RESTRICTIONS ON MANAGEMENT'S RIGHT TO DISMISS WORKERS BY MEANS OF PLANT CLOSINGS OR BY WORKFORCE REDUCTIONS, THE RELATIONS BETWEEN EMPLOYERS AND PUBLIC AUTHORITIES, AND THE ROLE OF COLLECTIVE BARGAINING IN THE UNITED STATES

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The legal system in the United States provides little protection for workers against the job and benefit loss which accompanies plant closings. Within the existing legal framework in the United States, many plants can close without giving workers any advance notice. And, in conjunction with a plant closing, many workers lose their pensions and health and life insurance completely.

In short, the United States has failed to deal adequately with the problem of plant closings. This failure is well reflected by the fact that no comprehensive and accurate statistics on the subject exist. The Job Training Partnership Act of 1982[1] contained a provision mandating a nationwide study of plant closings. Yet, we still do not have any statistics; the earliest they possibly may be available is 1986. Even that may be doubtful because funding for continuing the study either may be severely reduced or eliminated altogether. The Bureau of Labor Statitics figures[2] which Dean Beaird mentioned were complied as part of the groundwork for the study. Those figures were released in 1984, and show that 11.5 million United States workers over the age of twenty were laid off work because of plant closings, slack work, or elimination of their job classification between 1979 and 1984. Approximately 5.1 million of those had held their job for three years or longer. Further analysis was done only for this group. While sixty percent of these 5.1 million laid off workers were reemployed as of January 1984, forty-five percent of the reemployed held

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[1] Act of Oct. 13, 1982, Pub. L. No. 97-300, ____Stat. ____(1982).

[2] U.S. Department of Labor, Bureau of Labor Statistics, *Reports on Displaced Workers,* Nov. 30, 1984, USDL 84-492 (Washington, D.C., 1984).

lower paying jobs. Older workers, women, blacks, and Hispanics were less successful in finding new employment; of these, older workers had the most difficult time being reemployed. Of the entire 11.5 milion Americans who lost their jobs during this period, according to this study almost one-half received no advance notice of their layoff.

The only real protection that a worker in the United States has against plant closings is available to workers who are represented by a labor union. Although the statistics are not very accurate, represented employees compose only between eighteen and twenty percent of the private national workforce — relatively few workers. The protections which these represented workers have are the bargaining requirements of the National Labor Relations Act discussed by Dean Beaird and the specific or implied provisions of their collective bargaining agreements, a subject to which I will return.

The remainder of the private workforce is, by and large, unprotected. No national legislation has been enacted and very few states have statutes covering plant closings. I have a few copies of House Rule 1616,[3] the proposed federal legislation. The bill is actually very conservative. Although several other bills have been proposed at the national level since 1973, H.R. 1616 is the first that has ever made it out of even the subcommittee; all the other bills died at that level. Those previous proposals would have amended the National Labor Relations Act to make plant closings a mandatory subject of bargaining. That apparently was much too radical for most people in the United States; H.R. 1616 is much more conservative. As Dean Beaird mentioned, this bill merely provides for a ninety-day notice of a closing of permanent layoff affecting more than fifty employees and consultation with the union in the plant if there is one. If there is no union in the plant, the bill simply "encourages" the employer to speak with the employees. The bill allows an employer to circumvent the notification provision completely if it can show "unavoidable business circumstances;"[4] it has yet to be seen just what this term means. The bill itself calls for formation of a commission to study and make recommendations about further legislation in the plant closing area. Now, as Dean Beaird mentioned, Labor Secretary Brock

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[3] Labor Management Notification and Consultation Act of 1985, H.R. 1616, 99th Cong., 1st Sess. (1985).

[4] *Id.*

just recently announced that he will form a task force on the subject.[5] Already, opponents of the national legislation are saying that if we have a task force, we do not need legislation.[6]

The state legislation which exists is piecemeal and basically very weak. And, as Dean Beaird mentioned, all of it is under vigorous attack from business groups who claim that no state legislation validly can exist on the subject of plant closings because of the doctrine of federal preemption. Maine has a statute which requires companies to notify their employees and the municipality if they move a plant more than 100 miles away from its location.[7] This Act also requires employers to provide severance pay to workers who lose their jobs because of such a move; however, the fine for failure to provide severance pay is only $500.00. Needless to say, the sanction is insufficient to make the severance pay requirement enforceable.

Wisconsin also has a plant closing statute, which was first enacted in 1976; it requires sixty-days' notice of a closing be given to the state. Last year, the statute was amended to require companies with 100 or more workers to notify employees, unions, and municipalities affected by the closing, as well as the state.[8] The first test of Wisconsin law may well come this summer. The attorney general of the state is pursuing an action against Jones Dairy Farm, a company that did not give the required sixty-days' notice.

The Illinois legislature has considered plant closing bills three times, but none has been enacted into law there. Yet another bill may be

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[5] In October 1985, Secretary of Labor Brock announced the 21 members of the "Task Force on Economic Adjustment and Worker Dislocation." The members include representatives from labor, business, and government organizations and will be chaired by Malcolm Lovell, director of George Washington University's Industrial Relations Institute and former Under Secretary of Labor. The Task Force is to complete its duties by December 1986 and report to Secretary Brock. News Bulletin, United States Department of Labor Office of Information (October 18, 1985).

[6] During November 1985, H.R. 1616 was debated on the floor of the House of Representatives. Labor Secretary Brock corresponded with members of the House prior to the debate, urging defeat of the bill. On November 14, an amendment of the bill was accepted which eliminated all of the remedies and enforcement tools included in the committee-approved bill with the exception of back pay to employees who are not given the notice required. Then, on November 21 still another amendment of H.R. 1616 was approved. This amendment struck the provisions for consultation over a proposed closing, leaving nothing in the bill except the 60-day notice requirement. The House rejected another amendment which would have made the act apply only to employers having 200 or more workers, rather than 50. Finally, on the 21st, the House defeated H.R. 1616. The vote was 208 against; 203 for the bill.

[7] ME. REV. STAT. ANN. tit. 26, § 625-B (West Supp. 1981).

[8] WIS. STAT. ANN. § 107.07 (West. 1957 & Supp. 1985).

presented this year. The legislation being discussed would require six months' notice of a closing, a six-month extension of health care benefits, and severance pay to employees with more than three years of service. However, supporters are not optimistic that this new proposal will pass if it is introduced. Minnesota also has attempted unsuccessfully to enact plant closing legislation. Still another attempt may be made this year; but, as in Wisconsin, the labor people in Minnesota are not really hopeful of passage. Bills requiring prior notification of plant closings have been discussed in New Jersey, but have failed to be enacted, although, as Dean Beaird pointed out, a bill passed recently in New Jersey is awaiting the Govenor's decision on whether to sign it.[9] This bill is rather strict compared to those of other states; it requires six-months' notice of a plant closing to the state and three-months' notice to any union representing employees at the plant to be closed. In addition, it requires an employer to provide severance pay and to continue health and life insurance for six months.

By comparison, Massachusetts has a voluntary notice ordinance in effect.[10] It provides certain incentives to businesses that give advance notice of a plant closing. Pennsylvania is discussing similar voluntary programs offering tax incentives to businesses that give prior notice. Pennsylvania has a very severe problem with plant closings. Between 1980 and 1984, over 100,000 persons in the state lost their jobs because of the closing of industrial plants.[11] A notice ordinance is in effect in Philadelphia[12] and in Vacaville, California. In Pittsburg, Pennsylvania, the city council passed a plant closing ordinance in 1983. Several business groups sued, claiming that the law was invalid because it violated the state's Home Rule Charter Act which prohibits a locality from regulating business. The trial court in Pennsylvania agreed with the business groups,[13] and the Pennsylvania appellate courts refused to hear the case.

A major problem with state legislation is that individual states are very wary of scaring away business. Moreover, those states that need plant closing legislation the most are the same states that are most

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[9] *See* Beaird, *Relations of Employers with Workers' Representatives in the United States,* this issue, *supra* page 220 n.4 and accompanying text.

[10] MASS. GEN. LAWS ANN. ch. 208 (West 1968 & Supp. 1986).

[11] LAB. REL. REP. (BNA) 308 (Dec. 17, 1984).

[12] PHILADELPHIA, PA. CODE (Business, Trades & Professions) ch. 9-1500 (1982).

[13] Smaller Manufacturers Council v. Council of the City of Pittsburgh, No. GD 83-11245 (Allegheny County, C.P. Penn., Aug. 19, 1983).

vulnerable to these fears. In addition, this legislation is very piecemeal and generally quite conservative. The voluntary plans are fairly offensive to some in the labor movement because basically what they do is offer a reward to business for doing something (such as giving notice or offering severance pay) which some think should be required of all businesses, given the tax breaks and other benefits the companies receive.

Lawsuits have been filed in conjunction with plant closings under the Age Discrimination Act[14] and under ERISA,[15] which is the Employee Retirement Income Security Act.[16] ERISA basically regulates and insures certain pension funds that employees and employers have established. Apparently in some cases, companies have been keeping computer tabs on their plants; when a workforce in a particular plant is approaching the age where their pensions will become vested, the companies are closing down those plants.[17] The argument put forward is that this action violates the Employee Retirement Income Security Act because the Act specifically provides that an employer cannot discriminate against employees on the basis of their eligibility for pensions. The theory is much the same under the Age Discrimination Act. In cases advancing age discrimination arguments, the plants being closed are ones where the workforce is composed primarily of older workers; the allegation is that the employer is seeking to avoid retirement costs.

With regard to collective bargaining agreements, I have sufficient copies of portions of a study done by the Industrial Union Department of AFL-CIO.[18] It surveys 100 major collective bargaining agreements in the United States and provides statistics from 1984 on contract provisions dealing with plant closings. Thirty percent of the collective bargaining agreements in the study provided for severance pay in the event of closing. This provision was the most common included in

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[14] EEOC v. Borden's Inc., 724 F.2d 1390 (1984).

[15] See Amaro v. Continental Can Company, 724 F.2d 747 (1984). In Gavalik v. Continental Can Co. (W.D. Pa. Sept. 24, 1985), the court held, after factual findings, that the company did not violate § 510 of ERISA by closing part of its operation and laying off certain employees just before they attained the necessary years of service to qualify for full pension benefits.

[16] Act of Sept. 2, 1974, Pub. L. No. 93-406,____Stat.____(1974).

[17] *See* address by C. Frankel, The Law of Collective Bargaining In Hard Economic Times: Concessions, Plant Closings, The Insolvent Employer (presented at the 1984 AFL-CIO Lawyer Coordinating Committee conference).

[18] Industrial Union Dep't., AFL-CIO, Comparative Survey of Major Collective Bargaining Agreements-Manufacturing & Non-Manufacturing (November 1984).

the contracts. Only 2.67% of the contracts provided for a special company/union committee to discuss plant closings. When you review the statistics, you will see that what unions have been able to bargain for is very limited. And further, recent decisions by the Reagan Board make it appear that unions' bargaining power will become much more limited. In the *Otis Elevator* case discussed by Dean Beaird, the board remanded the question of "effects bargaining" to the administrative law judge, who is the trial judge in Board proceedings. While the issue before him will be a factual one — namely, did the company, in fact, bargain over the effects of the closing — chances are that if the employer loses, it will certainly appeal the decision to the Board. The Board could undermine or even reserve the requirement that a company participate in "effects bargaining." The company's counsel in *Otis Elevator* implied that at some point, (not necessarily in the *Otis* case) employers may challenge "effects bargaining."[19]

Another source of protection for employees in plant closing situations is the collective bargaining agreement. Clear language on job security which prevents layoffs or relocations or work transfers or subcontracting can be most helpful.[20] Strong clear language like this is hard to win, particularly since unions' bargaining power has been severely eroded over the years. With language that states that the company will not reassign any work presently performed by employees covered by the agreement to personnel in any other plant, employees can often prevail before an arbitrator and win an award preventing work transfer. In those situations it is essential to go into court and get an injunction pending the outcome of the arbitration hearing. If that is not done, even though the arbitrator may rule in the employee's favor, the arbitrator will be very reluctant to order that the plant be reopened. A problem with bargaining for specific language preventing plant closings is that if any compromises on the language must be made or any part of it be withdrawn, an arbitrator will use that bargaining history to limit severely the union's rights. You either have to have the bargaining strength to get very good language into the contract or not bargain on specific language, and leave the contract silent. In that cae, it is possible to argue an implied rights theory, saying that the recognition clause gives the union an implied right

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[19] *See* address by Joseph C. Wells, The Duty To Bargain Over Major Employment Decisions - *Otis Elevator* and Its Progeny (delivered at the 1984 Labor Law Institute, State Bar of Georgia).

[20] *See* L. PAGE AND D. SHERRICK, THE LAW OF PLANT CLOSINGS (UAW 1984).

to continue having the employees it represents do the work. Unions have had very limited success with an argument in the plant closing situation, however, it is at least a posibility. Nevertheless, apparently weak language can often be much more harmful than no language at all when presented to an arbitrator.

One other theory that unions have been utilizing comes into play when a company has demanded concessions and the union has had to give back benefits and/or accept wage cuts. In these cases, when the company goes ahead and closes the plant anyway, unions have been presenting cases partially on a promissory estoppel theory, arguing that the union's concessions were in exchange for the company's promise to stay in business. There has been very limited success with this approach. Success basically depends on the actual agreement and the words that the company used at the time. One case, decided on ordinary contract theory, involved a company which actually put in writing that if the union gave concessions the company would spend $2.5 million reinvesting in the plant.[21] Then the company failed to make that investment although the union did give the concessions. While the company was not required to maintain this plant, the judge ordered that the company either pay the union the $2.5 million dollars or pay the equivalent of the concessions. But, unless the company's commitment is in writing and is fairly clear, that theory has not enjoyed great success.

[21] Local 461 & District III, I.U.E. v. Singer, 540 F.Supp. 415 (N.J. 1982).