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Erratum

PAGE 1252: add the following at the end of the article. "On October 30, 1966 (subsequent to the publication of this article) the Board decided Ozark Trailers, Inc., 161 NLRB No. 48, BNA 1966 DAILY LAB. REP. No. 212, at D-1 (1966). The Board in a carefully worded opinion held that, not only is it an unfair labor practice to refuse to bargain over the effects of a permanent shutdown of part of a business, but also to refuse to bargain over the decision itself. The Board found that the Respondent permanently closed one plant of a multi-plant operation for economic reasons; the Board, therefore, found it to be closing only part of its business and thereby avoided the total shutdown implications of the Darlington case. The Board specifically rejected the reasoning of the Eighth Circuit and the Third Circuit in the Adams Dairy and Royal Plating & Polishing cases, respectively, and stated inter alia that if decisions to contract out are subjects for collective bargaining, then it is '... a fortiori true with respect to decisions regarding the relocation or termination of a portion of the business.' It is submitted that this decision was to be anticipated and that it is likely that the same rationale will apply to a total cessation of business."

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The Role of Collective Bargaining in Decisions to Change Operations

Harvey M. Adelstein

Recent decisions have made some important changes in the employer's obligation to bargain in the area of plant removal and closing. Mr. Adelstein examines the effects these cases have had upon employers and unions alike in determining when and how they can satisfy the duty to bargain over basic decisions involving changes in operations. He concludes that these decisions have resulted in confusion, wasted effort, and a breakdown in the institution of collective bargaining. As a partial solution to this problem, he suggests that appropriate procedures should be developed to deal with important issues, such as decisions relating to plant removal, plant closing, and going out of business, which may arise during the life of a collective bargaining agreement, rather than postponing negotiations to the expiration of the agreement.

The obligation of an employer to bargain collectively over the decision and effects of plant removal, plant closing and going out of business has been discussed, researched, and subjected to careful analysis recently.¹ No answer has been found as to the ability of the institution of collective bargaining to cope with the problems created by such management actions. No answer will be found in this article — only opinion and suggestions will be offered.

Since the passage of the Wagner Act² in 1935, which first embodied the concept of "bargaining in good faith," the National Labor Relations Board (NLRB or Board) and the courts have been interpreting and shaping that concept. The Labor Management Relations Act³ (the act) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."⁴ This duty is defined in section 8(d) of that act⁵

which provides that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, but such obligation does not compel either party to agree to a proposal or require the making of a concession." 6

Recent decisions of the NLRB and the courts have apparently drastically changed an employer's obligation to "bargain in good faith" in the area of plant removal and closing. Similarly, section 8(a)(3) of the act, 7 which prohibits an employer from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," 8 is directly involved in this area due to the recent Supreme Court decision in Textile Workers v Darlington Mfg. Co. 9 and the interpretations thereof.

It is the effect of these recent decisions on the collective bargaining process that is the concern of this article. It is submitted at the outset that the decisions have placed upon employers and unions alike an impossible task of determining for themselves when and how they can satisfy the duty to bargain over basic decisions involving changes in operations.

I. FIBREBOARD AND TOWN & COUNTRY THEORY

In its original Fibreboard Paper Prods. Corp. 10 case, the NLRB was considering the question of whether an employer, without any discriminatory motivation, violated section 8(a)(5) of the act when he failed to notify and negotiate with a union about a decision to subcontract work which had been previously done by bargaining unit employees. The case involved the contracting out of all plant maintenance work which resulted in the discharge of all employees in a collective bargaining unit of maintenance employees. There was no question of discriminatory motivation in the case. Prior to the expiration date of the collective bargaining agreement,
the employer notified the union of its decision to subcontract all maintenance work and this decision was put into effect upon the termination of the agreement. In this first case, the Board held that there was no unlawful refusal to bargain since all the employer was required to do was bargain with the union representing his employees concerning the effect of the move or subcontract on the wages, hours and other conditions of employment of those employees who would be affected by the change. The failure or refusal to bargain over the effect in such cases had long been held to be a violation of section 8(a)(5)\textsuperscript{11} Therefore, the NLRB found that there had been no violation since the company was willing to bargain about the effects of the subcontract which was all the law required.\textsuperscript{12}

This bargaining requirement over managerial changes was changed, however, in *Town & Country Mfg. Co.*\textsuperscript{3} In that case, a company unilaterally decided to subcontract its entire hauling operation. The result - of this subcontract was the termination of employment of all truck drivers in the collective bargaining unit for which a union had been certified as bargaining agent. The decision was made and effectuated without prior notice to, or discussion with, the union.

In *Town & Country*, section 8(a)(3) and section 8(a)(5) violations were alleged, and the Board found that the drivers had been discharged for discriminatory reasons in violation of section 8(a)(3). Moreover, the Board found that the termination of this portion of the employer's business constituted a refusal to bargain under section 8(a)(5) due to the fact that the employer had refused to bargain because the change was motivated by anti-union animus and an attempt to undermine the union as bargaining representative of the employees. However, the Board did not stop at that point in regard to the section 8(a)(5) violation. The Board stated that even if the subcontracting had been motivated solely by economic considerations the unilateral action of subcontracting was, nevertheless, violative of the act since the decision itself to subcontract was a mandatory subject of collective bargaining. The *Town & Country* decision thus, by dictum, overruled the prior *Fibreboard* case in the following terms:

\textsuperscript{11} See Mount Hope Finishing Co., 106 N.L.R.B. 480, rev'd on other grounds, 211 F.2d 365 (4th Cir. 1954); Rome Prods. Co., 77 N.L.R.B. 1217 (1948).


\textsuperscript{13} 136 N.L.R.B. 1022 (1962), enforced, 316 F.2d 846 (5th Cir. 1963).
The elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase "other terms and conditions of employment" and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act. Experience has shown that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. But it commands no less.

Although the Town & Country decision was enforced by the Fifth Circuit, that court did not consider the question of economic motivation; therefore, the Board's dictum, as quoted above, has become the basis of the controversial theory of the duty to bargain over decisions as opposed to effects.

Shortly after the Town & Country decision, the Board decided to review the original Fibreboard Paper Prods. case. It applied the Town & Country rationale and overturned its former decision. In doing so, it stated the following: "As we stated in Town & Country, 'it would be an exercise in futility to attempt to remedy this type of violation if an employer's decision to subcontract were to stand. No genuine bargaining over a decision to terminate a phase of operations can be conducted where that decision has already been made and implemented.'"

The Supreme Court decision, affirming the Fibreboard case, of course, has far reaching effects. The majority of the Court stated as follows:

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.

The Court justified its conclusion on two basic premises: (1) bargaining on the subject would contribute to industrial peace, and
(2) subcontracting is commonly a subject of collective bargaining in the United States. The Court stated in this regard:

The conclusion that "contracting out" is a statutory subject of collective bargaining is further reinforced by industrial practices in this country. While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework. Provisions relating to contracting out exist in numerous collective bargaining agreements, and "contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators."\(^9\)

The Court, at the end of its decision attempted to soften its impact by stating:

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case — the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment — is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.\(^{20}\)

Justice Stewart, joined by Justices Douglas and Harlan, concurred in the majority decision of the Court but they were disturbed by the implications emanating from the majority opinion. Justice Stewart, therefore, attempted to explain what his interpretation of the majority opinion was and perhaps, more importantly, what it was not. In this regard he stated as follows:

The question posed is whether the particular decision sought to be made unilaterally by the employer in this case is a subject of mandatory collective bargaining within the statutory phrase "terms and conditions of employment." That is all the Court decides. The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that this employer's decision to subcontract this work, involving "the replacement of employees in the existing bargaining unit with those of an independent con-

\(^{19}\) \textit{Id.} at 211-12. (Citations omitted.)

\(^{20}\) \textit{Id.} at 215. (Citations omitted.)
tractor to do the same work under similar conditions of employment," is subject to the duty to bargain collectively. Within the narrow limitations implicit in the specific facts of this case, I agree with the Court's decision.\textsuperscript{21}

Justice Stewart, although agreeing with the Court's decision in the particular case was obviously concerned about the far reaching implications of the case. He stated:

While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor saving machinery. Another may resolve to liquidate its assets and go out of business. 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 the 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. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.\textsuperscript{22}

Therefore, the situation after the Supreme Court's affirmance of the Fibreboard case was that contracting out was now a statutory subject of collective bargaining despite the strong concurring opinion which attempted to minimize the effect of the entire decision. Although both the majority and the concurring Justices attempted to limit the case to its facts in some way, it specifically upheld the Board's authority in finding unfair labor practices in such cases and, as a remedy, to restore the status quo ante, namely,

\textsuperscript{21} Id. at 218.

\textsuperscript{22} Id. at 223.
in the *Fibreboard* case, resumption of maintenance operations by the company, and the rehiring of discharged employees with full back pay. Moreover, the confusion of the Supreme Court's decision in *Fibreboard* is heightened by a footnote to the decision which indicated that "the terms 'contracting out' and 'subcontracting' have no precise meaning. They are used to describe a variety of business arrangements altogether different from that involved in this case."23

No matter how the *Fibreboard* decision is read, the suggestion in the majority opinion and the direct statement in the concurring opinion that other kinds of "contracting out" may not be mandatory subjects of bargaining makes the exact scope of that decision unclear.

Prior to the Board's theory in *Town & Country* and *Fibreboard* and the Supreme Court's affirmation of this theory — that certain managerial decisions about changes in operations which affect employment cannot be made unilaterally but must be bargained about with the union in advance of the decision — court and Board authority was to the contrary, namely, bargaining must take place in managerial decisions of this kind but only as to the effects on the employees. In *NLRB v. Rapid Bindery, Inc.*,24 it was stated that "the decision to move was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion."25 In *Mahonong Mining Co.*,26 the Board stated that it

"has never held that . an employer may not in good faith change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected."27

Similarly in *Brown-McLaren Mfg. Co.*,28 it was held that the refusal to negotiate with the union in regard to the transfer or removal of operations from one plant to another of the same company did not constitute a section 8(a)(5) violation of the act.29

It is, therefore, quite obvious that in the area of basic managerial

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23 *Id.* at 215 n.8.
24 *Id.* at 215 n.8.
25 *Id.* at 215 n.8.
26 *Id.* at 215 n.8.
27 *Id.* at 215 n.8.
28 *Id.* at 215 n.8.
29 *Id.* at 215 n.8.
decisions (whether subcontracting, plant shutdown, or movement) the Board, supported by certain courts of appeals and the Supreme Court, is changing the basic collective bargaining process by requiring employers to bargain in advance of making a decision in a vital matter.

II. LEGAL RESULTS OF TOWN & COUNTRY THEORY

It is a short step to go from subcontracting to plant shutdown, movement, or liquidation. The Board took this step shortly after it enunciated its view in the second Fibreboard case. In Star Baby Co.,\(^{30}\) the Board stated the following: "We accordingly find that by unilaterally terminating their business operations without consulting with the Union, the respondents further violated Section 8(a)(5) of the Act."\(^{31}\) Although the Star Baby case primarily involved a section 8(a)(3) violation of the act, the position of the Board was clear. Earlier, in Wemgarten Food Center, Inc.,\(^{32}\) the company had sold five of its six stores in a particular area and had terminated the employment of all of its employees in those stores. The company did not bargain with the union about its decision but did seek to discuss with the union its plans for granting severance pay to the employees and for rehiring certain of them in its sole remaining store. No unlawful refusal to bargain concerning the decision to discontinue the operations was found because of the technicality that the General Counsel of the NLRB had failed to argue this violation; but the decision is clear in that, if it had not been for this technicality, the doctrine of failing to bargain about a decision to go out of business would have been applicable to the case and the Board would have found a section 8(a)(5) violation.

In Mitchell Boat Co.,\(^{33}\) the trial examiner applied the new theory (of bargaining over a decision to subcontract) to the shutdown of an unprofitable plant for purely economic reasons, where the company refused to negotiate over the effects of the shutdown and the method of choosing employees for layoff. This decision

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\(^{30}\) 140 N.L.R.B. 678 (1963), enforced as modified, 334 F.2d 601 (2d Cir. 1964) The court of appeals did not consider the § 8(a)(5) portion of the Board’s decision.

\(^{31}\) Star Baby Co., 140 N.L.R.B. 678, 681 (1963), enforced as modified, 334 F.2d 601 (2d Cir. 1964)

\(^{32}\) 140 N.L.R.B. 256 (1962)

\(^{33}\) 1964 CCH NLRB § 12928.
was affirmed by the Board when no exceptions were taken to the trial examiner's decision.

In *United Dairy Co.*, the trial examiner found, on the basis of the *Town & Country* and *Fibreboard* decisions, that an employer had violated section 8(a)(5) by entering into a contract for the sale of some of the existing plants which were admittedly unprofitable, without first affording the union an opportunity to bargain with respect to such a decision. In reaching his decision, the trial examiner stated: "I think that since sales, or mergers, or other dispositions of facilities in our rapidly changing economy have such an obvious, direct and often devastating impact on the jobs of employees they fall within the principle relied upon by the Board in subcontracting cases."

In another case illustrative of the Board's feelings in this matter, it found a violation of section 8(a)(5) where the company discontinued its cheese processing and packaging operation without first notifying and bargaining with the union as statutory bargaining representative of its employees in the appropriate bargaining unit. In *Winn-Dixie Stores, Inc.*, the Board in affirming the trial examiner stated:

An employer is under a duty to bargain with the chosen representative of his employees concerning matters affecting their wages, hours, and terms and conditions of employment and cannot unilaterally change established employment conditions without bargaining, regardless of the existence or nonexistence of a collective-bargaining agreement. Thus, in the instant case, the Respondent was not justified in completely disregarding that duty regardless of what may have appeared to it to be the economic desirability of terminating the cheese packaging operation. The Union had a statutory right to be notified in advance of the proposed action and to be given an opportunity, if so desired, to consult and negotiate with the Respondent about the need for elimination of unit jobs and the possibility of alternative approaches that might avoid such action. Failing other resolution, the Union had a further right to bargain about steps that might

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34 BNA 1963 DAILY LAB. REP. No. 107, at D-1, complaint dismissed on procedural grounds, 146 N.L.R.B. 187 (1964). Because of the dismissal the trial examiner's ruling on the merits was not considered.

35 United Dairy Co., 1964 CCH NLRB § 12928.


37 147 N.L.R.B. 788 (1964); accord, Apex Linen Serv., Inc., 151 N.L.R.B. No. 34 (1965), where it was held to be a § 8(a)(5) violation to close a plant for economic reasons, without notifying the union and giving it an opportunity to bargain over the decision.
be taken to minimize the effects upon employees of the proposed action.\textsuperscript{38}

The above cases are merely illustrative of the Board's view of the duty to bargain over mandatory subjects of collective bargaining. It is apparent from those decisions and others which will be discussed later, that the Board feels that there is a duty to bargain over the decision to shut down a facility, to partially shut down a facility, to move a facility, or to completely go out of business.

III. THE DARLINGTON CASE AND ITS EFFECTS

Although the case of \textit{Textile Workers v. Darlington Mfg. Co.}\textsuperscript{39} basically involved a question of a violation of section 8(a)(3) (discrimination) in the area of going out of business, the language of that decision has been used in subsequent section 8(a)(5) cases and must be analyzed. Darlington Manufacturing Company was a South Carolina corporation operating one textile mill. A majority of Darlington stock was held by Deering Millikin & Company which marketed textiles produced by others. Deering Millikin was controlled by Roger Millikin, President of Darlington, and by other members of the Millikin family. It was found at the Board hearing that the Millikin family, through Deering Millikin, operated seventeen textile manufacturing companies including Darlington Manufacturing, whose products, manufactured in twenty-seven different mills, were marketed through Deering Millikin. In March, 1956, the union initiated a successful organizational campaign at the Darlington Company which culminated in an election won by the union on September 6, 1956. Advised of the victory, Roger Millikin met with the board of directors and told them that the company could not possibly be competitive as a result of the union victory. The board of directors subsequently met and voted to liquidate the corporation. The plant ceased operations entirely in November, 1956, and all plant machinery and equipment was sold piecemeal at auction in December of that year.

The union filed section 8(a)(1), (3), and (5) charges against the company. The Board found that the closing, because of anti-union animus, was a violation of section 8(a)(3) of the act and that the refusal to meet with the union to bargain regarding a new collective bargaining agreement was a violation of section 8(a)(5), especially in light of the fact that the plant closing was an

\textsuperscript{38} Winn-Dixie Stores, Inc., 147 N.L.R.B. 788, 789 (1964).

\textsuperscript{39} 380 U.S. 263 (1965)
unfair labor practice. The case was appealed, and on review the Fourth Circuit Court of Appeals denied enforcement.\textsuperscript{40} That court held that a company has the absolute right to close out a part or all of its business, regardless of anti-union motivation. The court therefore did not even review the Board’s finding that Deering Millikin was a single-integrated employer. The Supreme Court granted certiorari in the case and in its decision stated:

We hold that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases, but disagree with the Court of Appeals that such right includes the ability to close part of a business no matter what the reason.\textsuperscript{41}

The Court went on to state that:

A 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 Labor Relations Act. We find neither.\textsuperscript{42}

The Court answered, in the following manner, the AFL-CIO’s contention that the company’s action was similar to a discriminatory lockout in that it was designed to frustrate organizational efforts to destroy or undermine bargaining representation:

The personal satisfaction that such an employer may derive from standing on his beliefs or the mere possibility that other employers will follow his example are surely too remote to be considered dangers at which the labor statutes were aimed. Although employees may be prohibited from engaging in a strike under certain conditions, no one would consider it a violation of the Act for the same employees to quit their employment en masse even if motivated by a desire to ruin the employer. The very permanence of such action would negate any future economic benefit to the employees. The employer’s right to go out of business is no different.

We are not presented here with the case of a “runaway shop” whereby Darlington would transfer its work to another plant or open a new plant in another locality to replace its closed plant. Nor are we concerned with a shutdown where the employees, by renouncing the union, could cause the plant to reopen. Such cases would involve discriminatory employer action for the purpose of obtaining some benefit in the future from the new employees. We hold here only that when an employer closes his entire busi-

\textsuperscript{40} Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963), vacated and remanded, 380 U.S. 263 (1965)


\textsuperscript{42} Id. at 270.
ness, even if the liquidation is motivated by vindictiveness towards the union, such action is not an unfair labor practice.\textsuperscript{43}

In discussing the partial closing aspects of the case the Court stated:

By analogy to those cases involving a continuing enterprise we are constrained to hold, in disagreement with the Court of Appeals, that a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing will likely have that effect.\textsuperscript{44}

The Court stated further:

If the persons exercising control over a plant 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 promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.\textsuperscript{45}

On the basis of this reasoning the Court remanded the decision to the Board for further hearings and decision to decide whether or not the case at hand was a partial or entire closing.

The discussion of Darlington is necessary due to the fact that it is possible that the courts and the Board and some employers feel that it deals with the duty to bargain as well as discriminatory shutdown of a plant. However, the Supreme Court, in a footnote, stated that "such a finding [8(a)(5) violation] was in part based on the determination that the plant closing was an unfair labor practice, and no argument is made that section 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise. Cf. Fibreboard Paper Products Corp. v Labor Board."\textsuperscript{46}

\textsuperscript{43} Id. at 272-74. (Citations omitted.)
\textsuperscript{44} Id. at 275.
\textsuperscript{45} Id. at 275-76.
\textsuperscript{46} Id. at 267 n.5. Even in the light of the Supreme Court's statement in regard to the independent § 8(a)(5) aspects of the Darlington case, it can be argued that the logical application of the Darlington doctrine, that an employer has the "absolute right to terminate his entire business," means that there is no duty to bargain over the decision to do so. It seems that such a conclusion does not necessarily follow, and that there certainly can be no such position supported in cases involving relocation (partial or total), subcontracting, or closing of a portion of a business enterprise (whether multi-plant or not).
It is interesting to note that the Darlington case, which basically only dealt with discriminatory activity under section 8(a)(3) of the act has already been used in section 8(a)(5) managerial decision cases. In NLRB v Adams Dairy, Inc., the Eighth Circuit for the second time refused to enforce a Board order of a section 8(a)(5) violation in regard to a subcontracting situation. In the case the court relied, in part, upon the Darlington language. The case is essential to a discussion of the duty to bargain over managerial decisions, even though it involves subcontracting, because it is the second time that the Eighth Circuit has refused to accept the Board's duty-to-bargain theory about a managerial decision. Moreover, the Adams Dairy case is important due to the fact that it involves a managerial decision during the term of a collective bargaining agreement.

The company had entered into a collective bargaining agreement with the union to become effective September 1, 1959, and this contract was not to expire until September 1, 1962. The 1959 contract was the third between the parties since negotiations began in 1954. During the negotiations for all three of the collective bargaining agreements, the union had attempted to include a clause which would have prevented Adams Dairy from selling employees' routes or parts thereof to independent contractors. During the 1959 negotiations the company expressed concern over the fact that rival companies had lower delivery costs and were able to undersell Adams. The union again proposed the inclusion of a clause in the contract prohibiting further substitution of independent contractors on company routes, but the proposal was again rejected by the company.

During November and December of 1959, the company initiated a series of meetings with the union for the purpose of discussing the unfavorable competitive situation in which it found itself due to lower delivery costs of other dairies. The company asked the union for recommendations that it might have with regard to lower delivery costs but the union expressed its inability to help. In February of 1960, the company made a decision to terminate a phase of its business and distribute all of its products through independent contractors rather than driver-salesmen represented by the union. Upon those facts the Board found a violation of section 8(a)(5) of the act. When the company refused to com-

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ply with the Board’s decision the NLRB petitioned the court of appeals for enforcement. In *NLRB v. Adams Dairy, Inc.***, the Eighth Circuit held that the decision of the company, on economic grounds, to terminate a portion of its operations was not a required subject of collective bargaining under the act and that, therefore, the company had not violated section 8(a)(5) of the act by discontinuing its operation without first notifying and consulting with the union. The court held that on the issue of whether the company violated the act in its discontinuance of a phase of its operations, the Board was not correct in ignoring the question of intent. The Board could not find an unfair labor practice without “first finding some illegal motivation or intent or discriminatory result that naturally followed therefrom.” The court then went back to the pre-*Town & Country* decisions and found only that the company must bargain about the effects of this discontinuance but that there was no necessity to bargain concerning the actual decision.

After the Eighth Circuit Court’s opinion, the General Counsel

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49 322 F.2d 553 (8th Cir. 1963)

50 NLRB v. Adams Dairy, Inc., 322 F.2d 553, 559 (8th Cir. 1963)

51 It is interesting to note that the Eighth Circuit in stating that there could be no unfair labor practice without intent seemed to be ignoring the prior decisions in regard to § 8(a)(5) of the act and was relying on discriminatory motivation cases under § 8(a)(3) of the act.

Under the original *Adams Dairy* decision the trial examiner, Arnold Ordman (who is now the NLRB General Counsel) made some disturbing statements. Section 8(d) of the act provides in part that “where there is in effect a collective bargaining contract covering employees, the duty to bargain collectively (as set forth in § 8(a)(5)) shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification serves written notice sixty days prior to the expiration date of that contract “and continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.”

Trial Examiner Ordman found that the employer had violated § 8(d) and derivatively § 8(a)(5) by its unilateral act. Ordman reasoned as follows:

By eliminating both the work which was the subject matter of the collective-bargaining contract and the employees who performed that work, Respondent in the most real sense terminated that contract since there was no area left in which it could be operative. Without more, therefore, it appears that Respondent’s failure to follow the procedure prescribed by section 8(d) as a precondition to such termination constitutes a violation of section 8(a)(5). I so find. 137 N.L.R.B. 815, 825 (1961)

While this conclusion was not affirmed by the Board (it found it unnecessary to pass thereon) the fact that the General Counsel favors such an interpretation of the act is in itself significant. If this interpretation is adopted by the Board, the necessary effect will be to deny the employer the right to shut down or subcontract an entire operation during the contract term unless such a move is consented to by the union which represents its employees. Furthermore, if this rationale is adopted, it is not unlikely that the Board would expand its scope to cover the case of a partial shutdown or move.
of the NLRB petitioned the Supreme Court for a writ of certiorari and on January 18, 1965, the petition was granted, the prior judgment of the Eighth Circuit was vacated, and the case was remanded to that Circuit for reconsideration in the light of the Supreme Court decision in *Fibreboard*.\(^5\)

This, of course, brings us to the present *Adams Dairy* decision of the Eighth Circuit.\(^5\) In the light of the *Fibreboard* case the Eighth Circuit, nevertheless, upheld the company's right to unilaterally discontinue its operation. The Eighth Circuit, in effect, stated that since the Supreme Court decision in *Fibreboard* was expressly limited to its own facts the *Adams Dairy* situation could be distinguished and, relying upon the concurring opinion in *Fibreboard*, upheld the company. The Eighth Circuit distinguished *Fibreboard* on the following bases. In *Fibreboard* the contracting out did not change the basic operation of the company since the contractor performed the same work on the company's premises with the same machinery and equipment under the direct control of the company with the company directly enjoying the benefits of the contractor's work. The court pointed out that in the *Adams* situation, a basic operational change had occurred when it decided to change its existing distribution system by selling its products to independent contractors. After the decision was made, all the trucks used previously by driver-salesmen were sold to independent distributors. Adams Dairy did not finance the sale, nor did it arrange for such financing, and the routes driven by the independent contractors did not correspond to the previous routes of the driver-salesmen. Independent distributors took control of the products at dock-side and Adams legally had no concern with what was done with the products. Distributors were solely responsible for selling the product. The work done by the independent contractors was not primarily performed in the Adams plant for the benefit of the dairy and, finally, Adams was not directly concerned with whether the distributor sustained a profit or a loss.

In reaching its conclusion regarding this change the court stated:

Contrary to the situation in *Fibreboard*, then, there is more involved in *Adams Dairy* than just the substitution of one set of employees for another. In *Adams Dairy* there is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situa-


tion in Fibreboard, there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment. To require Adams to bargain about its decision to close out the distribution end of its business would significantly abridge its freedom to manage its own affairs. Bargaining is not contemplated in this area under the history and usage of section 8(a)(5)\(^{54}\)

The court did not stop at this point. It still felt the necessity of discussing anti-union animus in order to find a section 8(a)(5) violation. In this respect, the following language from the Supreme Court decision in the Darlington case was quoted: "A partial closing is an unfair labor practice under §8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."\(^{55}\) The court seized upon the above quotation in concluding that since there was no anti-union animus in the Adams Dairy situation the company did not violate the act by refusing to bargain about a partial closing of its operation.\(^{56}\)

The Eighth Circuit, then, in effect is saying that in order for there to be a section 8(a)(5) violation of a management decision to terminate a portion of its operations it is necessary first to have anti-union animus. This is based upon its original decision and upon the language of the Darlington case. It is submitted that the Adams Dairy court in relying on the necessity of anti-union animus and the Darlington case has misinterpreted and misread the law in this respect. There is no requirement that there be anti-union animus in order to find a refusal to bargain under section 8(a)(5) of the act.\(^{57}\) In holding that Adams Dairy did not violate the act, it appears, that the Eighth Circuit relied upon the concurring opinion in the Fibreboard case, which concurring opinion was mainly concerned with explaining the Court's decision (if that could be done), the concept of anti-union animus, and a Supreme Court decision dealing mainly with a section 8(a)(3) violation.

The Eighth Circuit is not the only court that is interpreting the section 8(a)(5) obligation in this way. In \textit{NLRB v. Royal Plating & Polishing Co.,}\(^{58}\) the Third Circuit reversed a Board finding that an employer had violated section 8(a)(5) of the act.

\(^{54}\) \textit{Id.} at 111. (Citations omitted.)

\(^{55}\) \textit{Id.} at 112.

\(^{56}\) \textit{Id.} at 113.


\(^{58}\) 350 F.2d 191 (3d Cir. 1965)
In that case the employer unilaterally began negotiations for the sale of his facilities at the same time as he was engaged in collective bargaining negotiations with the union representing his employees. While negotiations with the union continued, the employer proceeded to grant an irrevocable ninety-day option to purchase his property to the city housing authority; several weeks after the union contract was executed (after a one week strike) the employer and the housing authority reached agreement on the terms of sale and the employer conveyed his title to the property, retaining, however, a six-month lease. Shortly thereafter, the employer announced for the first time that he had sold the plant and would cease operations; this was in fact done several weeks thereafter and all the employees were laid off. All the machinery and equipment was sold at public auction. On the basis of those facts the Board held that the employer had violated section 8(a)(5) of the act by failing to notify the union and failing to afford it "an opportunity if it desired, to consult and negotiate with [the employer] about the contemplated action and the possibility of alternative approaches that might avoid such action." The Board also stated:

As we have emphasized before, seemingly unsolvable problems, can, upon occasion, be solved if the parties to a bargaining relationship confront each other honestly and openly across the bargaining table with their respective problems and positions. It is not necessary that a satisfactory solution to the serious issues involved in a closedown of operations be the probable result of bargaining negotiations for the obligation to give notice and opportunity for discussion of such matter to be a viable and intrinsic part of the statutory bargaining obligation.

The Third Circuit reversed the Board's decision as well as its approach to the matter. The court pointed out that the question involved in the case was whether a partial termination of operations is a mandatory subject of bargaining under the act. In answer to that question the court stated that "an employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down." In reaching this decision the court relied upon the Supreme Court's concurring opinion set forth in the Fibreboard case and that Court's opinion in the Darling-
The court then went on to remand the case back to the Board to determine whether the company violated the act in refusing to bargain over the effects of the shutdown as opposed to actual decision. Just recently the Board decided the case on remand finding that the company did in fact fail to bargain over the effects of the sale.63

It is interesting to note at this point that the NLRB has refused to accept the rationale of Darlington in section 8(a)(5) decisions. In Carmichael Floor Covering Co.,64 the Board found that an employer had violated the act by unilaterally contracting out certain work that had been performed by the employees represented by the union. The argument was made that the situation was controlled by the rationale of the Darlington case. In response to this argument the Board stated:

Respondents rely upon a statement by the Court in that case [Darlington Mfg. Co.] to the effect that a partial closing of an employer's business will not be an unfair labor practice unless found to be "motivated by a purpose to chill unionism." Respondents' reliance upon the rationale of Darlington is misplaced. In Darlington the Court was concerned with an issue of discriminatory motivation and its application, if any, to a complete or a partial closing of a plant. The charge in the instant case, however, relates solely to respondent's statutory duty to bargain. The alleged violation concerns the consequences of their failure to fulfill such duty regardless of the existence of any discriminatory motivation.65

It is submitted that the Board is correct in this instance of rejecting the Darlington reasoning in dealing with section 8(a)(5) cases. That is not to say that managerial decisions to partially close a plant or move a plant or completely go out of business are so clearly mandatory subjects of collective bargaining. It is merely to state that relying on the language of the concurring opinion in Fibreboard or the final decision in Darlington is not the proper way of approaching the problem.

IV. WHEN THE DUTY TO BARGAIN ARISES

Whether in the area of subcontracting, wherein most of the significant decisions lie, or in the area of plant closing, move-

64 60 L.R.R.M. 1364 (NLRB 1965).
65 Carmichael Floor Covering Co., 60 L.R.R.M. 1364, 1366 (NLRB 1965).
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ment, or similar significant management decisions, the NLRB seems to be applying a "significant detriment" test in determining whether employer unilateral action is violative of section 8(a)(5) of the act. In some respects it appears that the Board is backing off the hard line that it took shortly after the original Town & Country and Fibreboard decisions were handed down. For example, in Westinghouse Elec. Corp., the Board in upholding an employer's unilateral decision to subcontract where no employees were laid off stated:

Our decisions in this area make it clear that Fibreboard was not intended to lay down a hard and fast rule as to unilateral subcontracting and that even where a subject of mandatory bargaining is involved, there may be circumstances which the Board would accept as justifying unilateral action. Thus, as we have recently pointed out, an employer's obligation to give prior notice and an opportunity to bargain concerning particular instances of subcontracting does not normally arise unless the sub-contracting will affect some change in the terms and conditions of employment of the employees involved. Consistent with this view, the Board has refused to find a violation of section 8(a)(5) where the employer's allegedly unlawful unilateral action resulted in no "significant detriment" to employees in the appropriate unit.67

The problem is, of course, in determining what constitutes a "significant detriment." In the following circumstances involving subcontracting, the Board has ruled that there was no "significant detriment". (1) loss of some Saturday overtime; (2) the fact that laid-off employees could have performed the work contracted out; and (3) the fact that laborers were precluded from performing certain work at craft rates.70

Where, however, the unilateral action results in the immediate loss of bargaining unit jobs, it seems that the Board will require bargaining over the decision. Thus in Weston & Brooker Co., the Board held that the laying off of one employee due to a subcontract constituted a "significant detriment," noting that "respondent's decision had a demonstrably adverse impact on the job tenor of at least one unit employee."72

66 59 L.R.R.M. 1355 (NLRB 1965).
68 General Tube Co., 151 N.L.R.B. No. 89 (1965). But see Cities Serv. Oil Co., 158 N.L.R.B. No. 120 (1966), where the loss of $8 per week in overtime pay was considered a "significant detriment."
70 American Oil Co., 152 N.L.R.B. No. 7 (1965).
71 60 L.R.R.M. 1015 (NLRB 1965).
72 Weston & Brooker Co., 60 L.R.R.M. 1015, 1017 (NLRB 1965).
It is obvious that in decisions not involving subcontracts but involving more significant determinations, such as plant removal, plant closing, or partial plant closing or removal, a "significant detriment" exists.

V SATISFYING THE DUTY TO BARGAIN

Beginning with the original Adams Darty decision\(^7\) by the Board, the question of satisfaction of the duty to bargain in cases of this type has been a burning issue. In that case the employer based its defense, in part, upon the claim that it had bargained during contract negotiations over the issue of subcontracting and that it had, therefore, satisfied its obligations as set forth in the act. Although the Board conceded that the evidence showed that the parties had discussed at length, in negotiations, the employer's right to subcontract and also that the union had attempted to include in the contract a clause which would limit that right but was unsuccessful, nevertheless, it rejected the employer's defense. Its rejection was based upon the fact that the parties to the contract had never bargained seriously over the activities actually engaged in by the employer, namely, the farming out of all of the bargaining unit work. The Board stated that "inasmuch as Respondent had never proposed to the Union the complete abolition of its driver-salesmen operation and the replacement of its driver-salesmen by independent distributors, the Union cannot be found either to have agreed with that proposal or to have waived its objections in that regard."\(^7\)

The position adopted by the Board in that Adams Darty decision appears to be in accord with its well-established rule that in order for an employer to justify unilateral changes in working conditions during the term of a contract it must demonstrate that the union has "clearly and unmistakably waived or bargained away its statutory rights to bargaining" with respect to such changes.\(^7\)

Phrased differently, the Board has specifically stated that an employer violates section 8(a)(5) if he unilaterally institutes changes in working conditions during the term of the contract without affording the union an opportunity to bargain thereon, "unless it can be said from an evaluation of the prior negotiations that the matter was 'fully discussed' or 'consciously explored' and the union

\(^7\) Adams Darty, Inc., 137 N.L.R.B. 815 (1961)
\(^7\) Id. at 824.
‘consciously yielded’ or ‘clearly and unmistakably waived’ its interest in the matter.”\footnote{The Press Co., 121 N.L.R.B. 976, 978 (1958); see also Proctor Mfg. Corp., 131 N.L.R.B. 1166 (1961); Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949).}

In the case of Shell Oil Co.,\footnote{149 N.L.R.B. 283 (1964).} the Board’s position on unilateral changes during the term of a contract, and the company’s satisfaction of the duty to bargain as evidenced by the contract was further set forth. In that case there was no question that subcontracting was the major issue during negotiations preceding the execution of the parties’ agreement. The agreement, like those which the parties had adhered to for approximately ten years before, contained a clause which provided that in the event the employer subcontracts work “which could be performed by employees covered by this agreement, the company will . . . [require] the contractor to pay not less than the rates of pay provided in this agreement for the same character of work.”\footnote{Shell Oil Co., 149 N.L.R.B. 283, 284 (1964).} In the latest negotiations prior to the agreement, the union had sought provisions which would limit the company’s right to subcontract. These proposals were rejected by the company and the contract, as signed, contained no such limitations. Further, the Board found that the company had for some time engaged in subcontracting of “occasional maintenance work” which employees could and normally would perform. The Board found that the contract as signed “evidenced a contractual intent that, except for the limitation on subcontractors’ wage rates [the company] was free to award occasional maintenance subcontracts without obligation to provide advance notice or an opportunity to bargain.”\footnote{Id. at 287} The disturbing aspect in the Board’s decision is the fact that it only held that “occasional maintenance work” could, under the Shell agreement, be unilaterally subcontracted. The descriptive phrase “occasional maintenance work” was emphasized throughout the opinion, and the Board made it very clear that it was upholding only the employer’s right to “continue” the unilateral subcontracting of work properly classified as “occasional maintenance.” Furthermore, the Board gave an explicit caveat: “We wish to make it clear that our present holding is limited to the particular circumstances of this case and that we do not pass upon whether or not . . . [the company] may, in the future, lawfully expand its subcontracting practice without prior notice and consultation with the
As noted above, the subcontracting clause in the agreement made no reference to "occasional maintenance work," nor did it contain any limitation upon the scope or nature of the work which could be subcontracted. In the light of this circumstance, it is significant that the Board chose to carefully limit its holding to "occasional maintenance work."

Therefore, from a reading of the Adams Darry decision and the Shell Oil decision it was clear at that time, that the Board would scrutinize contractual provisions most carefully and that only explicit waiver of the type of action contemplated would satisfy the employer's duty to bargain (or waive the union's right to bargain).

The question then presented to employers was whether or not it was necessary, in decisions of the nature of permanent cessation of operations or plant removal or subcontracting or other such serious management decisions, to bargain to "impasse" before a unilateral action could be taken.

Recent cases, however, seem to be more concerned with the "significant detriment" test than with the impasse theory and the Board seems to have established two different sets of rules to govern what constitutes good faith bargaining. For example, where the employer's unilateral action does not affect the size or scope of the enterprise, but rather affects the terms of existing employment, the Board is placing a strict bargaining duty upon the employer. In the Board's decision in Westinghouse Elec. Corp., where a one cent increase in the price of coffee supplied by a private caterer was deemed to be a mandatory subject of bargaining, the Board found a section 8(a)(5) violation. On the other hand recent decisions in the area of basic managerial decisions having an effect on employment have been subjected to the "significant detriment" test. It seems that if it is determined by the Board that the decision in question does not have a "significant detriment" the Board rules that there is no obligation to bargain.

Where the duty to bargain exists, recent cases indicate that there are various ways to satisfy it or even to be "excused" from it. Moreover, it seems that waiver of the right to bargain by the union can take place more easily. In Edward Axel Roffman Associates, Inc., the Board held that the employer had given the union

80 Id. at 289-90.
81 156 N.L.R.B. No. 96 (1966)
82 Westinghouse Elec. Corp., 59 L.R.R.M. 1355 (NLRB 1965)
83 147 N.L.R.B. 717 (1964)
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sufficient notice and time to negotiate the decision to move the plant under the following facts. In February of 1963, the employer made inquiries to local banks for financing the building of a new plant. In March, the union inquired as to the truth of rumors heard about the plant moving; the employer acknowledged that it was looking for space elsewhere but merely for expansion purposes. In April the employer leased a temporary location elsewhere and began hiring employees. In a letter dated May 27 the employer notified the union that it was contemplating the moving of the plant, but it was not now committed to such move. The company offered to initiate bargaining with the union concerning the contemplated move. The union ignored the letter and the employer sent another letter terminating the agreement which would expire August 31 and told the union that a final decision on the plant’s move would have to be made within two weeks. On July 1 the parties met for the last time and on August 31 the employer ceased operations at its present location.

In *International Shoe Co.*, the Board “excused” the company from bargaining over the movement of work from one plant of the company to another and relied partially on the management rights clause (and an arbitrator’s prior interpretation of it) which reserved to management the right to “decide methods of selling and distributing products.” The Board did not treat the language as constituting a waiver but rather as an excuse.

The Board did find an express waiver, however, in *Ador Corp.* The clause the Board accepted as a waiver read as follows:

The management of the Company’s plant and the direction of its working forces, including the right to establish new jobs, abolish or change existing jobs, increase or decrease the number of jobs, change materials, processes, products, equipment and operations shall be vested exclusively in the Company. Subject to the provision of this agreement, the Company shall have the right to lay off employees because of lack of work or other legitimate reasons.

The company discontinued production of one of its products because it was economically unfeasible to continue. The discontinuance resulted in the instant layoff of four employees and the later layoff of ten employees who worked on production of orders already accepted prior to the implementation of the company’s de-

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84 151 N.L.R.B. No. 78 (1965).
85 58 L.R.R.M. 1280 (NLRB 1965).
86 *Ador Corp.*, 58 L.R.R.M. 1280, 1281 (NLRB 1965).
cision to discontinue the line. In relying upon the management rights clause for decision, the Board stated:

The so called management rights section of the collective-bargaining contract in effect at the time Reinhard made his decision and took the basic steps in the implementation thereof, gave to the Company the exclusive right to eliminate production of any of its products and to layoff employees who were, as a consequence of such decision, no longer needed.87

A most interesting case in this area of management's satisfaction of its duty to bargain in these areas is the New York Mirror case.88 In that case the company terminated operations for economic reasons without prior notification to the union. The termination was accomplished in the face of an existing collective bargaining agreement which, inter alia, contained provisions for termination pay “in the event of permanent suspension” by the newspaper. The contract also contained a “zipper” clause which read as follows: “The parties hereto agree that they have fully bargained with respect to terms [wages, hours] and conditions of employment and have settled the same for the terms of this agreement in accordance with the terms thereof.”89

The trial examiner held that the decision to suspend operations “was not a mandatory” subject for bargaining. His decision was based on the finding that by executing the agreement containing the termination pay and “zipper” provision, the union waived the right to bargain in advance of such a decision. The Board upheld the trial examiner’s decision but specifically rejected his findings with respect to the effect of the above mentioned clauses. The Board stated:

Turning to the issue of waiver, we, of course, recognize that the statutory right of a union to bargain about changes in terms and conditions of employment may be waived by the union. However, a waiver of a statutory right is not to be lightly inferred but must be "clear and unmistakable." The Board will not find that contract terms of themselves confer on the employer a management right to take unilateral action on a mandatory subject of

87 Ibid. See Druwhit Metal Prods. Co., 153 N.L.R.B. No. 35 (1965), where the Board found, under a similar management rights clause, that the union had “effectively waived [its] right to bargain over the decision to discontinue a phase of the Company’s operation.” See also General Motors Co., 149 N.L.R.B. No. 40 (1964), remanded, UAW v. NLRB, 52 CCH Lab. Cas. ¶ 16681 (D.C. Cir. 1965), aff’d on rehearing, 158 N.L.R.B. No. 24 (1966); Shell Oil Co., 149 N.L.R.B. No. 26 (1964) Compare Fafnir Bearing Co., 151 N.L.R.B. No. 40 (1965)

88 58 L.R.R.M. 1465 (NLRB 1965)

89 New York Mirror, 58 L.R.R.M. 1465, 1466 (NLRB 1965)
bargaining unless the contract expressly or by necessary implication confers such a right.\textsuperscript{90}

In explaining what is meant by "necessary implication" the Board stated:

We agree with the respondent that in determining the parties' actual contractual intent we are not restricted to the contract provisions themselves but may properly evaluate them against the lucidating background of their bargaining history.

Thus, for example, if it were to appear that after full exploration of the subject during prior negotiations the unions had consciously yielded their interest to be notified about the permanent suspension of the Mirror's operations in return for the severance of termination provisions, a finding of a clear and unmistakable waiver might well be justified.\textsuperscript{91}

The Board found that "on the specific waiver issue with which we are here concerned, the severance and termination provisions are at best equivocal" because they "contain no specific reference to a right . to terminate operations without prior notice or consultation" with the union.\textsuperscript{92}

After the Board stated that the union did not waive its statutory right, it then "excused" the unilateral action of shutting down the paper under the guise of following the Supreme Court's statement in \textit{NLRB v. Katz}\textsuperscript{93} that "there might be circumstances which the Board could or should accept as excusing or justifying unilateral action."\textsuperscript{94} The Board relied upon the following circumstances in this regard: (1) press of economic necessity; (2) a long and effective bargaining relationship pursuant to which the company and union had reached contractual settlement of the employees' severance pay and termination rights; (3) the employer had bargained over the effect of the shutdown and had cooperated in efforts to find the laid-off employees other employment; and (4) no evidence of anti-union animus. Accordingly, the Board held that "effectuation of the purposes of the Act would not require a remedial order even if a technical violation were found."\textsuperscript{95}

Only confusion develops when one attempts to understand the Board's "waiver" concept in the light of \textit{New York Mirror} on

\textsuperscript{90} Id. at 1467.
\textsuperscript{91} Ibd.
\textsuperscript{92} Ibd.
\textsuperscript{93} 369 U.S. 736 (1962)
\textsuperscript{94} NLRB v. Katz, 369 U.S. 736, 747 (1962)
\textsuperscript{95} New York Mirror, 58 L.R.R.M. 1465 (NLRB 1965)
the one hand, and *Ador* and *Druwhit Metal Prods. Co.* on the other.

To further confuse the matter as to what is an employer's and union's duty to bargain in these areas is the very recent case of *Cumberland Shoe Corp.* In that case the employer operated two plants. The Board's opinion noted that the employer had determined in March, 1964, that one of the plants had to be closed due to financial losses and that on March 11 it communicated with the union and arranged a conference for the following day. At that conference the union was asked for suggestions, and in response to its question was told that a wage cut would not prevent closing. The employer said that it would try to re-employ as many of the laid-off employees as possible at its other plant. On April 1, 1964, the plant was closed. At the date of the first hearing, forty-one employees had been transferred to the remaining plant, but approximately one hundred others had been terminated. Upon these facts the Board stated that "the Respondent [Company] did in fact give the union adequate notice and an opportunity to discuss all relevant matters, and hence that it bargained in good faith concerning the closing." From a reading of the *Cumberland Shoe* decision apparently all that is necessary in the area of plant shutdown is notice to the union and an opportunity to discuss the employer's decision; in that case, it seems that when the meeting was held with the union, the decision to close had already been made. If the employer meets these requisites, it can thereafter act unilaterally even though a bargaining impasse in the conventional sense of the word has not been met. To be safe, however, it seems that the decision should remain tentative until notice and an opportunity to bargain are given.

In another recent case, the Board's apparent lack of clarity in regard to the duty to bargain over managerial decisions is highlighted. In *Young Motor Truck Serv., Inc.*, the Board upheld the trial examiner's decision finding that the company had not violated section 8(a)(5) of the act in the actual sale and shutdown of a trucking terminal. The trial examiner in his decision clearly distinguished between subcontracting and the sale of the business or a portion thereof. In his decision the examiner reasoned that

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96 153 N.L.R.B. No. 35 (1965) See cases cited note 87 supra.
97 1966 CCH NLRB § 20173 (Jan. 26, 1966)
98 Cumberland Shoe Corp., 1966 CCH NLRB § 20173, at 25385 (Jan. 26, 1966)
99 61 L.R.R.M. 1099 (NLRB 1966)
subcontracting "affects the union's designation and status as bargain-
ing agent, because, the work of the unit for which the union has
been selected as such bargaining agent is still being performed for
the employer who is lawfully bound to recognize and bargain with
the union." On the other hand the examiner likened the sale of
the business to the sale of "a product or services," because "the pur-
chaser is not performing on behalf of the employer any of such em-
ployer's work any more than a purchaser of an employer's products
may be said to be performing the employer's work." Following this
analogy he concluded that "since an employer need not negotiate
with the collective bargaining agent concerning the sale of merchan-
dise or services which he produces or offers, he need not bargain or
negotiate respecting the disposing of his production processes, so
long as such position is not tainted by desire to disparage or under-
mine the collective bargaining agent." The trial examiner did
in the case, however, note a distinction between the sale of a business
and the relocation of facilities. Both were involved in the case. Be-
cause the facilities were relocated only five miles from the previous
location, however, and because employees apparently were trans-
ferred without difficulty, he found that the relocation under these
circumstances was purely a matter of management prerogative, but
that the company would have to continue dealing with the incum-
bent bargaining representative.

Although the Board upheld the trial examiner's ultimate find-
ings and conclusions that the company did not violate the act by
refusing to bargain with the union over the decision to sell part of
its operation and close down a trucking facility, the decision is
based on the fact that the union in fact waived its right to bargain.
The Board found that the union was advised of the impending ac-
tion but made no request to bargain about it. The Board, how-
ever, stated that it could not go along with the trial examiner's
reasoning in "certain erroneous interpretations of the Act, such as
that Section 8(a)(5) does not impose any obligation on an em-
ployer to refrain from unilateral action with respect to a proposed
sale or transfer of his business." 102

It is submitted that this statement is somewhat in conflict with

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100 BNA 1964 DAILY LAB. REP. No. 139, at A-3 (July 17, 1964).
101 Ibid.
102 Young Motor Truck Serv., Inc., 61 L.R.R.M. 1099, 1100 (NLRB 1966) See
the Cumberland Shoe holding since in that case it appears that the decision had been made when the first notice was given.

The Board has, in the past year or so, indicated that the employer's statutory obligation to bargain about mandatory subjects may be satisfied by the following alternatives: (1) giving notice of the possible unilateral action and offering to sit down and discuss with the union;\(^\text{103}\) (2) if an express waiver of the union's statutory right is contained in the collective bargaining agreement;\(^\text{104}\) (3) if the contractual intent of the parties "necessarily implies" that such right has been waived as, for example, by the presence of a strong management rights provision;\(^\text{105}\) or (4) if all the surrounding circumstances such as motive, past bargaining relationship, and willingness to bargain after unilateral action indicates that the employer was "excused" or "justified" for not bargaining on the mandatory subject.\(^\text{106}\) There is still no clear cut duty set forth by the Board or the courts. Obviously, both management and unions do not know the duty as yet. For example, in a recent article,\(^\text{107}\) Rudolph Oswald, AFL-CIO economist, stated that plant closings and other major changes affecting employers are not spur-of-the-moment decisions by management, and unions need more lead time to negotiate in advance of such matters.\(^\text{108}\) Oswald states that the usual clause in a collective bargaining agreement requiring one or two weeks' notice of layoff is not sufficient to meet the serious layoff problem created by basic managerial decisions.\(^\text{109}\) Oswald in effect is proposing that a union should have at least one year's advance notice of layoffs of employees as a result of plant closings, mergers, subcontracting, or major technological changes.

VI. SOME PRACTICAL RAMIFICATIONS

Although it appears that there is a "softening" in the Board's approach and that it is possible that contract language and prior negotiating history can help a company and a union in regard to the

\(^{103}\) Cumberland Shoe Corp., 1966 CCH NLRB § 20173 (Jan. 26, 1966); Edward Axel Roffman Associates, Inc., 147 N.L.R.B. 717 (1964)

\(^{104}\) Ador Corp., 58 L.R.R.M. 1280 (NLRB 1965)

\(^{105}\) Ibid., New York Mirror, 58 L.R.R.M. 1465 (NLRB 1965)

\(^{106}\) Ibid.

\(^{107}\) AFL-CIO AMERICAN FEDERATIONIST *passim* (December, 1965) See also report of speech by Malcolm L. Denise of Ford Motor Company warning of the dangers of allowing all business decisions that affect employees to become subjects for collective bargaining. BNA 1966 DAILY LAB. REP. No. 173, at AA-1 (Sept. 6, 1966).

\(^{108}\) Ibid.

\(^{109}\) Ibid.
duty to bargain, it should be emphasized that this prior negotiation history and the language in the agreement can be extremely relevant to the problem of satisfaction of the duty to bargain. In short, the questions of whether or not the parties have "fully discussed or consciously explored" the issue of plant relocation, of plant shutdown, or other major managerial decisions and whether or not the union consciously yielded its interest in the matter would necessarily involve a determination as to whether such issues were considered during contract negotiations. If, for example, the facts show that the union at one time proposed clauses which would prevent such management moves and subsequently dropped its demands, an argument might be made that the union did in fact concede to the company its right to relocate. While this argument standing alone would be unlikely to persuade the present Board, it is possible that courts of appeals would, on review, find merit in it. On the other hand, due to the fact that the Board and the courts have not set forth a clear statement as to just what is the duty of employers and unions in this area, the parties are fearful of negotiations in this area as well as particular contract language. Even in the light of recent Board decisions it cannot be assumed that the typical management rights clause will give the company the unilateral right to move its plant; on the other hand, a union is fearful of proposing limiting language and then finding itself signing an agreement without such limiting language in it. The result of this could be, as pointed out above, a finding of a waiver of its right to bargain with the company over its decision. Some questions which arise are, for example, whether the traditional impasse rule will be applied in this area, how long the discussions must last if in fact discussions are necessary, what is the union's right to information.

10 Another serious question is whether such matters as contract language, prior negotiating history should be passed upon at all by the NLRB, or whether this is a matter to be left solely to the arbitration procedures under the collective bargaining agreement. In regard to arbitration of plant removal cases see Dolgen, _The Remedy of Plant Return in the Arbitration of Plant Removal Cases_, 11 ILR RESEARCH 10 (Feb. 1966). Depending on the contract language (or lack thereof), arbitrators often decide the rights in cases involving basic managerial decisions. For example see Sivyer Steel Castings Co., 39 Lab. Arb. 449 (Arb. Howlett, 1962); United Packers, Inc., 38 Lab. Arb. 619 (Arb. Kelliher, 1962) (upholding the companies' right to shut down and relocate); Air Prods. & Chem., Inc., 39 Lab. Arb. 807 (Arb. McDermott, 1962); Weyerhaeuser Co., 37 Lab. Arb. 308 (Arb. Sembower, 1961) (upholding the companies' right to transfer operations from one plant to another) For some decisions contra see cases cited in Dolgen, _supra_.

11 Another question of the duty to supply information under § 8(a)(5) of the act poses extremely difficult problems since under Board and court decisions almost any relevant data must be furnished during collective bargaining, if requested by the union. See, e.g., NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Taylor Forge & Pipe Works
and whether the concurring opinion in *Fibreboard* truly states the current thinking of the Supreme Court. Until the Board or the courts or both are able to set forth some clear lines by which management and unions can guide themselves in the negotiations of these basic managerial decisions there will be difficulty in the practical aspects of the problem. ¹¹²

VII. CONCLUSION

In practice, it appears that the effect of the recent decisions in regard to the bargaining duty has resulted in confusion, wasted effort, and, curiously enough, a breakdown in the institution of collective bargaining. Although, in theory, the Board's policy of bargaining about a *decision* appears reasonable, the desired result has not been attained. Companies, not sure of exactly what the obligation entails, and fearful of disastrous remedies¹¹³ in the event of violating the obligation, are sometimes overly cautious and in some instances will go to great lengths to "appear" to have bargained prior to making a decision. This latter situation has in fact been forced upon companies in particular situations due to the actual practicalities of a problem. A company may, because of economic and business conditions, have to close down all or part of an operation, or move all or part of an operation, and there is no way that such a result can be avoided. However, because of the necessity of


¹¹³ Remedies in refusal to bargain over basic managerial decisions have varied. Originally, in *Fibreboard*, the Supreme Court upheld the Board's remedy of restoration of the status quo ante, namely, re-establishment of the operation with back pay. Similarly in Winn-Dixie Stores, Inc., 147 N.L.R.B. 788 (1964), the Board ordered payment of back pay to affected employees until the company either (1) reinstituted the operation; (2) reached an agreement with the union; or (3) reached an impasse in bargaining. On the other hand, in Renton News Record, 136 N.L.R.B. 1294 (1962), the Board, taking into account the extreme financial situation, stated that restoring the status quo ante would have a detrimental effect on the company and, therefore, merely ordered bargaining on the *effect* of the termination. See also New York Mirror, 58 L.R.R.M. 1465 (NLRB 1965). More recently, in American Mfg. Co., 156 N.L.R.B. No. 109 (1966), the Board, on remand from the court of appeals, NLRB v. American Mfg. Co., 351 F.2d 74 (5th Cir. 1965), which upheld the § 8(a)(5) finding but not the remedial order *in toto*, reversed that portion of its original order requiring reinstatement of the operation but maintained its order in regard to bargaining and reinstatement with back pay. But see Garwin Corp., 153 N.L.R.B. No. 59 (1965).
bargaining with the union prior to the actual decision making, elaborate plans, efforts, and documentation are required to guard against legal action. The result is that a company, having in reality already made its decision (or having its decision made for it) must go through the motions of "good faith" bargaining when it is clear that there is no course to take but the one already decided upon.

On the other hand, the recent decisions have tended to give unions a weapon to use to attempt to prevent a basic decision, or at least to hinder the making of such a decision. However, once the actual negotiations over the "decision" begin and it becomes clear to the union that nothing can be done to prevent the proposed management action, collective bargaining can deteriorate into a series of threats and counter-threats until an agreement is reached in regard to the effectuation of the decision, namely, the union will not attempt to prevent the move, provided the employees are granted appropriate monetary compensation.

It is submitted that where solutions are possible as a result of collective bargaining over decisions, and where a sound collective bargaining relationship has been in existence, there is no need for the Fibreboard doctrine since the parties will undoubtedly handle such matters in a reasonable manner on their own. Conversely, in situations where collective bargaining solutions to certain problems are not possible (either because the problems cannot be solved by changes in wages or working conditions, or because the parties' relationship has not been one that has been constructive), the Fibreboard doctrine merely forces the parties to engage in fruitless "play acting." Time, money, and energy are expended to no useful purpose.

In a recent case involving subcontracting, the Fourth Circuit Court of Appeals pointed up the problem. The court upheld the Board's finding of no violation of section 8(a)(5) of the act on the basis that there was no "significant impact" on the employees. The court discussed the bargaining problem in regard to subcontracting. It was pointed out that employees' fears arising from unilateral decisions are appreciated and the fact that the fears prove unfounded in the future in no way lessens them. If such fears are proven legitimate, the next step is litigation and perhaps a remedy after years of struggle. On the other hand the court points out that a company's position must also be considered. Protracted negotiation to the point of impasse on a basic management decision during a contract

term seems inappropriate. The court then stated that "it would be an invaluable service to management and labor to develop appropriate procedures to deal with subcontracting issues arising from time to time during the life of a collective bargaining agreement. Negotiations of this type should not be the same as bargaining for a contract. They need not be as formal or extensive, but some form of negotiation is likely to be needed in the interest of industrial peace during the life of the agreement." The court also stated that under certain circumstances action might be demanded of an employer without delay and in such cases that action should be allowed without bargaining or even notification. In cases where there is no practical detriment to notifying the union and allowing it an opportunity to be heard, this should be done; but the court stated in this latter regard:

By notification and discussion, however, we mean an alternative in appropriate cases to full-scale collective bargaining. The union should not be permitted to stall the company's decision by insistence on protracted negotiations. The company should be permitted, after listening to the union's suggestions, to accept or reject them as its economic judgment dictates. But this does not mean that ordinarily the employer should act without giving notice and an opportunity for exchange of ideas.

It is submitted that the Fourth Circuit's suggestion is constructive and is equally as applicable in shutdown and movement cases as in subcontracting cases. Without such a reasonable approach to the problem of bargaining over decisions rather than effects, the collective bargaining process will break down in its ability to handle the attendant problems.

Without guidelines to which employers and unions can reasonably conform, the confusion, error, and frustration will remain.

115 Id. at D-2.
116 Id. at D-3.