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Relations of Employers with Workers' Representatives in the United States

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RELATIONS OF EMPLOYERS WITH WORKERS' REPRESENTATIVES IN THE UNITED STATES

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I am very pleased to have the opportunity to participate with this distinguished group in a discussion of a subject that is growing in importance in the United States. I want to compliment Professor Vogel-Polsky for providing the participants with a copy of Edward Yemin's book, *Workforce Reductions in Undertakings*,[1] and an outline which will help us focus our discussion. My colleague, Mary Kay Lynch, and I have agreed to share the topics in this outline. I will provide a general overview and deal principally with relations of employers with workers' representatives; she will deal specifically with United States restrictions on management's right to dismiss workers by means of plant closings or by workforce reductions, relations between employers and public authorities, and collective bargaining. In the process she will examine these problems from labor's point of view. The statement by Professor Harold Oaklander on page 187 of the Yemin book that "[i]n the United States workers are not as well protected against workforce reductions as in other industrial countries" is probably more true today than it was in 1982. According to the Bureau of Labor Statistics, an estimated 11.5 million employees lost jobs through plant closings and layoffs between 1979 and 1984.[2]

At the present time, unlike the situation in many EEC countries, no specific national legislation deals with plant closings or major layoffs in the United States, although the House Education and Labor Committee just reported out a bill, H.R. 1616.[3] This bill would require employers to give ninety-days' notice to employees or their bargaining representatives of a plant shutdown or mass layoff involving at least fifty employees over a thirty-day period. The employer would be

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[1] INTERNATIONAL LABOUR ORGANIZATION, WORKFORCE REDUCTIONS IN UNDERTAKINGS (E. Yemin ed. 1982).

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

[3] Labor Management Notification and Consultation Act of 1984, H.R. 1616, introduced March 20, 1985.

required to consult with the union during the ninety-day notice period and to provide relevant information about the plant closing decision. The Secretary of Labor then determines whether an employer has complied in good faith with the notice requirements, grants waivers of the notice requirement to employers if justified by "unavoidable business circumstances," and exempts employers from disclosing sensitive information. The ranking minority member of the committee urged the committee to await the results of a study by a special plant closing task force established by Labor Secretary Brock before proposing legislative action.

As Ms. Lynch will report, there has not been a great deal of activity in this area at the state level. One example of activity is in New Jersey, where the state legislature passed a plant closing bill this summer; however, the bill has not yet been signed by the governor.[4] Such legislation appears to be threatened by employer organization claims that this subject area is preempted by frderal law. Ms. Lynch has some information from the industrial union department of the AFL-CIO which she will distribute regarding the extent to which collective bargaining agreements deal with this subject.

Statistics are not particularly good as to the extent to which collective bargaining agreements require notice of mass layoffs and plant closings. In his statement on H.R. 1616, Congressman Ford said that at unionized firms, fewer than twenty percent of the major collective bargaining agreements contain prenotification provisions.

In Western Europe, either through EEC directives or individual country legislation, law plays a major and direct role in layoffs resulting from plant closings. In the United States, however, the one area in which the law comes into play in a major way on the issue of plant closings and work transfers is in the application of the bargaining requirements of the National Labor Relations Act. This statute, which consists of the original 1935 Wagner Act, the 1947 Taft-Hartley Amendments, and the 1959 Landrum-Griffin Amendments, applies to about fifty percent of the nation's private sector workforce.

The National Labor Relations Act places an obligation on both covered employers and unions to bargain in good faith regarding

[4] S. 3024. The governor of New Jersey conditionally vetoed S. 3024 in August, leaving only a provision for a state commission on plant closings; however, on September 13 the Democratic caucus of the New Jersey Senate refused to forward the bill as it existed after the conditional veto to the floor of the Senate. This action effectively killed the bill.

"wages, hours, and other terms and conditions of employment." The nature of this obligation can be fully understood only by recognizing some of the basic concepts underlying the bargaining process. The principles of exclusive representation and majority rule have a persuasive influence on this process. To remedy the inequality of bargaining power between employers and unorganized employees, Congress not only guaranteed employees the right to organize, but also declared that the representative chosen by a majority of the employees in an appropriate bargaining unit is the exclusive representative for all unit employees. The union chosen by the majority, therefore, represents even those who vote for another union or for no union. This principle of exclusivity, almost unique to the United States, is fundamental to national labor policy and the collective bargaining process. One effect of this principle is localized and fragmented bargaining.

Second, the basic thesis of the Act is to provide a legal framework within which the parties try to reach private agreements regarding "wages, hours, and other terms and conditions of employment." It was never intended that the government would become a party to negotiation or directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of the agreement. It has long been recognized that within this framework agreements in some cases might be impossible.

Archibald Cox had this to say about the American system in his collection of essays entitled *Law and the National Labor Policy*:

> [t]he American system of industrial relations rests upon private enterprise in markets which, despite increasing government regulation, are still remarkably free. We believe in individual initiative, private decision making, and personal responsibility not only as economic and political doctrine but also as moral philosophy, although our beliefs run beyond our practice in this respect as well as others. Organized labor is scarely less committed to the existing system than other segments of the community. It attracts more idealists, reformers, and rebels, but most union officials, whether business agents or general presidents, have the same basic beliefs as their corporate counterparts. Specifically, they share the conviction that wages and conditions of employment must be fixed by private agreements.[5]

Third, and probably most important in terms of today's topic, the Supreme Court in *National Labor Relations Board v. Wooster Di-*

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[5] A. COX, LAW AND THE NATIONAL LABOR POLICY (1960).

vision of Borg-Warner Corp.[6] divided the subject of bargaining into three segments: mandatory, permissive, and illegal. A bargaining subject falling within the phrase "wages, hours, and other terms and conditions of employment" is considered a mandatory subject; all other lawful subjects are termed permissive. Whether a subject is mandatory has considerable significance. The parties are required to bargain in good faith concerning mandatory subjects and the bona fides of that bargaining can be second-guessed by the Board and the courts. Also, a party may insist to impasse that a bargaining demand concerning a mandatory subject be included in the collective agreement and may resort to lawful economic weapons to achieve its demand. Further, the employer is required to supply the union with all information relevant to mandatory subjects. Also, only with respect to mandatory subjects does the Act forbid unilateral modification. Bargaining is not, however, limited to mandatory subjects. Proposals regarding permissive subjects may be advanced by either party and may become enforceable upon agreement. But there is no statutory duty to negotiate in good faith concerning these matters; a party is free to bargain or not. A third segment consists of illegal subjects, such as an unlawful union security or a hot cargo clause. The parties may not lawfully bargain concerning these matters and, thus, any agreement reached is unenforceable. In the case of either permisive or illegal subjects, the parties may neither insist to impasse nor engage in lawful economic warfare because such conduct is in effect a refusal to bargain over mandatory subjects. The net effect of this differentiation is to employ administrative and judicial processes to draw a line between subjects requiring bargaining and management functions. In effect, the line is drawn between employee participation in decisionmaking and management prerogatives. If the Board and the courts hold a decision to close a plant or to transfer work for economic reasons to be a mandatory subject, the employees may bargain over the decision and receive relevant information incident to the employer's plans. If such decisions are held to be permissive, then the employer may act unilaterally without notice or consultation with the employee's representative. While bargaining over the decision may not be required, bargaining over the effects of that decision on employees may be.

Before 1962 the NLRB held that there was no statutory obligation on the part of the employer to bargain over basic management

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356 U.S. 342 (1958).

decisions. The National Labor Relations Act was construed as not covering managerial decisions motivated by the economics of business operation. As a result, decisions to commit capital or managerial effort to a new product line or to dispose of inefficient operations were considered basic entrepreneurial rights that preceded the bargaining duties imposed by the Act. Thus, although an employer could be held to a duty to bargain on the effects of such decisions, he did not have to bargain over the decision itself.

This position was perceived as having serious effects on job security, and many unions argued that where an employer's decision had the effect of terminating unit jobs, it involved "conditions of employment" requiring mandatory bargaining under the Act. In 1962 the Kennedy Board accepted this construction in *Fibreboard Paper Products Corp.*[7] In this case the Board extended the duty to bargain to an economically motivated management decision to subcontract that had the effect of eliminating bargaining unit jobs.

The Supreme Court upheld this position but added some significant caveats:

> [w]e 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 'sub-contracting' which arise daily in our complex economy.[8]

Justice Stewart, while concurring, wrote a further explanation. He observed that there are many managerial decisions imperiling job security that would not be the subject of collective bargaining. He stated that "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise" are not subjects of collective bargaining regardless of their impact on employment; such decisions, Justice Stewart noted, lie at the "core of entrepreneurial control."[9] This approach focuses on the nature of the decision and asks whether it is one that is fundamental to the basic direction of the enterprise.

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[7] 138 NLRB 550 (1962), *enf'd.* 322 F.2d 411 (D.C. Cir. 1963).
[8] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).
[9] *Id.* at 223.

The Kennedy-Johnson Board gave an expansive reading to the majority holding in *Fibreboard.* Taking the position that any decision having major effects on unit jobs should be a mandatory subject of bargaining, the Board attempted to extend the bargaining obligation to many areas such as partial closings, decisions to sell a business, and changes in distribution systems. The Board's rationale was outlined succinctly in its decision in *Ozark Trailer, Inc.*[10] when it stated:

> [a]n employer's decision to make a major change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his work life, accumulating seniority, accruing pension rights, and developing the skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.[11]

While the Board was giving the Supreme Court's *Fibreboard* decision a broad interpretation, the courts of appeal around the country were not. Board orders expanding the duty to bargain over management decisions were consistently reversed by the appellate courts, which gave more consideration than did the Board to the majority's caveats and Justice Stewart's concurrence. In 1971 the Nixon Board, apparently acquiescing in these court decisions, held in *General Motors Corp.*[12] that there was no duty to bargain over a transaction involving the sale of an employer's business. This basic issue again reached the United States Supreme Court in 1981 in *First National Maintenance Corp. v. NLRB.*[13] This case involved the decision of an employer to close part of its business. In this case the Supreme Court developed what appears to be a new balancing test. This test was articulated by the Court as follows:

> . . . bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit for labor-management relations and the collective bargaining process outweighs the burden placed on the conduct of the business.[14]

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[10] 161 NLRB 561 (1966).
[11] *Id.* at 566.
[12] 191 NLRB 951 (1971).
[13] 452 U.S. 666 (1981).
[14] *Id.* at 679.

The "benefit for labor-management relations and the collective bargaining process" is determined by whether the decision in question is based upon factors which the union could possibly influence through bargaining. The "burden" is determined by the hardship that the delay or publicity of bargaining would place on the employer. Thus, the *First National Maintenance* approach attempts to balance the benefits which bargaining would bring for employees against the burden it would place upon management.

The *Fibreboard* and *First National* decisions outline two basic approaches to the issue of whether a given decision is a mandatory subject of bargaining. *Fibreboard* requires looking to the decision itself and asking whether it represents a change in the nature and direction of the business. If it does, the decision would not be a mandatory subject. *First National* concentrates on the balance between the potential benefits of collective bargaining and the burdens that bargaining would place on the employer. If the balance tilts toward the benefit of bargaining, the decision would be a mandatory subject.[15]

There seems to be a difference among the current Board members in dealing with economically motivated management decisions as to whether to apply the *Fibreboard* or *First National* rationale. In *Otis Elevator*,[16] a partial plant closing case handed down only recently, the majority of the Labor Board panel simply said that the decision to close was at the core of entrepreneurial control and held it was not a bargainable decision. A concurring member, while reaching the same result, used the balancing test of *First National Maintenance*.

The *Otis Elevator* decision sets out the full range of inquiry which must be made to determine whether a given management decision is a mandatory subject of bargaining. First, the nature of the change within the business brought about by the decision must be ascertained. Then, the reasons for that change must be known. Third, it must be determined whether the factors upon which the decision is based and the relationship between management and the union together suggest that the decision could be affected by bargaining. And finally, the burdens which bargaining would place upon management must be considered.[17]

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[15] *See* Datz, *Major Economic Decisions of an Employer — Are They Mandatory Subjects of Bargaining?* (delivered at the 1984 Labor Law Insitute, State Bar of Georgia).

[16] NLRB 162 (1984).

[17] *Id.*

In another recent case, the current Labor Board, as well as the Court of Appeals for the District of Columbia, held that the removal of work from a unionized plant to a nonunionized plant operated by the same employer is not a violation of the Act. In earlier decisions the Labor Board had held that such a move violated section 8(d) of the statute, which provides that the duty to bargain is not to be construed as requiring any party to bargain about or agree to any midterm modification of the terms and conditions of employment contained in any collective bargaining agreement. However, the Board and the court held in *Milwaukee Spring*[18] that a transfer of work did not change any of the provisions of the current collective bargaining agreement; therefore, it was not an illegal midterm violation of the contract.

There is no question but that current policy in the United States comes down heavily on the side of management flexibility in the area of economic decisionmaking. The question is: should that be changed?

[18] 268 NLRB 601 (1984).