally focused specifically upon the interrelationship of operations, the existence of the "centralized control of labor relations," the presence of common management, and the existence of common ownership or financial control.[208]

Thus, the Board carefully scrutinizes the above-mentioned factors in determining whether an alter ego or joint employer situation exists and imposes appropriate remedial sanctions upon an employer who sought to avoid the obligation to bargain. Sanctions will issue regardless of the employer's claim that the establishment of the second corporation was partially motivated by economic circumstances[209] or that a new and distinct corporation existed after the original corporation was liquidated and reopened.[210]

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205. *See, e.g., id.* at 468; Republic Engraving & Design Co., 236 N.L.R.B. 1150, 1154 (1978); Appalachian Constr. Ins. Co., 235 N.L.R.B. 685, 686 (1978). *Cf.* Key Coal Co., 240 N.L.R.B. No. 153 (1979) (employer unlawfully sublet four mining properties as a way of attempting to avoid bargaining over mining).

206. *See, e.g.*, Aerospace Supply, Inc., 238 N.L.R.B. No. 181 (1978); Los Angeles Marine Hardware Co., 235 N.L.R.B. 720, 732 (1978).

207. *See* R.L. Sweet Lumber Co., 207 N.L.R.B. 529, 533-34 (1973). *See generally* Blake Constr. Co., 245 N.L.R.B. No. 76 (1979); P.A. Hayes, Inc., 226 N.L.R.B. 230 (1976).

208. *See* Stoll Industries, Inc., 223 N.L.R.B. 51, 53-54 (1976), *enforced*, 551 F.2d 301 (2d Cir. 1977); Sakrete of Northern California, Inc., 137 N.L.R.B. 1220, 1222 (1962). *Cf.* Gerace Constr. Co., 193 N.L.R.B. 645, 645 (1971) ("a critical factor in determining whether separate legal entities operate as a single employing enterprise is the *degree* of common control of labor relations policies") (emphasis added).

209. *See, e.g.*, Van-Note Harvey Assocs., 247 N.L.R.B. No. 139 (1980).

210. *See, e.g.*, Circle T Corp., 238 N.L.R.B. 35 (1978); Los Angeles Marine Hardware, 235 N.L.R.B. 88 (1978).

In spite of the fact that the creation of a straw or dummy corporation may be utilized by an employer for a variety of legitimate reasons, *i.e.*, tax avoidance or real estate acquisition, the formation of such corporate shells are generally not deemed an effective means of lawfully avoiding the obligation to bargain with the employee representatives pursuant to sections 8(a)(5) and 8(d) of the NLRA.[211]

While the aforementioned varieties of prohibited conduct do not exhibit an exhaustive list of those activities deemed to be offensive to the NLRA, they do constitute some of the more commonly utilized methods implemented by employers for the purpose of avoiding the obligation to bargain concerning basic structural changes in their business operations. Pragmatically, even the appearance of such conduct should be avoided, lest the employer risk violating the NLRA and potentially incurring substantial liability through remedial orders.[212]

B. *Conduct in Which the Employer May Engage in Seeking to Avoid the Obligation to Bargain*

1. *Waiver of the Union's Right to Bargain*

One of the most commonly asserted defenses by employers who have been charged with refusing to bargain concerning decisions to alter their business operation is union waiver of its right to negotiate. The concept of waiver, or the relinquishment of the right to bargain, was articulated in the early case of *NLRB v. Jacobs Manufacturing Co.*[213] The majority opinion rendered by the Board in this decision stated that a party could waive its right to negotiate over a bargainable issue during the term of a contract if the issue was covered in the contract or discussed in precontract bargaining sessions, and the waiving party's conduct revealed the fact that the waiver was manifestly clear.[214]

As a general rule, such doctrines relating to waiver of the right to bargain are fairly strictly limited in their practical application, as the Board has entertained a presumption against the waiver of the right to bargain, unless an explicit contract clause or previous conduct by the parties reveals the existence of such a waiver.[215]

Additionally, it is also generally conceded that the party claiming waiver has the task of showing that the opposing party has specifically

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211. *See* Van-Note Harvey Assocs., 247 N.L.R.B. No. 139 (1980).

212. *Cf.* Smyth Mfg. Co., 247 N.L.R.B. No. 164 (1980) (illustrates the substantial economic burden which may evolve for an employer as a result of Board-ordered remedies).

213. 196 F.2d 680 (2d Cir. 1952).

214. *Id.* at 683.

215. *See, e.g.*, Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949). *See generally* Note, *The Development of "Fibreboard" Doctrine: The Duty to Bargain Over Economically Motivated Subcontracting Decisions*, 33 U. CHI. L. REV. 315 (1966).

waived the right to bargain, as such a waiver will generally not be inferred from the evidence.[216] Under circumstances in which the evidence reveals the employer had issued the union a "fait accompli" relating to the likelihood of altering the employer's decision through bargaining, the Board has generally held that any such bargaining requests would be futile, and that a formal waiver of right to bargain by the union was not accomplished.[217]

Similarly, under circumstances in which the evidence establishes that the employer has concealed his operational decision from the employees, the employer is generally estopped from claiming that the union has waived the right to bargain, even where no bargaining request was timely made.[218] Thus, the defense of waiver of the right to bargain is available to an employer under circumstances in which he is able to show that the union has clearly waived its right to negotiate based upon either an express provision in the contract, previous negotiations on the subject matter in question, or failure of the union to pursue negotiations following timely notification and the opportunity to bargain pertaining to the employer's tentative decision.[219]

2. *Contractual Clauses Which Alleviate the Duty to Bargain*

Another course of conduct which management may pursue in an effort to avoid the duty to bargain with the union concerning mid-contract structural changes involves the codification of provisions in the original collective bargaining agreement which set forth the rights and obligations of the parties in the event that a major operational decision must be made.

There exist primarily three types of contract clauses which an employer may seek to utilize in an effort to limit the duty to bargain. Typically, these clauses include a management rights clause,[220] a "zipper" clause[221] and a general clause[222] which delimits the circumstances under which an obligation to bargain may be extinguished. The restrictive approach taken by the Board to management rights clauses is generally consistent with its view

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216. *Cf.* Ador Corp. v. NLRB, 150 N.L.R.B. 1658, 1660 (1965) (employer could properly lay off employees without bargaining with union since a collective bargaining agreement allowed such action).

217. *See, e.g.*, National Car Rental, 252 N.L.R.B. No. 27 (1980); Walter Pape, Inc., 205 N.L.R.B. 719, 720 (1973).

218. *See, e.g.*, Ozark Trailers, Inc., 161 N.L.R.B. 561, 564 (1966).

219. *See, e.g.*, NLRB v. Spun-Jee Corp., 385 F.2d 379, 383-84 (2d Cir. 1967); Key Coal Co., 240 N.L.R.B. No. 153 (1979). *Cf.* American President Lines, Ltd., 229 N.L.R.B. 433, 455 (1977) (no violation by employer despite lack of notice).

For cases which hold that failure to give timely notice bars an employer from asserting the defense of waiver, see Local 57, Int'l Ladies' Garment Workers' Union v. NLRB, 463 F.2d 907, 918 (D.C. Cir. 1972), *cert. denied*, 395 U.S. 980 (1967); NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967).

220. *See* text accompanying note 224 *infra*.

221. *See* text accompanying note 225 *infra*.

222. *See* text accompanying note 226 *infra*.

that residual rights provisions in collective bargaining agreements should not be controlling in cases in which basic business or operational changes instituted by the employer may affect the terms and conditions of employment.[223]

In spite of the tendency of the Board to construe such managerial rights provisions in a narrow fashion, the economic bargaining strength of the respective parties will generally determine whether such a clause is to be included in a contract, and the parties may choose to stipulate to the interpretation intended to be given the language in the clause. Pragmatically, it may be an extremely difficult process for an employer to gain a concession from the union, which includes a managerial rights clause permitting unilateral structural changes without pursuing bargaining negotiations with the union, capable of surviving scrutiny of the Board.[224] Nevertheless, the option for the inclusion of a managerial rights clause in a collective bargaining contract is one worthy of exploration as a means of avoiding mid-contract confrontations over such structural decisions.

The second type of clause which employers have frequently attempted to utilize as a method of limiting an employer's liability for refusal to bargain concerning structural changes undertaken during the course of the collective bargaining agreement is the "zipper" clause. As a general rule, the Board has not been quick to extend adjudicative credence to the waiver of statutory rights through the use of "zipper" clauses holding that the mere expression that the contract represents the complete agreement of the parties does not, standing alone, constitute a sufficiently clear waiver as to a specific item.[225] While such contractual provisions are not generally viewed with a great deal of favor by the Board, they still may constitute a potential avenue, albeit an infrequently utilized one, for avoidance of the bargaining obligation with the union.

The final type of contractual provision utilized by parties to a collective bargaining contract seeks to delineate the rights and obligations governing the conduct of each party in the event that the employer is forced to alter the structure of his business. The clause may impose a duty to bargain solely in the event of subcontracting while allowing partial closure or relocation to remain a management prerogative. Similarly, it may include an obligation to bargain concerning any one of the aforementioned operational changes. The obvious purpose for such a contractual provision is an attempt by the parties to ascertain, in advance, those difficulties which may produce structural changes in the business and to allocate the rights and duties of

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223. *See, e.g.*, Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949). *But see* Hughes Tool Co., 100 N.L.R.B. 208 (1952); General Controls Co., 88 N.L.R.B. 1341 (1950).

224. *See, e.g.*, Amcar Div. ACF Indus., Inc., 231 N.L.R.B. 83 (1977).

225. *See, e.g.*, New York Mirror, 151 N.L.R.B. 834 (1965). *Compare* Weltronic Co. v. NLRB, 419 F.2d 1120 (6th Cir. 1969) *with* Consolidated Foods Corp., 183 N.L.R.B. 832 (1970).

each party with respect to such changes prior to their occurrence.[226]

3. *Factual Circumstances Which May Alleviate the Duty to Bargain*

a. *Structural Alterations Which Have an Inconsequential Effect upon the Employees' Job Security.* The third type of general circumstance which will allow an employer to be relieved of the duty to bargain collectively with an employee representative arises under circumstances in which the employer's contemplated structural business change produces an inconsequential effect on the employment security of the unit employees. Recognizing that the Board has consistently held contracting out to be a mandatory subject of bargaining when unit employees had been terminated or experienced an alteration in the terms of employment,[227] the Board has refused to enforce a bargaining obligation under circumstances in which the unilateral decision has been shown to have a "de minimis" effect on the employee's job security.[228] The Board and circuit courts have refused to enforce a bargaining obligation where it is shown that an employer's unilateral decision to subcontract may have had the effect of preventing laid off employees from returning to work or depriving certain unit employees of overtime hours.[229] In both circumstances, the adjudicating bodies have found that the employee's claims of substantial detriment by virtue of the employer's unilateral decision were of either such a speculative or "de minimis" nature that no obligation to bargain could rightfully be imposed under the circumstances.[230]

b. *Relief from the Bargaining Obligation Where Severe Economic Considerations Preclude Meaningful Bargaining.* The second set of circumstances in which the Board has refused to require an employer to bargain comprehensively has occurred under circumstances in which the Board has found that the employer's decision has been mandated by economic factors not permitting meaningful bargaining negotiation. The types of cases which

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226. *See, e.g.*, Leroy Mach. Co., 147 N.L.R.B. 1431 (1964).

227. *See, e.g.*, Central Soya Co., 151 N.L.R.B. 1691 (1965); General Tube Co., 151 N.L.R.B. 850 (1965); American Oil Co., 151 N.L.R.B. 421 (1965); Fafnir Bearing Co., 151 N.L.R.B. 332 (1965).

228. *See, e.g.*, American Oil Co., 152 N.L.R.B. 56 (1965).

229. *See* Westinghouse Elec. Corp., 153 N.L.R.B. 443, 446 (1965). *Cf.* District 50, United Mine Workers of America v. NLRB, 358 F.2d 234, 237 (4th Cir. 1966) (where no substantial adverse impact on employees, the employer's action could stand).

230. *See, e.g.*, District 50, United Mine Workers of America v. NLRB, 358 F.2d 234, 237 (4th Cir. 1966). The court found that a limited bargaining obligation should be imposed in spite of the fact that no substantial detrimental effects upon the conditions of employment had been shown by the union. *Id.* at 238. The court reasoned that the union should not be permitted to delay management action by insisting upon protracted full scale bargaining negotiations. *Id.* Nevertheless, a limited bargaining obligation was imposed to the extent that notification of the decision and subsequent meetings for the purposes of exchanging ideas and receiving input from the union on the implementation of the decision were encouraged. *Id.*

have been recognized by the Board have generally been situations in which an employer has terminated his plant operation due to severe economic circumstances beyond his control.[231] The Board frequently scrutinizes such cases carefully to determine the effect upon the employment security of the unit employees and whether the employer's motivation in instituting such a decision was based upon pure economic considerations. A finding of failure to bargain under section 8(a)(5) of the NLRA generally does not carry with it a remedial bargaining order where evidence establishes that negotiations would be futile to alter the employer's decision.[232] Decisions rendered by the Board and the courts in cases of severe economic circumstances are founded upon the rationale that, where it is clear that economic circumstances beyond the employer's control have forced the unilateral decision, to force the employer to bargain over that decision where no other alternatives are available would be punitive rather than remedial in nature.[233]

While the aforementioned cases do not articulate any tests or rules which may be applied to a given factual circumstance to determine whether or not the employer is relieved of the bargaining obligation, as a practical matter the question of "bargaining futility" only arises after the employer has made a decision to act without negotiation. Since litigation upon the issue only serves to exonerate the employer of an unfair labor practice charge *after* he has made his decision not to bargain with the union, it may be sound advice for an employer to notify the union and engage in negotiations, unless exigent economic factors force immediate action. The rationale is, of course, that by notifying the union in bargaining concerning the decision, the futility of the negotiations will become immediately apparent and the employer will have satisfied his statutory obligation to bargain.

One obvious caveat which must be advanced to any employer contemplating the utilization of the claim of severe economic circumstances addresses the requirement of a sufficient showing, based upon substantial economic evidence, that severe financial necessity makes bargaining inconsequential. The Board and courts have evaluated the adequacy of the employer's economic hardship allegations to ascertain the extent to which the company is truly burdened by exigent financial circumstances, or whether the employer's arguments are merely a pretext given to obscure a unilateral business structural change.[234]

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231. *See, e.g.*, New York Mirror, 151 N.L.R.B. 834 (1965).

232. *See, e.g., id.; Cf.* Renton News Record, 136 N.L.R.B. 1294 (1962). In *Renton*, the employer unilaterally purchased a type setting machine for its newspaper operation which automatically brought about the termination of employment of a number of unit employees. *Id.* at 1297-98. The Board found no evidence of anti-union motivation and held that, while the employer had violated section 8(a)(5) of the NLRA, no bargaining order would issue on the ground that competitive conditions of the market place imposed the economic necessity of changing the mode of the employer's operation. *Id.*

233. *See, e.g.*, Brooks-Scanlon, Inc., 246 N.L.R.B. No. 176 (1979).

234. *See, e.g.*, Doug Neal Management Co., 226 N.L.R.B. 985, 987 (1976). *See also* Frito

The factors frequently focused upon by the adjudicatory bodies in an attempt to evaluate the extent to which the economic hardship claim is a viable defense to bargaining are: Whether the employer had the residual capacity to rectify the economic problems without undertaking a unilateral decision to alter the structural operation of his business; whether the decision sought to be implemented involves the utilization of the employer's assets; and whether the decision to be put in effect requires immediate implementation due to extraneous circumstances beyond the employer's control.[235] In addition, adjudicatory bodies frequently evaluate whether the particular economic decision implemented will serve to rectify the economic malady from which the employer claims he suffers, or whether the business is essentially no better off as a result of the decision.[236]

A recent Iowa case which is illustrative of the successful assertion of economic hardship claim by an employer is that of *Raskin Packing Co.*[237] In *Raskin,* the employer was engaged in the slaughtering and processing of wholesale beef in Sioux City, Iowa.[238] The plant was closed without any advanced notice to the union on October 21, 1977.[239] The closing resulted from the employer's claim that a loan received from Northwestern National Bank had been discontinued, thus severing the line of credit which the company had received for many years.[240] The economic severity of the bank's decision produced the necessity for immediate action by the company, and the Board held that the employer was relieved of the obligation to bargain relating to the decision to close the plant facility.[241]

The Board's willingness to carefully scrutinize the particular circumstances claimed by the employer as productive of need for the implementation of a unilateral decision evolves from the position of the Board that a bargaining obligation should be imposed under any circumstance in which a remote possibility exists which would allow the union to influence the final decision of the employer.[242] Thus, only where the employer is able to establish by a preponderance of the evidence that the claim of economic hardship is not a pretext to circumvent the bargaining obligation will the company be permitted to unilaterally implement a major structural decision which has the effect of impacting upon the employment security interest of the employees.[243]

Lay, 232 N.L.R.B. 753, 754 (1977); Erlichs 814, Inc., 231 N.L.R.B. 1237 (1977).

235. *See, e.g.,* Amcar Divisions Acf Indus., Inc., 231 N.L.R.B. 83 (1977).

236. *See, e.g.,* Smyth Mfg. Co., 247 N.L.R.B. No. 164 (1980).

237. 246 N.L.R.B. No. 15 (1979).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *See, e.g.,* Brooks-Scanlon Inc., 246 N.L.R.B. No. 76 (1979).

243. *See, e.g.,* NLRB v. Production Molded Plastics, Inc., 604 F.2d 451, 452 (6th Cir. 1979); NLRB v. Lloyd Wood Coal Co., 585 F.2d 752, 756 (5th Cir. 1978); Love's Barbeque

C. *Necessary Conduct to be Engaged in by the Employer to Avoid Remedial Sanctions under the NLRA*

1. *Effect Bargaining*

In spite of the confusion which shrouds the issue of the scope of mandatory bargaining relating to business structural changes, decisional law has long imposed the requirement that an employer bargain with employee representatives pertaining to the effects of a decision which impacts upon the terms and conditions of employment.[244] While the question of the obligation to engage in effect bargaining is not disputed, controversy frequently arises pertaining to the *adequacy* of the employer's bargaining with the union as it may relate to the effects of the employer's decision on the employees. As discussed in a previous section of the Article dealing with sham bargaining, the employer is required to bargain with the union in good faith.[245]

The Board, as a result of its desire to afford positive protection to the employment interests of the unit employees, carefully evaluates the sufficiency of employer bargaining and the extent to which the union is given ample opportunity to discuss a broad range of topics of concern to the employees affected by the employer's operational decision.[246]

2. *The Duty of Notification*

Consistent with the employer's obligation to bargain pertaining to the effects of a decision on the employment of unit employees, the employer has an affirmative duty to notify the union in a timely fashion relating to a decision to engage in subcontracting, plant closure, or plant relocation.[247] Relevant issues surrounding the obligation of notification arise concerning the adequacy and sufficiency of the notice delivered to union representatives as well as the timeliness of such notification.

Initially, section 8(d)(1) of the NLRA requires written notice by either the employer or the union to the other party of any proposed termination or

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Restaurant, 245 N.L.R.B. No. 17 (1979).

244. *See* note 100 *supra*.

245. *See* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

246. *Cf.* General Motors Corp., 191 N.L.R.B. 951, 953, *cert. denied*, 470 F.2d 422 (D.C. Cir. 1972) (The Board rejected the union's contention that the employer had failed to bargain in good faith concerning the effects of a sale. Findings rendered by the Board established that the union had had sufficient opportunity to discuss a wide range of topics concerning vacation pay, seniority, insurance programs and benefits, as well as any pending grievances. The employer had made concessions concerning issues of vacation pay and seniority rights with the issue of transfer of employees as the only issue left unresolved following negotiations).

247. *Cf.* Royal Optical Mfg. Co., 135 N.L.R.B. 64, 65 (1962) (Board held that concealment of plans to relocate was not a managerial privilege and constituted a refusal to bargain with the union in good faith). *See also* NLRB v. Aluminum Tubular Corp., 299 F.2d 595 (2d Cir. 1962); Ozark Trailers, Inc., 161 N.L.R.B. 561, 563-64 (1966).

modification of a collective bargaining agreement.[248] The language of the NLRA does not contain a specific requirement that notice be given prior to the implementation of a decision which would have the effect of terminating or modifying the collective bargaining agreement, such as may occur in a subcontracting, closure or plant relocation circumstance. Nevertheless, it is conceivable that an interpretation could be given the statute which would require notification prior to the implementation of such a structural change pursuant to the requirements of section 8(d)(1) of the NLRA.

The question of the sufficiency of the employer's notice carries with it the company's obligation to produce information and necessary data relevant to its decision in order that the union may engage in informed negotiations.[249] While an employer may be relieved of the obligation to bargain concerning its basic decision, company officials should be cognizant that the effect bargaining requirement carries with it the attendant duty to produce relevant economic information necessary for the union to participate in an informed fashion in subsequent negotiations.[250] The degree to which the employer considers its financial or economic data as sensitive must certainly bear upon the employer's implementation of a unilateral decision which will require the disclosure of such information to the union in preparation for bargaining negotiations.

The Board has not yet rendered a decision which definitively sets forth precise time limitations within which the employer must give notification to the union concerning collective bargaining. In a holding rendered shortly after the Supreme Court's decision in *Fibreboard Paper Products,* the Board held that notification to the union of decisions to subcontract must be made at a time in which the employer would still be able to alter the decision should negotiation sessions between the parties prove fruitful.[251] It is recommended that an employer tender notice at least seven days prior to the implementation of the desired course of action, although as little as two days of prior notification has been held to be sufficient.[252]

Thus, while an employer's obligation to bargain pertaining to his decision to undertake a business structural change remains somewhat in a state of flux, the law has clearly established that the employer must bargain with

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248. 29 U.S.C. § 158(d)(1) (1976).

249. *See, e.g.*, Kurz-Kasch, Inc., 238 N.L.R.B. No. 106 (1978); Shaw College of Detroit, 232 N.L.R.B. 191 (1977); Western Mass. Elec. Co., 228 N.L.R.B. 607 (1977).

250. *See* NLRB v. Acme Indus. Co., 385 U.S. 432, 435-36 (1967). *See also* NLRB v. Davol, Inc., 237 N.L.R.B. 431 (1st Cir. 1979); Shaw College of Detroit, 232 N.L.R.B. 191 (1977); Western Mass. Elec. Co., 228 N.L.R.B. 607 (1977).

251. Shell Oil Corp., 57 N.L.R.B. 1279 (1964).

252. *See, e.g.*, Lowery Trucking Co., 191 N.L.R.B. 464 (1972). *Cf.* Farmcrest Bakeries, 241 N.L.R.B. No. 195 (1979) (the employer was found not to have violated section 8(a)(5) of the NLRA where his decision to close his plant facility was arrived at two days before the action was implemented and sufficient discussions were held with the union pertaining to objections to the decision).

the union concerning the effects of his decision and must tender notification to the union prior to the implementation of such decision for purposes of effect bargaining.

VII. Conclusion

In spite of the existence of a wealth of decisional law relating to the scope of bargaining pertaining to major managerial structural changes such as subcontracting, partial closure and plant removal, conclusive responses to all employer questions relating to the scope of the duty to bargain remain unavailable. While it would appear that the residual management rights theory has been virtually extinguished, American businessmen are still faced with the problematic decision of whether to engage in bargaining negotiations prior to the formulation of a unilateral decision to alter their businesses.

Advocates of the bargaining obligation claim that such pre-crisis collective bargaining is advantageous for both parties. Initially, it is said that bargaining about such structural changes prior to the codification of a contract permits the employer to avoid the possibility that the union will seek to utilize a demand for mid-contract negotiations as a means of creating leverage for concessions through the inhibition of the employer's ability to move rapidly on a unilateral course of action. The attendant bargaining delay, coupled with the disclosure of strategic or confidential business plans, could undermine consumer confidence in the employer's product or company's ability to produce. Further, it is argued that preventative, pre-contract bargaining satisfies the employer's mandatory obligation to bargain and circumvents the possibility of severe remedial sanctions which many employers can ill-afford during the current period of economic recession. Finally, the employer is said to also acquire the intangible benefit of heightened employee morale and increased harmony within the employment relationship through voluntary pre-crisis bargaining.

Benefits said to accrue to the union and employees through early collective bargaining negotiations include the provision of a viable means for the protection of the employee's job security, access to the employer's decision-making process, and recognition of the employee's bargaining representative as capable of influencing major managerial decisions on behalf of the represented employees.

While proponents of the bargaining obligation point to the imposition of collective negotiations as consistent with the achievement of the goals and purposes of the NLRA, there exist some obvious liabilities inherent in the early negotiation process. Initially, the employer is stripped, to a certain extent, of the managerial flexibility which many employers deem necessary to allow them to successfully meet the demands of their customers, thus remaining competitive in the volatile business marketplace. Second, the employer is required to lay bare a rather substantial amount of sensitive eco-

nomic data for utilization by the union in the bargaining process. Finally, the employer's voluntarily acquiescence to the negotiation of such business changes may frequently be construed by labor to be a significant concession on the part of management to the "partnership" concept of operating the business.

The imposition of collective bargaining on such decisions also frequently thrusts the union into a role with which it is not familiar in terms of analyzing detailed economic data and deliberating over sensitive company strategy. Additionally, the significance of the union's role in negotiations may also be suspect under circumstances in which the employer has already engaged in a sophisticated cost-benefit analysis concerning a structural change mandated by factors distinct from labor costs. On one hand, the union is asked to secure concessions from an employer prior to the occurrence of conditions which may require a structural change, and, on the other hand, the union is expected to assume a meaningful role in negotiations where sophisticated financial data and managerial criteria have almost dictated the proper course of action regardless of input from the union.

Recognizing that a number of considerations concerning the pre-crisis bargaining option must be evaluated it remains clear that the employer is burdened with the responsibility of deciding whether to initiate the bargaining process. In evaluating the difficult decision of whether to avoid collective bargaining by unilaterally formulating and implementing a major structural business decision, each employer should be cognizant of the following considerations:

1. The employer must predicate his unilateral decision on valid economic factors.
2. The decision must seek to remedy the conditions necessitating the structural changes.
3. An evaluation must be undertaken concerning whether the decision will substantially affect the terms and conditions of employment of the unit employees.
4. The employer must consider the existence of any past practice of negotiations between the parties relating to such business operational changes.
5. The employer should be aware of the status of its overall relationship with the union, including the presence of any factors or incidents which may exhibit anti-union hostilities.
6. The employer should give timely notification of any major structural decisions and provide an opportunity for the union to bargain concerning the effects of the decision upon the unit employees.
7. The employer should evaluate the extent to which its competitive position within the market place may be harmed in the event remedial sanctions are imposed for failure to bargain.
8. The employer should carefully consider whether the factors deemed to require such a structural change could be remedied effectively through reduction of labor costs.

9. The employer should evaluate whether the structural change envisions a significant alteration in the direction of the business and whether the change constitutes a substantial capital investment or capital withdrawal.

10. The employer should seek to ascertain whether the imposition of collective bargaining would substantially abridge his freedom to manage his business.

11. The employer should evaluate whether the presence of any factors surrounding its decision may lead to the filing of unfair labor practice charges (*i.e.*, acceleration of a decision to partially close a plant facility, engaging in sham bargaining relating to the effects of the decision on employees, etc.).

12. The employer should be cognizant of the availability of potential defenses to charges of failure to bargain (*i.e.*, union waiver of the right to bargain, etc.).

13. The employer should evaluate the extent to which the "goals and purposes" of the NLRA would be advanced under the factual circumstances through collective bargaining on the decision.

While it is recognized that the process of collective bargaining can be of great utility in the avoidance of debilitating industrial disputes, the negotiation process itself can only be effective if each party is fully cognizant of the topics which constitute the mandatory subjects of bargaining. It is thus incumbent upon the Board and the courts to render, in a comprehensive fashion, a body of law which provides a workable mechanism through which employers and employees alike may ascertain the extent to which a bargaining obligation exists concerning decisions to subcontract, partially close or to remove a plant facility. Recognizing the divergent interests of the parties to the bargaining relationship, the adjudicatory bodies must formulate a method of analysis which consistently balances the parties interests in a uniform manner. To continue to shroud with confusion the question of when a mandatory duty to bargain arises under sections 8(a)(5) and 8(d) of the NLRA is to perpetuate the frustration of the articulated policies of the NLRA and to impede industrial peace and employment harmony.