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THE BOARD RETREATS: A VIABLE SOLUTION TO THE DECISION-BARGAINING CONTROVERSY?

by Boyd Mangrum

Under section 8(a)(5) of the National Labor Relations Act,¹ employers are obligated to bargain collectively concerning "wages, hours, and other terms and conditions of employment."² Thus, if a subject can be included within this language, it is a mandatory subject of bargaining—there can be no lawful refusal to bargain over such a topic.³ For many subjects, such as plant rules,⁴ "no strike" clauses,⁵ and pensions,⁶ it has been relatively easy to determine whether they are mandatory subjects of bargaining. One area, however, has not lent itself to easy classification. The area of management decisions to subcontract work, to remove or sell plants, or to partially close plants⁷ has been the subject of much litigation, yet the law remains confused. Whether such topics are mandatory subjects of bargaining or, alternatively, exclusively executive decisions properly reserved to managerial discretion, has not been conclusively determined.⁸ It shall be the purpose of this Comment to trace the development of this problem area, to examine the solutions that have been proposed, and, finally, to assess the present direction of the law.⁹

I. THE BOARD VERSUS THE COURTS

There seems little doubt that the 1964 United States Supreme Court decision in *Fibreboard Paper Products Corp. v. NLRB*¹⁰ was the genesis of the question under consideration. The Court found that the particular form of subcontracting at issue—"replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment"¹¹—was a mandatory subject of bargaining.¹² Justice Stewart concurred, but pointed out in his separate opinion that the type of subcontracting involved fell "short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what

¹ 29 U.S.C. §§ 151-68 (1970). For studies of the legislative history of the Act, see R. CORTNER, *THE WAGNER ACT CASES* (1964), and Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199 (1960).

² 29 U.S.C. §§ 158(a)(5), (d) (1970).

³ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

⁴ *Miller Brewing Co.*, 166 N.L.R.B. 90 (1967).

⁵ *Shell Oil Co.*, 77 N.L.R.B. 1306 (1948).

⁶ *Inland Steel Co.*, 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

⁷ The closing of plants may involve problems other than those involving § 8(a)(5). For an analysis of them, see Bliss, *Labor's Plant Closure Pains*, 24 SW. L.J. 259 (1970).

⁸ The legislative history of the Act is not particularly helpful in this area. The general view is that the lack of such history and the vague wording in the Act necessitate the Board's defining the area of the duty to bargain, subject, of course, to judicial review. See Smith, *The Evolution of the "Duty To Bargain" Concept in American Law*, 39 MICH. L. REV. 1066 (1941). Congressional efforts in 1947 to define the bargaining duty more explicitly were not successful. See generally Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950).

⁹ The complex area of remedies for refusal to bargain in this area is, of course, beyond the scope of this Comment.

¹⁰ 379 U.S. 203 (1964).

¹¹ *Id.* at 215.

¹² The Court thus held that the Board was empowered to order resumption of operations and reinstatement with back pay. *Id.*

the basic scope of the enterprise shall be."¹³ It was Justice Stewart's contention that the Court's holding could not be extended to determine if "any aspects of those larger issues could under any circumstances be considered subjects of compulsory collective bargaining."¹⁴ Justice Stewart's view of the limited nature of the decision is not evident from a reading of the majority opinion. It stated that "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 . . . necessarily results from the contracting out of work performed by members of the established bargaining unit."¹⁵ If the Court meant to say that any subject concerning termination of employment fits the statutory definition of "conditions of employment," then the holding of the case is broad indeed. Under this conception, a vast number of previously managerial decisions which involve termination of employment would be considered mandatory bargaining subjects. The Court felt that its decision was not so expansive, and that it "need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."¹⁶ The Supreme Court has not considered the question raised in *Fibreboard* since that decision,¹⁷ so the National Labor Relations Board and the circuits have been left to develop the law according to their own interpretations of the *Fibreboard* holding.

Prior to 1962 the Board held the view that, although an employer did not have to bargain concerning the decision to subcontract, he was required to bargain with the union concerning the effects of such a decision on the bargaining unit.¹⁸ In its 1962 *Town & Country Manufacturing Co.* decision,¹⁹ the Board extended its doctrine to include a requirement of bargaining over the decision itself. The Board has even formulated a set of criteria to use in deciding whether a specific subcontracting decision requires bargaining.²⁰

The Board could have chosen to go no further than this in the development

¹³ *Id.* at 225.

¹⁴ *Id.*

¹⁵ *Id.* at 210.

¹⁶ *Id.* at 215.

¹⁷ Two cases other than *Fibreboard* have frequently been cited by writers in this area, although, strictly speaking, they are not relevant since they did not involve § 8(a)(5) of the National Labor Relations Act. The Board has placed reliance upon *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960). The Supreme Court held that termination of employment was a "condition of employment" concerning which there was a duty to bargain. The Court spoke in broad language of the expanding scope of mandatory bargaining subjects, and that language has frequently been cited by the Board. The case, however, was decided under the Railway Labor Act, and not the National Labor Relations Act, so it is not direct precedent for the topic being considered here.

Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), is the favorite citation of the courts for the proposition that an employer may completely shut down his plant, even if motivated by anti-union bias, and not violate § 8(a)(3) by doing so. While the case appears to be a strong endorsement by the Court of management's freedom to act in this area, it is distinguishable since it did not involve any alleged § 8(a)(5) violations.

¹⁸ See, e.g., *Bickford Shoes, Inc.*, 109 N.L.R.B. 1346 (1954); *Diaper Jean Mfg. Co.*, 109 N.L.R.B. 1045 (1954); *Brown Truck*, 106 N.L.R.B. 999 (1953).

¹⁹ 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

²⁰ The suggested criteria are: whether the subcontracting was motivated solely by economic considerations, whether the employer has traditionally subcontracted similar types and quantities of work, whether the subcontracting would have a significant adverse impact on employees in the bargaining unit, and whether the union had the opportunity to bargain over the subcontracting at general negotiating meetings. *Westinghouse Elec. Corp.*, 150 N.L.R.B. 1574, 1577 (1965).

of its "decision-bargaining"²¹ requirement; instead, it gave a broad interpretation of the *Fibreboard* decision and extended the doctrine to cases other than ones involving subcontracting. In *Royal Plating & Polishing Co.*²² the Board held that section 8(a)(5) requires an employer to bargain over a decision to close part of a business. The Board explained its general approach to this area in *Ozark Trailers, Inc.*,²³ another partial closure situation. In that case the Board considered *Fibreboard* and expressed its feeling:

[J]ust as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.²⁴

Based upon this reasoning, the Board rejected the argument that the partial closing of a business is essentially a matter of traditional management prerogative. The Board noted that parties frequently resorted to bargaining when such matters were being considered, and apparently placed great value on the "mediating influence"²⁵ that collective bargaining might have. The Board has consistently adhered to its position in *Ozark Trailers* in cases involving plant relocations²⁶ and partial shutdowns.²⁷

The federal appellate courts, reading *Fibreboard* more narrowly than the Board, have refused to enforce Board decisions calling for decision-bargaining in cases other than subcontracting.²⁸ The courts have stressed the fact that under the particular circumstances involved in *Fibreboard* there was no change in the company's basic operation after the subcontracting decision. "Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business."²⁹ The courts' almost unanimous refusal to apply *Fibreboard* to any cases other than those involving identical fact situations has been described as "unsettling" and not warranted by prior case law or the historical development of bargaining topics under the Act.³⁰

²¹ The term "decision-bargaining" will be used herein to indicate mandatory bargaining about an economic decision. The term "effect-bargaining" will be used to indicate mandatory bargaining about the post-decision effects upon the wages, terms, and conditions of employment of the employees.

²² 152 N.L.R.B. 619 (1965).

²³ 161 N.L.R.B. 561 (1966).

²⁴ *Id.* at 566.

²⁵ *Id.* at 568.

²⁶ See, e.g., *McLoughlin Mfg. Corp.*, 182 N.L.R.B. 958 (1970) (but here the Board only required effect-bargaining as a remedy since the relocation was an accomplished fact); *Weltronic Co.*, 173 N.L.R.B. 235, *enforced*, 419 F.2d 1120 (6th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970).

²⁷ See, e.g., *Drapery Mfg. Co.*, 170 N.L.R.B. 1706 (1968), *partially enforced*, 425 F.2d 1026 (8th Cir. 1970); *Thompson Transp. Co.*, 165 N.L.R.B. 746 (1967), *enforcement denied*, 406 F.2d 698 (10th Cir. 1969).

²⁸ See, e.g., *NLRB v. Acme Indus. Prods., Inc.*, 439 F.2d 40 (6th Cir. 1971); *NLRB v. Thompson Transp. Co.*, 406 F.2d 698 (10th Cir. 1969); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965). One court has even refused to enforce a decision-bargaining order in a subcontracting case by distinguishing the facts of the case from those in *Fibreboard*. *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965).

²⁹ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 213 (1964).

³⁰ Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for*

II. STANDARDS FOR RECOGNIZING MANDATORY BARGAINING SUBJECTS

Due to the conflicting stances of the Board and the courts with respect to the duty to bargain over management decisions in this area,³¹ several proposals have been made as to what criteria should ideally be applied in such situations. Most of the commentators seem to start from the implicit assumption that at least some decision-bargaining should be required. Although frequent doubts have been expressed as to the wisdom of abridging management's traditional freedom of action, it nevertheless is generally conceded that the modern trend is to increase the participation of employees in the making of management decisions which vitally affect their conditions of employment.³² The primary dispute now seems to be over the development of workable standards which could be applied to determine what particular management decisions are mandatory subjects of bargaining.

Contractual Rights. This approach would allow the rights and duties of the parties as to decision-bargaining to be made solely a function of the contract. The feeling is that, since the law is so unclear in this area, and since virtually all management decisions might be held to affect the terms and conditions of employment within the meaning of the Act, then management should be able to protect itself at the bargaining table.³³ Under this view, if, at contract negotiations, the union was unable to secure, for example, a clause barring subcontracting, then the employer would be free to make such a decision unilaterally, although bargaining would be required concerning the effects of the decision. *Long Lake Lumber Co.*, which allows management to insist upon a management-rights clause, is cited as a step in the right direction.³⁴

Of course, statutory rights can often be waived, and it is likely that management-rights clauses will continue to be used.³⁵ Unfortunately, there are several reasons why this standard should not be given serious consideration. The basic misconception in this approach is the failure to recognize that the duty to bargain is a statutory requirement, not a function of what the parties have finally incorporated in their bargaining agreement. The Supreme Court has held that sections 8(a)(5) and 8(d) "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment' The duty is limited to those subjects, and within that area neither party is legally obligated to yield."³⁶ Thus, under the statute and the

Standards in Defining the Scope of the Duty To Bargain, 71 COLUM. L. REV. 803, 813 (1971).

³¹ The area has sparked scholarly as well as judicial conflict. For the opposing views, see the two addresses entitled *Management Prerogatives: The Limits of Mandatory Bargaining* by Bakaly (management view) and Sheinkman (labor view) in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 255, 289 (1971).

³² See Rabin, *supra* note 30, at 815-16.

³³ Nelson, *Through a Looking Glass Darkly: Fibreboard Five Years Later*, 21 LAB. L.J. 755 (1970).

³⁴ 182 N.L.R.B. 435 (1970), cited in Nelson, *supra* note 33, at 760.

³⁵ The Board has recently upheld the use of a management-rights clause which allowed the employer to unilaterally contract out work. *Savannah Elec. & Power Co.*, 197 N.L.R.B. No. 118, 5 CCH LAB. L. REP. ¶ 24,311 (June 20, 1972).

³⁶ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

interpretive case law, there is a duty to bargain over mandatory subjects; the only question is whether a subject falls within the statutory phrase and is, therefore, a mandatory subject of bargaining. The lack of precision in the law relative to this area may be deplorable, but it does not warrant a complete abandonment of the principles which have thus far developed. Allowing the contract to control the scope of the duty to bargain would deprive labor of its statutory right to participate in at least some of the decision-making vital to its interests.

Past Practices and the Likelihood of Resolution. In *Fibreboard* Chief Justice Warren mentioned two standards which should be considered when determining whether a decision is a mandatory subject of bargaining.³⁷ The first standard is an examination of past industry practices; the second is the likelihood of resolution at the bargaining table. The Chief Justice admitted that such considerations are "not determinative."³⁸ Nevertheless, one commentator has suggested that such considerations should be the only standards used.³⁹

It is submitted that the adoption of such standards and their application on a case-by-case basis would effectively abrogate the developing duty of management to bargain in this area. The first standard seems to embody the feeling that if in the past such decisions have been the subject of voluntary bargaining, then, thereafter, the decision should be held to be a mandatory subject. The second standard is apparently an expression of the belief that in some cases employees may not be competent to assist in technical management decisions, and that other management decisions may be motivated by strong economic considerations which could not be outweighed by any union concession. There seems little doubt that in every case management would strongly contend that nothing the union could offer could possibly affect its ultimate decision, that the matter was highly technical in nature, that it was motivated solely by irreversible economic trends, and that there was no industrial history of bargaining over such decisions. The union would surely differ on these points. The result could be that the parties would frequently end up in protracted negotiations over whether they were required to bargain about the decision. Under such flexible and argumentative criteria, it is unlikely that the duty to bargain would develop along recognizable and consistent lines. Furthermore, there are legitimate questions about the desirability of measuring the present duty to bargain by examining past bargaining practices. The employees' vital interests, the "terms and conditions" of their employment, might be involved regardless of whether the decision had historically been the subject of collective bargaining. History may be instructive, but it should not be used to condition the statutory rights of employees in this instance.

Similarly, the "likelihood of resolution at the bargaining table" standard has intrinsic difficulties of application. Clearly, the employees involved will certainly view themselves as competent to participate in decision-making af-

³⁷ 379 U.S. at 211.

³⁸ *Id.*

³⁹ Rabin, *supra* note 30, at 821. It should be noted that Professor Rabin recognized several limitations on applying the *Fibreboard* doctrine.

fecting their livelihoods. The argument that some decisions are motivated by economic considerations that cannot be affected by union concessions or suggestions does not withstand scrutiny. In almost all cases union concessions concerning wages, hours, or other terms might conceivably have some influence on management decision-making. Even in an extreme example, such as the Government's prohibition of the manufacture of a particular product, the union might still be able to make a meaningful suggestion as to the possibility of continuing use of plant facilities and workers by switching to related production. The value of the union's suggestion would be enhanced by the skills and experience of the workers involved. Thus, it may be said that the *Fibre-board* criteria are too flexible, are unsuited to rational application, and do not adequately preserve the interests of employees. It is no doubt true that:

In the United States in particular, management of society's scarce resources is vested primarily in private enterprise, and the amazing productivity of the American economy is, without much question, tied closely to the ingenuity, imagination, competence and *freedom of action* of private business management.

On the other hand, maximizing the real output of goods and services, while critically important, is not and should not be the sole concern of society. Total dedication to such an objective may lead to neglect of other equally vital societal concerns.⁴⁰

Substitution of Non-Unit Workers⁴¹ Standard. It has been proposed that decision-bargaining should be required only when the employer plans to substitute non-unit workers for unit workers.⁴² Bargaining would, therefore, always be required in plant removal cases, but in partial or complete shutdown cases, it would be required only when the employer intended to begin purchasing the goods or services previously produced by unit employees from independent contractors or from another company.⁴³ This purported "middle ground between the positions of the Board and the courts"⁴⁴ has as its underlying assumption the belief that decisions to substitute non-unit workers for unit workers are motivated solely by cost considerations within the unit, whereas decisions to close a plant partially or completely without purchasing the product elsewhere are motivated solely by consideration of costs which are independent of the costs prevailing within the unit. This approach supposedly requires decision-bargaining only when the union can affect the decision by offering concessions which are relevant to the decision.

The fallacy in this approach is its over-simplified economic analysis of business decision-making. Surely the approach is correct in at least requiring decision-bargaining where non-unit workers are being substituted for unit workers. Obviously, cost considerations within the unit will be highly relevant to such a decision, and the union will have important concessions or other cost-

⁴⁰ Nelson, *supra* note 33, at 756 (emphasis in original).

⁴¹ "Non-unit workers" is used to indicate those of subcontractors and other employers. "Unit workers" will indicate workers employed within the plant or unit under discussion.

⁴² Schwarz, *Plant Relocation or Partial Termination—The Duty To Decision-Bargain*, 39 *FORDHAM L. REV.* 81 (1970).

⁴³ *Id.* at 100.

⁴⁴ *Id.*

saving suggestions to make at the bargaining table. But there is no justification for drawing an arbitrary line that forbids decision-bargaining when worker substitution is not planned. There are many situations in which an employer might decide to curtail or cease production at a unit primarily because of cost factors within that unit, and yet would decide not to begin subcontracting or outside purchase of the product because of other unrelated considerations. Thus, a localized firm producing a single product might decide that labor costs at its only plant had risen to the point of unprofitability because of union organization. Removal to a different plant might be ruled out because of the inadequacy of the labor supply in surrounding areas. Subcontracting or purchase at another plant might be ruled out because of the lack of a competent producer in the area. Therefore, in this situation an employer would be making a termination decision based primarily on costs in the unit, non-unit workers would not be substituted for unit workers, and yet, under this standard, management would not have to bargain over the decision, despite the fact that the union could at negotiations put forth relevant proposals that might affect or prevent the decision. Legitimate employee interests are at stake regardless of whether or not non-unit workers are substituted for unit workers, and in almost all instances, it is conceivable that the union would have some appreciable suggestions or concessions to make in furtherance of employee interests.

III. THE DECLINE OF DECISION-BARGAINING

There are preliminary indications that, perhaps due to the changing composition of the Board membership,⁴⁵ and the consequent shifting in the outlook of the Board,⁴⁶ the denouement of the Board-court conflict in this area may be upon us. In *General Motors Corp.*⁴⁷ the full Board was faced for the first time with the question of whether decision-bargaining should be required when the decision concerns the sale of an existing plant.⁴⁸ In light of previous Board rulings in this area,⁴⁹ it might have been supposed that the Board would again choose to extend its decision-bargaining doctrine. Such was not the case. The majority of the Board chose instead to hold that:

[The] issue is controlled by the rationale the courts have generally adopted in closely related cases, that decisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control, and are not the types of subjects which Congress intended to encompass within 'rates of pay, wages, hours of employment, or other conditions of employment.'⁵⁰

⁴⁵ For the political implications of the recent appointments to the Board, see N.Y. Times, Feb. 19, 1970, at 1, col. 4, and Aug. 29, 1970, at 11, col. 3.

⁴⁶ There is "a tendency for certain Board policies to make pendulum-type swings which reflect shifts in national political administrations." Morris, *The Case for Unitary Enforcement of Federal Labor Law*, 26 Sw. L.J. 471, 477 (1972). A defense of the NLRB as a judicial body is found in Miller, *The NLRB—Hero or Villain?*, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 317 (1971).

⁴⁷ 191 N.L.R.B. No. 149, CCH 1971 NLRB Dec. 30,072, noted in 23 SYRACUSE L. REV. 170 (1972).

⁴⁸ The Board had previously held that there was no bargaining duty regarding the total sale of a business. *Martin Marietta Corp.*, 159 N.L.R.B. 905 (1966).

⁴⁹ See notes 22-27 *supra*, and accompanying text.

⁵⁰ CCH 1971 NLRB Dec. at 30,074.

Following the lead of the courts, the Board majority relied upon Justice Stewart's concurring opinion in *Fibreboard*, and found no duty to bargain over the decision to sell the plant. Members Fanning and Brown dissented. It was their contention that:

[T]he concurrence in *Fibreboard* and the dicta with respect to managerial decisions are not the law of the case. The fact is that the Supreme Court has not addressed itself directly to the issue here involved, and *Fibreboard*, while it may be considered limited in scope, remains the only Supreme Court pronouncement in this area. We therefore would adhere to the Board's development of those principles, especially as set out in *Ozark Trailers*⁵¹

The dissenters also quoted the Supreme Court decision in *John Wiley & Sons v. Livingston*⁵² for the proposition that the objectives of national labor policy "require that the rightful prerogative of owners independently to rearrange their businesses and eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship"⁵³ It was also pointed out that to require effect-bargaining would be practically meaningless, since the employer would not be in a position after the sale to significantly control any of its effects on the employees.

Triplex Oil Refining Division of Pentalic Corp.,⁵⁴ considered by Members Miller, Jenkins, and Kennedy, presented the question of whether a decision to close a business completely should be a mandatory bargaining subject. The Board dismissed the complaint with the observation that "it has been held that an employer is under no duty to bargain with a union over its closing down of an entire company or a facility"⁵⁵

It might be contended that *General Motors* and *Triplex* do not represent a change in Board attitude toward decision-bargaining, but rather mark the outer limits of the area in which the Board will require such bargaining. Has the Board, in deference to the decisions of the courts of appeals, begun a general retreat from its decision-bargaining doctrine?⁵⁶ Or has it, on the other hand, merely indicated the point beyond which it will not go in requiring

⁵¹ *Id.* at 30,075; see text accompanying notes 23-27 *supra*.

⁵² 376 U.S. 543 (1964).

⁵³ *Id.* at 549.

⁵⁴ 194 N.L.R.B. No. 86, 5 CCH LAB. L. REP. ¶ 23,705 (Dec. 10, 1971).

⁵⁵ 5 CCH LAB. L. REP. ¶ 23,705, at 30,606.

⁵⁶ In *Lowery Trucking Co.*, 196 N.L.R.B. No. 74, 5 CCH LAB. L. REP. ¶ 24,090 (Apr. 20, 1972), the employer terminated the operation of one of its interstate truck lines without decision-bargaining. The trial examiner dismissed the union's § 8(a)(5) complaint on the authority of *General Motors*. The Board affirmed the dismissal, but only on the basis of a factual showing that the employer had voluntarily offered to bargain about the decision and the union refused. The Board found it "unnecessary to rule on the Trial Examiner's interpretation of the *General Motors* case." 5 CCH LAB. L. REP. ¶ 24,090, at 31,048.

In *Summit Tooling Co.*, 195 N.L.R.B. No. 91, 5 CCH LAB. L. REP. ¶ 23,923 (Feb. 22, 1972), the employer unilaterally terminated the production portion of its tool-designing plant, leaving open the non-manufacturing aspect of the business, staffed in part by former production employees. The trial examiner found that the employer had violated § 8(a)(5) by not decision-bargaining, and ordered reopening of the plant as a remedy. The Board majority (Members Jenkins and Kennedy) disagreed, contending that although the closing could be "characterized as a partial closing, the effect of the cessation of manufacturing was to remove the employer from the business of manufacturing tools." 5 CCH LAB. L. REP. ¶ 23,923, at 30,864. The trial examiner's reopening order was thus rejected, since to require decision-bargaining here would "significantly abridge [the firm's] freedom to manage its own affairs." *Id.* Member Fanning viewed the shutdown as a partial closing, and would have upheld the trial examiner's order.

decision-bargaining—cases of sale or complete shutdown of a business? While the two cases alone may not be decisive, the changing composition of the Board seems likely to foretell something in the nature of a general retreat from the decision-bargaining doctrine.⁵⁷

Of relevance to this discussion is the recent Supreme Court decision in *NLRB v. Burns International Security Services, Inc.*⁵⁸ *Burns* holds that "successor employers"⁵⁹ are bound to recognize and bargain with an incumbent union, but that they are not bound by the substantive provisions of a collective bargaining agreement, negotiated by their predecessors, which they did not assume.⁶⁰ Thus, in those situations in which there will be a successor employer after the implementation of a management decision, there may be less need for decision-bargaining since the union will still be recognized and can compel the new employer to bargain.⁶¹ This differentiation is suggested because the employees will not be left without a remedy after the decision is made.⁶² However, since the successor is not bound by the provisions of the old contract, the management decision of the predecessor is likely to cause significant changes in the employees' conditions of employment. Some may be discharged, a new or altered product may be produced, and working conditions may be drastically changed.⁶³ Therefore, it is felt that the failure to require decision-bargaining in the appropriate successorship situation would inject an unwarranted element of economic insecurity into the employer-employee relationship. Both the successorship doctrine and the decision-bargaining requirement are labor law concepts contributing to the stability of industrial relations and the institutional nature of the bargaining relationship. They need not be held to be mutually exclusive.

IV. CONCLUSION

The basic arguments of those who would, by some standard, limit the types of termination of employment decisions which should be mandatory subjects

⁵⁷ See note 45 *supra*.

⁵⁸ 92 S. Ct. 1571 (1972).

⁵⁹ A "successor employer" is a concern which gains control of a business through purchase, merger, or other means, when the scope of the business thereafter remains substantially the same as evidenced by use of the same employees, production of the same goods or services, and other factors. See C. MORRIS, *THE DEVELOPING LABOR LAW* 366 (1971).

⁶⁰ The Court thus distinguished *Burns* from *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), in which it was held that a successor was bound to arbitrate (as provided by the union's contract with his predecessor) the extent to which the successor was obligated under the pre-existing collective bargaining agreement. 92 S. Ct. at 1581.

⁶¹ This concept has been mentioned by one writer, although in the context of pre-*Burns* successorship doctrine. Rabin, *supra* note 30, at 828 n.116.

⁶² At the least, successor employers will be required to recognize and bargain with the incumbent union. The *Burns* majority seemed to have hopes that successors will assume even more responsibility.

In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.

92 S. Ct. at 1584.

⁶³ Since there are a number of factors relevant to a determination of whether a successorship situation exists, these changes would not preclude a finding of successorship if they were offset by a substantial continuity of business operations as evidenced by the other criteria used by the Board. See C. MORRIS, *THE DEVELOPING LABOR LAW* 368 (1971).

of bargaining seem to be that requiring bargaining over such subjects will infringe upon management's freedom of action,⁶⁴ and that "economic efficiency" will be reduced. Certainly, management will be less free to act unilaterally when it must negotiate with the representative of the employees over a proposed change in the scope of the operation. But it should be remembered that the entire *raison d'être* of the National Labor Relations Act is to regulate the rights and duties of employers, employees, and unions so that disputes may be settled peacefully.⁶⁵ Management's freedom of action has been irreversibly restricted by the requirement of collective bargaining embodied in the Act. The question for consideration is not the theoretical one of whether management's freedom of action should be further limited, but, rather, the practical question of whether it has been effectively so limited—whether termination of employment decisions affect the "terms and conditions of employment" and are thus mandatory subjects of bargaining.⁶⁶

It is remarkable that the writers in this area have not focused upon the extent to which management freedom of action would be reduced by requiring decision-bargaining in termination of employment disputes. Requiring an employer to bargain over a proposed decision is not the same as forbidding him to make the decision. If the employer and the union are unable to reach agreement on the proposed change, so that a genuine impasse has occurred, then the employer is always free to make the change unilaterally.⁶⁷ True, an economic strike might ensue, but the effectiveness of a strike in termination of employment disputes is open to serious question.⁶⁸ The requirement of decision-bargaining in termination of employment cases may be viewed as a logical clarification of the scope of the statutory bargaining duty which does not unreasonably restrict the freedom of the employer to determine the scope of his operation.⁶⁹

The premise that economic efficiency might be diminished by requiring decision-bargaining⁷⁰ appears, at best, weak. The very essence of economic efficiency is reduction of production costs, which might be expected to be the

⁶⁴ Management advocates have also contended that decision-bargaining is disruptive and, therefore, not compatible with the collective bargaining relationship. Adams & Coleman, *Can Collective Bargaining Survive the Board?*, 52 GEO. L.J. 366 (1964).

⁶⁵ The purposes of the Act are many, and are stated at length. 29 U.S.C. § 151 (1970).

⁶⁶ The typical view of labor advocates is that the content of the duty to bargain is flexible and evolutionary, and that whether or not specific subjects are mandatory should be determined by reference to the purposes of the Act, and not by resort to concepts of management convenience or management rights. Sigal, *The Evolving Duty To Bargain*, 52 GEO. L.J. 379 (1964).

⁶⁷ *NLRB v. Almeida Bus Lines, Inc.*, 333 F.2d 729 (1st Cir. 1964); *Eddie's Chop House, Inc.*, 165 N.L.R.B. 861 (1967); *American Laundry Mach. Co.*, 107 N.L.R.B. 1574 (1954). This was recognized in Note, *Duty To Bargain: Subcontracting, Relocation, and Partial Termination*, 55 GEO. L.J. 879 (1967), which adds: "The right to make the decision unilaterally is not a justifiable incident of managerial prerogative. It must be balanced against the impact on the bargaining unit and the benefits to be derived from frank, open discussion." *Id.* at 922.

⁶⁸ This is because the employees will in many such cases have no economic power; they cannot influence their employer by withholding their services since the employer no longer desires those services. In some cases, however, the employees may be able to influence the employer by the use of picket lines or other economic weapons.

⁶⁹ A similar view was expressed in Comment, *Changes in Employer Structure and Operations and Their Effect on Collective Bargaining Rights*, 15 DEPAUL L. REV. 117 (1965).

⁷⁰ See, e.g., Loomis & Herman, *Management's Reserved Rights and the NLRB—An Employer's View*, 19 LAB. L.J. 695 (1968).

result when employees make concessions in an attempt to dissuade the employer from terminating production. The continuation of employment with reduced labor costs or under less favorable conditions would seem to further economic efficiency rather than retard it. While employers required to decision-bargain would have less control over the timing of changes, the requirement of decision-bargaining might move them to institute more economically efficient long-range planning concerning the scope of operations.

Economic efficiency and management freedom of action are not the only values which are relevant to this problem.⁷¹ The interest of employees in their livelihood is directly involved, and should be given consideration. When management asserts that the time is near for a change in the scope of the business, there is an important role to be played by collective bargaining between union and management. The union will want to examine management's relevant data, and it may want to submit other data opposing the change entirely or in support of alternative courses of action. Whether the union rejects all management proposals, or ultimately decides to make concessions or suggestions which will avoid termination of employment, the employees will at least be allowed a hand in deciding their destiny. Decision-bargaining would thus seem to be a practice "fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions."⁷²

⁷¹ "The problems [which] collective bargaining is meant to resolve are by no means solely those of labor which, understandably, is gravely concerned with job security. They are also the interest of management which has a high stake in industrial peace, and that of the general public which is also deeply concerned with the welfare of our economic system." Platt, *The Duty To Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143, 159 (1968).

⁷² The quotation is from the statement of purposes of the National Labor Relations Act. 29 U.S.C. § 151 (1970).