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MILWAUKEE SPRING AND THE FIRST NATIONAL MAINTENANCE: MANAGEMENT RIGHTS VERSUS THE DUTY TO BARGAIN

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On June 18, 1985, the U.S. Court of Appeals for the District of Columbia Circuit handed down its decision in International Union, U.A.W. v. N.L.R.B. 1 In affirming the rehearing decision of the new Reagan majority on the Board, the D.C. Circuit Court has reestablished the employer's right to allocate work between union and non-union operations. This comment examines the context within which this decision was made, and the possible consequences for labor-management relations.

HISTORICAL OVERVIEW

Labor Law, Policy, and Politics.--Labor Law provides one of the classic examples of the impact of political and social philosophy on judicial and administrative decision-making.[2] From the earliest state cases holding that labor unions were criminal conspiracies under the common law,[3] through the use and abuse of the labor injunction[4] and the New Deal protective legislation,[5] to the very recent U.S. Supreme Court decision in Bildisco,[6] the role of labor unions in the American economy has been a subject of continuing debate. Free-market economists view labor as just another factor on the productive process, whose price and terms should be subject to the same sort of market adjustments as raw materials and physical plant.[7] This view is of course accurate in the broad sense; the cost of labor is a factor (and a very sizable one in many cases) in the price of the final product. But, carried to an extreme, this view overlooks the equally valid point that the labor "factor" consists of human beings. Individual employees worry about adequate pay, unequal treatment, and loss of their jobs. Those with relatively low-level skills, in particular, usually feel that they can not negotiate as equals with the managers representing their giant-industry employer. Without some form of protection, the threat of discriminatory treatment, including loss of the job, is ever-present.[8]

Labor unions present themselves as the protector of, and negotiator for, the individual employees. Most people, including most economists, would agree that this is, or can be, a legitimate union function.[9] Even many managers may find bargaining once with the union preferable to bargaining individually with several thousand employees. A union contract with a time-in-grade salary schedule may be considerably easier to administer than a personnel policy which attempts to evaluate individual productivity. Agreement on the legitimacy of these basic union functions, however, still leaves open the questions of what are legitimate union tactics and how to ensure internal union democracy.

The majority view on the legitimacy of basic union objectives found early expression in the celebrated Massachusetts case, Commonwealth v. Hunt, which rejected the criminal conspiracy doctrine.[10] Nearly a century later, after a sorry tale of brutalization and exploitation, bloody strikes, and court injunctions, Congress finally responded.[11] The Norris-LaGuardia Act of 1932[12] effectively prohibited the U.S. District Courts from issuing injunctions in labor disputes.[13] The National Labor Relations Act of 1935 (Wagner Act)[14] was one of the centerpieces of the New Deal.[15] In part as a result of this legislative sponsorship, labor union membership and power increased dramatically.[16] The Social Security Act of 1935[17] and the Labor Standards Act of 1938[18] were also designed to improve the workers' economic well-being, but had only a more indirect impact on the union movement.

In the aftermath of World War II, a wave of strikes triggered a call for a re-examination of national labor policy.[19] Following extended and heated debate, the Republican-controlled 80th Congress passed the Taft-Hartley Act of 1947.[20] President Truman vetoed the bill, but it had originally been adopted by large majorities in both Houses, and his veto was overridden.[21] Taft-Hartley became one of Truman's favorite targets during the presidential campaign of 1948,[22] and he refused to invoke its provisions to deal with the steel strike in 1952.[23] That refusal resulted in the Youngstown Sheet & Tube case, one of the U.S. Supreme Court's major expositions of presidential power.[24]

Almost by definition, the union solution to personnel matters involves a lock-step, monolithic approach, with very limited room for individualism. In many unions, this need to present a united front to employers has led to an unwillingness to tolerate dissent internally, as well. For many unions, "union democracy" has been an ideal much talked about but seldom implemented.[25] Bossism, corruption, and racketeering have been and continue to be widespread in the labor movement.[26] Lengthy televised hearings by the McClellan Senate Subcommittee during the late 1950s exposed many Americans to these problems for the first time.[27] The Landrum-Griffin Act of 1959[28] was the result of these hearings.

Statutory Inconsistencies--The conflicting philosophies and objectives of the three major pieces of labor relations legislation (Wagner, Taft-Hartley, Landrum-Griffin) have resulted in some notable disharmonies in our basic national statute governing labor law. There are exceptions to exceptions, and provisos to everything.[29] Labor unions are free to do their thing, "except...," "unless..," but "provided, however...." Not surprisingly, these areas of statutory disharmony are mirrored in the decisions of the National Labor Relations Board and the courts. Equally unsurprising is the fact that board members and judges with different perceptions of labor unions have combined these exceptions and provisos in different ways.[30] A seemingly clear statutory rule that labor unions can not "restrain or coerce" their members' "right to refrain from any or all" concerted activities was held not to have been violated when a union fined its members who crossed a picket line to go to work.[31] A majority of the Supreme Court held that such fines were permissible because of a proviso which permits a union "to prescribe its own rules with respect to the acquisition or retention of membership therein."[32]

Changes in membership on the Board and the courts can thus produce shifts in the rules of the game, often quite basic and dramatic ones.[33] The Nixon Supreme Court and the Reagan NLRB have recently combined to generate a change of potentially enormous significance. At issue is a company's right to shift work from a union to a non-union plant without getting the union's agreement prior to making the change.

SCOPE OF THE DUTY TO BARGAIN

Basic Approach.--Section 8(a)(5) of the NLRA makes an employer's refusal to bargain with the union chosen by his employees an unfair labor practice. Section 9(a) makes the union the exclusive bargaining representative for "rates of pay, wages, hours of employment, or other conditions of employment." The NLRB and the courts have generally taken a very broad view of this

requirement, and have required bargaining on nearly any topic which might arguably impact on the working environment. In Ford Motor Co. v. NLRB, for example, the Board and the courts ordered Ford to bargain with the UAW over the prices to be charged by an independent caterer who was selling food in the Ford plant.[34] The Board and the courts have also generally required disclosure by the employer of any information or economic data which might be helpful to the union in its bargaining or representation functions. The employer has also been required to participate in the bargaining process in a meaningful way. GE was held to have violated its duty to bargain when it made its "last, best" offer initially, and then tried to communicate with the employees directly, indicating that the first offer was all it could afford.[35] Generally, in making these determinations, the courts have tended to defer to the Board's "expertise," and have refused to overturn Board orders if they were supported by "substantial evidence in the record as a whole."[36] It is fair to say that the Board and the courts have interpreted the scope of the duty to bargain very broadly.

Two Landmark Cases on Management Rights.--The bargaining requirement poses a significant restraint to an employer's attempts to respond to economic conditions. To what extent is an employer duty bound to discuss proposed production changes with his employees' chosen union prior to implementing them? The U.S. Supreme Court addressed this problem in two landmark cases in the mid-1960s--Fibreboard[37] and Darlington.[38]

In Fibreboard, a majority of the Court felt that the employer had violated its statutory duty to bargain by contracting out work from the bargaining unit without discussing the change with the union. There was a union contract in force at the time, and many of the employees covered by the contract lost their jobs as a result of the subcontracting. The Court held that such subcontracting is a "mandatory" subject of collective bargaining, i.e., that it must be discussed with the union prior to implementation.

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage his business.[39]

As a result of this failure to bargain, the employer was required to resume the maintenance operation, to rehire the laid-off employees, with back pay, and to bargain with the union before subcontracting.

The management decision at issue in the other classic case was much more serious: to close the entire plant. When the Textile Workers Union won a bitterly contested election to organize the plant at Darlington, South Carolina, management decided to close the plant rather than to bargain with the union.[40] The NLRB found a violation of section 8(a)(3)--employer discrimination designed to discourage union membership, and of 8(a)(5)--the duty to bargain.[41] On the basis that the Darlington plant, although owned by a separate corporation, was in reality part of a larger conglomerate, the U.S. Supreme Court agreed that a partial closing could be an unfair labor practice,

if motivated by a desire to "chill unionism" at the employer's other locations. The case was remanded to the Board for a finding on the motivation question. After a careful examination of the timing of events and the statements made, the Board did find an anti-union motive, and ordered back pay and rehiring remedies. In its opinion, however, the U.S. Supreme Court had said that the closing of an entire business, for whatever motive, could not be an unfair labor practice.[42] In other words, even if the employer's sole motivation for closing was to avoid dealing with a union, there could be no unfair labor practices.

ADJUSTING TO THE NEW ECONOMY

Historically, U.S. industry has called its own shots, largely in isolation from the rest of the world economy. To be sure, we traded with other nations, but usually on our own terms. With our massive domestic market, producers worried about foreign competition only as incidental intruders. In the 1970s and 1980s, this view has had to be radically changed. The reality of effective foreign competition in our domestic market has brought a rude awakening. Flexibility and productivity are the watchwords. There are no guarantees, and management must be prepared to respond quickly to marketplace conditions. These changes in the national economic structure have brought concomitant changes in the labor relations field.

Partial Closing: FNMC.--Given the dynamic nature of the U.S. economy, it was only a question of time until the Board and the courts would have to deal with the really tough variation on Darlington: a partial closing not based on any anti-union motivation. That situation was presented by First National Maintenance Corporation, which had unilaterally decided to terminate its services to one customer, and had laid off the employees working on that job.[43] FNMC provided cleaning and maintenance services under individual contracts with its customers. After financial and other difficulties with one customer, the Greenpark nursing home, FNMC decided to terminate its service contract, and so notified Greenpark. Meanwhile, the Hospital and Health Care Employees' union had won a representation election among FNMC's employees on the Greenpark job. FNMC did not respond to the union's request for a bargaining meeting, but instead notified its Greenpark employees that their jobs had ended. The union filed charges with the NLRB, alleging violations of sections 8(a)(1) and 8(a)(5). The administrative law judge found in favor of the union, and recommended an order requiring FNMC to bargain about the decision, not just its effects, and to pay wages until the parties reached an agreement, or an impasse, or until the union failed to bargain in good faith.[44] The Board adopted these recommendations, and also required FNMC to rehire the discharged employees for other jobs, if necessary by discharging subsequently-hired workers, if the Greenpark contract were not reinstated.[45] The Court of Appeals for the Second Circuit enforced the Board's order.[46]

With Justices Brennan and Marshall dissenting, the U.S. Supreme Court reversed.[47] Writing for the majority, Justice Blackmun reviewed the policy objectives underlying the passages of the NLRA: "the establishment and maintenance of industrial peace to preserve the flow of interstate commerce," through the use of "collective bargaining as a method of defusing and channeling conflict between labor and management." Nevertheless, said Blackmun, in what is sure to become an oft-quoted passage, "Congress had no expectation that the elected union representative would become an equal

partner in the running of the business enterprise in which the union's members are employed."[48] Surely that is a fair and rational statement. "Despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place."[49] FNMC's decision here is not really about "the terms and conditions of employment," but rather about whether to continue an unprofitable operation. Certainly a decision about the scope and direction of the business impacts on the employment relationship, but so might a decision on an advertising campaign, or on a new product line. There is no question that the employer has the duty to bargain over the effects of its shut-down decision; the issue is whether it must bargain over the decision itself, before implementation.

Blackmun thought a balance had to be struck: "(I)n view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweights the burden placed on the conduct of the business."[50] These discharged workers were not being replaced by others, a key distinction from the Fibreboard case. Here the employer had simply decided not to engage in one particular (unprofitable) operation. If an employer can not be forced to stay in business even if its only motive in closing is to avoid dealing with a union (Darlington), how can it logically follow that an employer be required to bargain over continuing an unprofitable operation until the union is satisfied with the decision to close? Blackmun and the majority did not think that such an economically-motivated decision could be an unfair labor practice.

Runaway Shops: a Significant Reversal.--So-called "runaway shops" may occur in two rather different contexts. The first involves the shutting down of an existing unionized plant and the start-up of a new plant in a location less favorable to unionization (usually a southern state). The second situation is simply a shifting of work from a union plant to an existing non-union plant. This second situation was involved in U.A.W. v. N.L.R.B. (Milwaukee Spring).[51]

Illinois Coil Spring Company decided to move its assembly operations formerly conducted at its Milwaukee Division to its McHenry Division. The labor costs at Milwaukee were $8.00 an hour in wages and $2.00 an hour in fringe benefits; at McHenry, $4.50 in wages and $1.35 in fringes. A labor contract was in force at Milwaukee but not at McHenry. Illinois did bargain with its Milwaukee union about the change, by asking for wage concessions in order to keep the Milwaukee location viable. After the union rejected any concessions, Illinois did begin to relocate its assembly operations. There had also been a prior relocation of jobs from another facility, but no unfair labor practice charges had been filed in that instance.

The union alleged an illegal violation of an existing collective bargaining agreement, in violation of section 8(d) and 8(a)(1), (3), and (5). Illinois claimed that the union had waived any right to object to such changes through language in the contract, and that, in any case, it had committed no unfair labor practice since it had initially bargained about the change and was ready and willing to bargain about the effects of the change.

Milwaukee Spring I.--The Board initially found that Illinois had violated section 8(d) by making a unilateral change in the terms and conditions of

employment, during the term of the contract, without the other party's consent.[52] The then existing majority distinguished The University of Chicago case, where the U.S. Seventh Circuit had denied enforcement of a Board order in a situation where work had been shifted "to raise the quality of work at issue to a level in keeping with the high standards demanded by the University's professional staff."[53] This initial decision was based in large part on Los Angeles Marine Hardware Co., where the U.S. Ninth Circuit held that "repudiation of mandatory contractual terms without the union's consent during the term of the contract is not excused because the employer acted in good faith or was motivated solely by economic necessity."[54] This initial decision was reached despite a "management rights" clause in the contract which read as follows:

> Except as expressly limited by the other Articles of this Agreement, the Company shall have the exclusive right to manage the plant and business and direct the working forces.
>
> These rights include, but are not limited to, the right to plan, direct and control operations, to determine the operations or services to be performed in or at the plant or by the employees of the Company, to establish and maintain production and quality standards, to schedule the working hours, to hire, promote, demote and transfer, to suspend, discipline or discharge for just cause or to relieve employees because of lack of work or for other legitimate reasons, to introduce new and improved methods, materials or facilities, or to change existing methods, materials or facilities.[55]

Incredibly, the Board initially decided that this language did not "expressly" grant the Company the right to move work from the Milwaukee facility to the McHenry facility. The management rights clause specifically states that the Company has the right "to determine to operations or services to be performed at or in the plant," but the Board decided that just meant the right to determine "whether, and how, its products will be manufactured."[56] The Board glossed over the contract language which gave the Company the right "to relieve employees because of lack of work or for other legitimate reasons." There was no further work at the Milwaukee facility, so the union workers were "relieved," as per the contract. There was no question that the substantial savings on labor costs was indeed a "legitimate reason" for shifting the work, but the Board ignored this language as well. Most exasperating is the cavalier treatment given to the last phrase of the quoted contract language: "or to change existing methods, materials or facilities." The Board itself, in announcing its order speaks of the "Milwaukee Spring facility."[57] The contract language clearly gives the Company the right to change existing facilities, and they have done so--from one "facility" to another "facility." Apparently these Board members would have us believe that the contract clause permitted the introduction of machinery at one facility which might result in some job losses, but not the transfer of work from one facility to a more efficient one. To say the least, such a reading of the contract clause is a narrow and tortured one, if not out and out sophistry.

Milwaukee Spring II.--When the three Board members (Van de Water, Fanning, and Jenkins) who had made this initial decision were replaced, the new Reagan Board took the unusual step of asking that the case be returned to it by the Seventh Circuit Court.[58] (Dotson is now Chairman; Zimmerman,

Hunter, and Dennis were appointed; one vacancy remains.) With Zimmerman filing a lengthy dissent,[59] the new majority held that the Company had not violated section 8(d) of the NLRA by moving the work here involved,[60] nor section 8(a)5, since it had bargained over the decision.

The new majority almost totally rejected the prior analysis. It agreed with two prior Court of Appeals decisions, Boeing Co.[61] and University of Chicago,[62] which had refused to enforce Board orders. In each of these cases, the Court of Appeals had said that a "recognition clause" did not imply an agreement on work preservation. The union was merely being recognized as the bargaining representative for existing employees; there was no implied promise that those employees would have those jobs, at that location, for all time to come. The parties could, of course, have drafted and included a work-preservation clause--but they had not done so. (Rather the opposite, as the management rights clause make clear!)

It is not this second decision that overturns years of NLRB law; the first decision in this case had done that. The new majority cited the 1966 NLRB decision in Ozark Trailers, where the Board had said that the duty to bargain does not include a duty to agree, only to discuss.[63] "If such efforts fail, the employer is wholly free to make and effectuate his decision."[64] The new majority disagreed with prior Board decisions in Boeing[65] and Chicago,[66] and with the Board and Court of Appeals in Los Angeles Marine.[67] It quoted the Seventh Circuit Court of Appeals in Chicago, as follows:

> (U)nless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: (1) the employer complies with the Fibreboard Paper Products v. NLRB, 379 U.S. 203, 57 LRRM 2609... (1964), by bargaining in good faith to impasse; and (2) the employer is not motivated by anti-union animus, Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657 .. (1965)."[68]

The new majority then expressly overruled the inconsistent Board decisions in these three prior cases.[69]

The new majority also said there could be no violation of section 8(a)(3)--"discrimination in regard to hire or tenure of employment"--where there was no violation of section 8(a)(5), and admittedly, no anti-union animus.[70]

The majority felt its decision would encourage the bargaining process; member Zimmerman, in dissent, felt the decision would destroy collective bargaining.[71]

U.A.W. v. N.L.R.B.--Writing for a unanimous panel, Judge Harry Edwards totally rejected the union's arguments. He emphasized the employer's good faith economic motivation and lack of anti-union animus. The employer had told the union that it needed relief from the provisions of the collective agreement; it had bargained with the union about the relocation of work; and it had moved the work to the non-union facility only when the union had refused to make economic concessions. The employer remained ready to negotiate over the effects of the change. As Judge Edwards restated the precise issue presented to the Board, the answer seems almost self-evident:

> [W]hether an employer, after engaging in decision bargaining and while offering to engage in further effects bargaining, may, without union consent, relocate bargaining unit work during the term of an existing collective bargaining agreement from its unionized facility to its nonunionized facility, and lay off employees, solely because of comparatively higher labor costs in the collective bargaining agreement at the unionized facility which the Union declined to modify.[72]

Judge Edwards' focus was a bit different than that of the Board majority. He agreed that the employer's duty to bargain does not end with the signing of a collective agreement. But, he said, "During the term of a contract ..., the scope of the duty to bargain over a particular mandatory subject depends upon whether that subject is 'contained in' the contract." If a mandatory subject is not contained in the contract, "an employer must bargain in good faith to impasse with the union representatives; if no agreement is reached, the employer may unilaterally implement its bargaining proposal with respect to the matter not contained in the agreement."[73] Conversely, if the matter is contained in the agreement, "section 8(d) prohibits an employer from altering contractual terms concerning mandatory subjects of bargaining during the life of a collective bargaining agreement without the consent of the union."[74] This initial statement of the rules seems to indicate that the crucial decision is whether a matter is "contained in" the collective contract. As Edwards' opinion proceeds, that assumption proves to be only partially correct.

Mandatory subjects may become "contained in" an agreement either through explicit statement, as for example a wage provision, or through a "zipper clause," which "purports to close out bargaining during the contract term and to make the written contract the exclusive statement of the parties' rights and obligations."[75] Where there is a zipper clause, Edwards says, it "has the effect of incorporating all possible topics of bargaining--both those actually discussed and those neither discussed nor contemplated during bargaining--into the contract."[76] With a zipper clause, then, neither party can force the other to bargain over <u>any</u> mandatory subject, nor unilaterally implement any change, even after bargaining to impasse.

The contract involved in this case did contain a zipper clause, but it also contained the "management rights" clause discussed previously.[77] The union thus was not required to bargain with the company over the midterm wage concessions, but in any case it had done so voluntarily. Nor could the company implement the wage changes unilaterally, even after bargaining to impasse, since wages were a matter "contained in" the contract. The company, however, did not in fact change the agreed wages, so there could be no section 8(d) violation on that basis.

As to the legality of the company's decision to relocate the work, Edwards' analysis was a bit more complex. He said that the parties and the Board had somewhat obscured the "contained in" issue, but he was clear that the relocation did not violate the contract.[78] The Board had expressly found that no term of the contract restricted relocation decisions. Moreover, "[t]he Union does not contest this contractual right, nor does it argue that

the contract was violated or modified in any other way by the relocation decision."[79] Said Edwards, "it is undisputed that the Company acted consistently with the contract in deciding to relocate, and thus did not modify the agreement in violation of section 8(d)."[80]

If the employer has acted in good faith, if there's no anti-union animus, if the employer has made no improper modifications in the contract's wage structure, if the union concedes that the employer had the right to relocate the work, and if the employer is ready to bargain over the effects of the relocation, what's the problem? The union argued that the employer's (lawful) request for wage concessions, when coupled with its announced intention to move the work (lawfully), amounted to a violation of section 8(d)! According to the union, since the employer could not force the wage concessions by locking out the employees, nor implement wage changes unilaterally, it should also be prohibited by section 8(d) from bringing any sort of "economic pressure" to bear on the union.

Edwards completely rejected this theory as "untenable." "First, we cannot see how two rights can make a wrong. Second, we can find no support for the UAW's proposition that section 8(d) condemns any midterm behavior by one party to a contract that results in the other party feeling 'economic pressure' to bargain over modifications. The plain language of the statute proscribes only lockouts and strikes. Nothing in the rest of section 8(d), nor the Act's legislative history, persuades us that the Union's expansive reading of section 8(d)4 is correct."[81] The two cases cited by the Union did not support its position, since they "both concern strikes by employees, not generic 'economic pressure'."[82]

Edwards' discussion of the policy reasons for permitting such modifications of the collective bargaining agreement is worth quoting in full.

> In the absence of antiunion animus, it is lawful--and indeed common in this era of concession bargaining--for one party to a collective bargaining agreement to propose, midterm, the trade of a right it has under the contract for a modification of the agreement. The Union was under no compulsion to discuss wage concessions; it did so because it made sense in the context of the parties' bargaining relationship. This sort of ongoing flexibility in labor-management relations is crucial. The freedom to suggest exchanges of rights permits parties to adapt their relationship to unanticipated events or changed circumstances during the lifetime of a contract, thus keeping the collective bargaining process vital and responsive to both sides' needs.[83]

Edwards thus agrees with the Board majority that such concession bargaining is a legitimate and necessary part of labor-management relations.

CONCLUSIONS

It is clear that this issue involves important questions of economic and social policy. If U.S. industry is to remain competitive in the world economy, it must have the flexibility to respond to market conditions. If a particular product or service is no longer economically viable, changes must be made. Either the production system must be changed, or that line (at least at some point) must be discontinued. Losing operations simply cannot be continued for an indefinite time, unless our whole economic system is radically restructured. Under the present rules, the company which continues to lose money will at some point be forced into bankruptcy, and all its employees will then indeed lose their jobs.

Certainly the rights of the employees involved in these company changes must be protected, to the extent possible. The question is what is the best mechanism for doing so. Giving the union a veto over such changes during the life of a collective bargaining contract would surely be one possible rule. The difficulty with such a rule is that competitive conditions may not wait that long; an employer company could be forced out of business before it was permitted to make the necessary production changes.

A more realistic and balanced approach seems to be evolving from cases such as First National Maintenance and Milwaukee Spring. First things first--permit management to make the production changes necessary to meet competitive conditions in the marketplace. If some jobs are lost when work is transferred to more productive facilities, or when one process is ended, so be it. The company must be able to save itself, and the jobs of the rest of its employees, first; then it can bargain with the union over termination benefits and transfer rights for the affected employees. Such a requirement would not seem to be an undue burden on the employer. It can make the decision to close, but would have to factor in the consequences in drawing its economic balance.

A more explicitly drawn management rights clause might obviate such cases as Milwaukee Spring, although one suspects that management and counsel felt that the clause included in that contract was sufficient to do the job. Perhaps as a quid pro quo for such an explicit reservation by management of the right to make drastic production changes, a carefully drafted procedure for protecting the rights of affected employees could also be included in the contract. Priority hiring rights at other company locations, for instance, could be specified as part of the package. Perhaps a partial salary payment could be continued for a certain period of time. Job location and retraining services could be provided. Of course all such suggested benefits would cost money. But sudden job loss also imposes far more drastic costs on the employees and their families. It is not too much to demand that an employer take account of such effects in making the decision to close or to move a facility or its production.

FOOTNOTES:

1. INTERNATIONAL UNION, U.A.W. v. N.L.R.B., 765 F.2d 175 (D.C. Cir. 1985).

2. Another area would be antitrust law. See e.g., the majority and dissenting opinions in U.S. v. VON'S GROCERY CO., 384 U.S. 270 (1966).

3. See e.g., COMMONWEALTH v. PULLIS (1806), in Nelles, "The First American Labor Case," 41 YALE LAW JOURNAL 165 (1931).

4. Frankfurter, Felix and Nathan Green, THE LABOR INJUNCTION, (New York: The Macmillian Co., 1930).

5. See e.g., "The Logic of Government Protection," Chapter 7 in LABOR RELATIONS LAW, third edition, Benjamin J. Taylor and Fred Whitney, Englewood Cliffs: Prentice-Hall, In., 1979.

6. N.L.R.B. v. BILDISCO & BILDISCO, 104 S.Ct. 1188 (1984).

7. Ayers, Ronald M. "Two Myths of Employment Protection," THE FREEMAN, 34 (August 1984) 465-467.

8. Anyone who has actually worked in such a position is probably aware that this perception is not wholly incorrect. Even in public employment, including academia, the union movement is feeding on this fear.

9. Not all would agree, of course. See, e.g., Ayers, supra, note 7.

10. 4 Metcalf 3 (Massachusetts 1842).

11. Taylor & Whitney, supra, note 5, Chapter 9, "The Wagner Act."

12. Ibid., Appendix D.

13. Ibid., Chapter 5, "Control of the Labor Injunction."

14. Ibid., Appendix E.

15. Ibid., Chapter 9, "The Wagner Act."

16. Ibid., pp. 192-196.

17. Howell, Rate A., et al., THE LEGAL ENVIRONMENT OF BUSINESS, (Chicago: The Dryden Press, 1984), pp. 448-449.

18. Ibid., pp. 436-442.

19. Taylor & Whitney, supra, note 5, pp. 211-212.

20. Ibid., p. 212.

21. Ibid., p. 212.

22. Burns, James McGregor and Jack Walter Peltason, GOVERNMENT BY THE PEOPLE, (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1963), pp. 623-625.

23. Id., pp. 522-526.

24. YOUNGSTOWN STREET & TUBE CO. v. SAWYER, 353 U.S. 579 (1952).

25. Lipset, Seymour Martin, Martin Trow, and James Coleman, UNION DEMOCRACY, (New York: Doubleday & Co., 1956).

26. "Why Unions are Running Scared," U.S. NEWS & WORLD REPORT, (September 10, 1984), pp. 62-65; Wermiel, Stephen, "Justices Restrict Some Unions' Spending of the Dues Dissenting Workers Must Pay," WALL STREET JOURNAL, (April 26, 1984), p. 7; Penn, Stanley, "Benefit Blight: Organized Crime Finds Rich Pickings in Rise of Union Health Plans," WALL STREET JOURNAL, (October 5, 1982), pp. 1, 26.

27. Burns & Peltason, supra, note 22, p. 625; Kennedy, Robert F., THE ENEMY WITHIN, (New York: Popular Library, 1960).

28. Taylor & Whitney, supra, note 5, Appendix G.

29. For example, the proviso to Section 14(b): Does it bar the "agency shop"? The States do not agree.

30. See, e.g., the differences over the definition of an appropriate bargaining unit. Northrup, Herbert R. and Gordon F. Bloom, GOVERNMENT AND LABOR (Homewood, Illinois: Richard D. Irwin, Inc., 1963), pp. 61-64.

31. NLRB v. ALLIS-CHALMERS MFG. CO., 388 U.S. 175 (1967). Compare UNION STARCH & REFINING CO., 87 NLRB 779 (1949) with HERSHEY FOODS CORP., 207 NLRB 897 (1974). Compare PATTERN MAKERS' LEAGUE V. NLRB, 53 L.W. 4928 (1985).

32. Compare SCHOFIELD v. NLRB, 394 U.S. 423 (1969).

33. See e.g., Cooke, William N. and Frederick H. Gautschi, "Political Bias in NLRB Unfair Labor Practice Decisions," 35 INDUSTRIAL AND LABOR RELATIONS REVIEW, (July 1982), 539-549.

34. 441 U.S. 488 (1979).

35. NLRB v. GENERAL ELECTRIC CO., 418 F.2d 736 (1969).

36. UNIVERSAL CAMERA CORP. v. NLRB, 340 U.S. 474 (1951).

37. FIBREBOARD PAPER PRODUCTS v. NLRB, 379 U.S. 203 (1964).

38. TEXTILE WORKERS UNION OF AMERICA v. DARLINGTON MANUFACTURING CO., 380 U.S. 263 (1965).

39. FIBREBOARD, supra, note 37.

40. TEXTILE WORKERS, supra, note 38.

41. 139 NLRB #23 (1962).

42. TEXTILE WORKERS, supra, note 38.

43. FIRST NATIONAL MAINTENANCE CORP. v. NLRB, 452 U.S. 666 (1981). See Naffziger, "Partial Business Close-Downs by an Employer and the Duty to Bargain under the National Labor Relations Act," 20 AMERICAN BUSINESS LAW JOURNAL 223 (1982).

44. 242 NLRB 462 (1979).

45. 242 NLRB 462 (1979).

46. 627 F.2d 596 (2d Cir. 1980).

47. FNMC, supra, note 43.

48. Id.

49. Id.

50. Id.

51. 265 NLRB 28 (1982); 268 NLRB 87 (1984); 765 F.2d 175 (1985).

52. 265 NLRB 28 (1982).

53. Id.

54. Id.

55. Id.

56. Id.

57. Id.

58. 268 NLRB 87 (1984).

59. Id.

60. Id.

61. 230 NLRB 696 (1977), enf. denied 581 F.2d 793 (9th Cir. 1978).

62. 210 NLRB 190 (1974), enf. denied 514 F.2d 942 (7th Cir. 1975).

63. 161 NLRB 561 (1966).

64. Id.

65. BOEING CO., supra, note 61.

66. UNIVERSITY OF CHICAGO, supra, note 62.

67. 235 NLRB 720 (1978), enfd. 602 F.2d 1302 (9th Cir. 1979).

68. 514 F.2d 942 (7th Cir. 1975).

69. 268 NLRB 87 (1984).

70. Id.

71. Id.

72. U.A.W. v. N.L.R.B., supra note 1, at 178.

73. Id., at 179.

74. Id., at 180.

75. Id., at 180, footnote 21.

76. Id., at 180.

77. Supra, at note 55.

78. U.A.W. v. N.L.R.B., supra note 1, at 181.

79. Id., at 181.

80. Id., at 181.

81. Id., at 183-184.

82. Id., at 184.

83. Id., at 184.