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# LABOR'S PLANT CLOSURE PAINS

by

Robert H. Bliss\*

WHEN an employer who has a union representing his employees decides to close a factory or a business for any reason, he may commit a series of unfair labor practices under the National Labor Relations Act,<sup>1</sup> as well as a breach of any collective bargaining contract then in effect. The announcement of a decision to close may be held to constitute illegal interference with the employees' organizational rights<sup>2</sup> and an unlawful refusal to bargain with the employee's union.<sup>3</sup> The actual closure of the plant may be deemed unlawful anti-union discrimination.<sup>4</sup> In addition to unfair labor practices, the closure may violate provisions of a collective bargaining contract in effect between the employer and union, giving rise to a suit under section 301 of the Labor Management Relations Act for either damages or an injunction.<sup>5</sup> This Article explores the three employer unfair labor practices most likely to occur in a plant closure situation,<sup>6</sup> and the contractual remedies a union may have under the collective bargaining contract. Any remedies the employees as individuals might have (e.g., rights under the now defunct *Glidden*<sup>7</sup> doctrine) are not discussed.

Although this Article deals primarily with plant closure, two similar fact situations concerning subcontracting and plant removal are also discussed, and therefore must be distinguished. The term "plant closure," as used in the following pages, describes situations where a plant or business is closed (whether it is the only establishment of the employer or is one of many establishments within the employer's enterprise), and the operations of that plant are not transferred elsewhere. There is thus a reduction of total job opportunities. A "plant removal" involves the situation where a plant is closed in one location and reopened in, or operations transferred to, another location. In this instance there is a redistribution rather than a reduction of total job opportunities.<sup>8</sup> "Subcontracting," as used in this

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<sup>1</sup> 29 U.S.C. §§ 151-216b (1965).

<sup>2</sup> A § 8(a)(1) violation. 29 U.S.C. § 158(a)(1) (1965).

<sup>3</sup> A § 8(a)(5) violation. 29 U.S.C. § 158(a)(5) (1965).

<sup>4</sup> A § 8(a)(3) violation. 29 U.S.C. § 158(a)(3) (1965).

<sup>5</sup> 29 U.S.C. § 185 (1965).

<sup>6</sup> The other two employer unfair labor practices are not likely to occur in a plant closure situation. Section 8(a)(2) makes it an unfair labor practice for an employer to dominate or interfere in the formation of any labor union or to contribute financial or other support to a labor union. Section 8(a)(4) makes it an unfair labor practice for an employer to discharge or otherwise discriminate against any employee who has filed an unfair labor practice charge or has given testimony under the Act. 29 U.S.C. §§ 158(a)(2), (4) (1965).

<sup>7</sup> *Zdanok v. Glidden*, 288 F.2d 99 (2d Cir. 1961), *aff'd*, 370 U.S. 530 (1962) (employees' rehire and seniority rights were held to survive expiration of the collective bargaining contract at the old plant location and extend to the new plant location). After much criticism, the case was "formally interred" in *Local 1251, UAW v. Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968).

<sup>8</sup> Comment, *Labor Law Problems in Plant Relocation*, 77 HARV. L. REV. 1100 (1964).

Article, is defined to cover the situation where an employer contracts out work formerly done by unit employees.

### I. DISCRIMINATION: SECTION 8(a)(3)

In the absence of an unlawful refusal to bargain, the test of illegality under the National Labor Relations Act is one of motivation. Plant relocation or closure for economic reasons is valid, but when done for anti-union reasons, it is illegal. Section 8(a)(3) of the Act proscribes certain acts which, while normally permissible, are made illegal if committed out of a particular motivation.<sup>9</sup> Discrimination in fact without regard to motivation cannot support a finding of a section 8(a)(3) violation.<sup>10</sup>

Probably the most sensational case involving a section 8(a)(3) violation is *Textile Workers Union v. Darlington Manufacturing Co.*,<sup>11</sup> where the United States Supreme Court established rules applicable to situations where an employer shuts down his entire plant rather than deal with a union. The Darlington Manufacturing Company operated a single textile mill in Darlington, South Carolina, which employed approximately 500 people (about one-third of the town's population). In March of 1956, the Textile Workers Union began an organizational campaign which concluded in the union being certified after winning a Board-conducted election. Shortly after the certification, the president of the corporation, Roger Milliken, called a meeting of the board of directors in which it was decided to close down the mill and liquidate the corporation. All of the equipment and machinery was sold at an auction in December of that year. The stock of Darlington Manufacturing Company was owned by the Deering-Milliken Company (41%), the Cotwool Manufacturing Company (18%), and the Milliken family (6%). The Milliken family not only controlled both Deering-Milliken and Cotwool Manufacturing, but also sixteen other corporations operating twenty-seven non-unionized textile mills in both Southern and New England states. The union filed unfair labor practice charges with the National Labor Relations Board which resulted in a holding that the Deering-Milliken complex of corporations, including the Darlington mill, constituted a "single employer" within the meaning of the National Labor Relations Act, and that this "single employer" violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act by closing down its business for a discriminatory purpose.<sup>12</sup> The Supreme Court, considering only the section 8(a)(3) charge, held that it is not an unfair labor practice for an employer to close down his *entire* business when motivated by vindictiveness towards a union that has recently been certified as the representative of the employees. However, an employer does violate section

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<sup>9</sup> Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3) (1965).

<sup>10</sup> *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954).

<sup>11</sup> 380 U.S. 263 (1965).

<sup>12</sup> 139 N.L.R.B. 241 (1962).

8(a)(3) if he closes down a *part* of his business with an intent to "chill unionism" at his other plants.<sup>13</sup>

A section 8(a)(3) violation in a plant closure situation has been established if the employer closing the plant for anti-union reasons: (1) has a substantial enough interest in plants engaged in a similar line of business to give promise of reaping a benefit from the discouragement of unionization in those plants, (2) closes the plant with the purpose of producing that result, and (3) occupies a relationship to the other plants which makes it realistically foreseeable that the employees will fear that their plant will also be closed if they persist in organizational activities.<sup>14</sup> In other words, if an employer closes down plant *A* for the general interest and edification of his employees at plant *B*, and the employees at plant *B* get the picture, there has been an illegal plant closure. The *Darlington* case was remanded to the Board for further proceedings. Although the Board's findings of a single employer satisfied the elements of "interest" and "relationship," there were insufficient findings as to "purpose" and "effect," which must relate to the employees at the other plants.<sup>15</sup> On remand, the NLRB attorneys had a proverbial "field day" in proving "purpose" and "effect."<sup>16</sup> The Board rejected the contention that the plant had been closed for economic reasons. Roger Milliken had called a meeting of the board of directors six days after the election, in which it was brought out that *Darlington* had been losing money for the several previous years. At that meeting the directors voted to liquidate. Although the information about financial losses had been known prior to the union organizational campaign, no consideration had been given to closing the mill until after the union had won the election.

Substantial evidence was available to show that Roger Milliken stood to derive a benefit at his other mills by closing the one at *Darlington*. It seems that Mr. Milliken had made several speeches in South Carolina to the legislature and various business organizations in which he emphasized and re-emphasized the importance of preventing the unions from establishing a beachhead in the South's textile industry. In addition, he sent a memoran-

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<sup>13</sup> The closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place. On the other hand, a discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of section 7 rights among remaining employees of much the same kind as that found to exist in the 'runaway shop' and 'temporary closing' cases. Moreover, a possible remedy open to the Board in such a case, like the remedies available in the 'runaway shop' and 'temporary closing' cases, is to order reinstatement of the discharged employees in the other parts of the business. No such remedy is available when an entire business has been terminated. By analogy to those cases involving a continuing enterprise, we are constrained to hold . . . that a partial closing is an unfair labor practice under section 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.

380 U.S. at 274-75.

<sup>14</sup> *Id.* at 275-76.

<sup>15</sup> *Id.* at 276.

<sup>16</sup> *Darlington Mfg. Co.*, 165 N.L.R.B. No. 100, 65 L.R.R.M. 1391 (1967), *enforced*, 397 F.2d 760 (4th Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969).

dum to his other mills emphasizing the need for "public relations" and stressing the point that those mills would also be closed down if unionized.<sup>17</sup> The speed and manner in which the mill was closed was also evidence of the intent to chill unionism at other plants. Since the Darlington mill was not a particularly profitable one, and therefore dispensable, its unionization presented a golden opportunity to create an example to show the employees at other mills what could happen to them. Therefore, the purpose, or at least a purpose, in closing the Darlington mill was to discourage unionism at the other mills of Roger Milliken. It must also be determined whether the Darlington closing had the requisite "effect" on the employees at the other mills. The term "effect" must be defined in reference to the "nature of the relationships" between the person controlling the closing and the remainder of the business. In other words, is the relationship one which will make it realistically foreseeable that the employees in the other plants will fear a similar closing? The Board found that such a relationship existed. Some of the other plants were nearby and were served by the same newspaper that served Darlington, South Carolina. The Darlington closing was a common conversational topic among the employees at the other mills. The employees realized the connection between Roger Milliken, their mills, and the Darlington mill. Also, the employees generally appreciated the possibility that their plant could similarly be closed, and freely discussed it.<sup>18</sup>

Although the Board vigorously applied the *Darlington* doctrine to the *Darlington* case itself, there has been a more subdued enforcement in other cases. In *A. C. Roebat Co.*<sup>19</sup> the employer closed down his sheet metal operations shortly after his employees were organized because his religious principles prevented him from dealing with unions. The Board held that the partial closing of the employer's business did not violate section 8(a)(3) under the *Darlington* doctrine because there was no purpose to chill unionism in the remaining part of the business, which consisted of one bookkeeper and one salesman who sold air-conditioning and refrigeration equipment. Also, there was no likelihood that the employer would reap any substantial economic benefit from discouraging unionism. In *Motor Repair, Inc.*<sup>20</sup> the employer operated garage and motor repair facilities at six shops in three Southern states. After the Teamster's Union organized the five employees at one shop, he closed it and discharged the employees. The Board held that the closing of the organized shop was not for the purpose of chilling unionism because: (1) there was no evidence that contemporaneous union activity was being carried on at the other shops, that unionization of one shop was the first step toward unionization of the others, or that the employer believed that it was the first step; (2) there was no evidence to indicate that the employees of the other shops were aware of any organizational activities at the Birmingham facility; and (3) there was no evidence that the employer's officials at the other garages discussed the

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<sup>17</sup> 65 L.R.R.M. at 1398.

<sup>18</sup> *Id.* at 1403-04.

<sup>19</sup> 163 N.L.R.B. No. 49, 64 L.R.R.M. 1321 (1967).

<sup>20</sup> 168 N.L.R.B. No. 148, 67 L.R.R.M. 1051 (1968).

closing of the Birmingham shop with their employees. In *Morrison Cafeterias Consolidated, Inc.*<sup>21</sup> the employer closed down his Little Rock cafeteria shortly after a union won an election. The evidence established numerous instances subsequent to the closing where the employer stated that if any other cafeteria were organized it would be closed down as was the Little Rock cafeteria. The Board found no evidence that the Little Rock cafeteria was closed for the purpose of chilling unionism at the other cafeterias. There was no evidence of any contemporaneous union activity at the other cafeterias, and the subsequent statements to the effect that a shut-down would also take place at other cafeterias, if organized, was nothing more than an attempt to take advantage of the Little Rock closing.

The doctrine as developed by the Board seems to be geared to the publicity the employer generates to warn his employees at other plants. On remand in the *Darlington* case, the Board noted the tremendous publicity and notoriety generated by the mill's closing and fanned by Roger Milliken to his other mills. It stated that the absence of such publicity might negate a finding to "chill unionism."<sup>22</sup> Therefore, if an employer has two mills, one in Florida and one in Maine, and he shuts down the Maine plant because of a stated distaste for dealing with unions, and the evidence disclosed no intention to give the closing notoriety in Florida, then on these "bare facts" the Board would not be likely to conclude that an illegal purpose (*i.e.*, to chill unionism) existed. Also, there would be no illegal purpose if the employer closed down the Maine plant because of a personal satisfaction that he might gain from standing on his beliefs.<sup>23</sup>

In dealing with violations of section 8(a)(3) of the Act, it must always be kept in mind that there is a difference between a plant closure and a plant removal. The *Darlington* doctrine deals solely with a plant closure. The plant removal or "runaway shop" cases involve instances in which the work of one plant is transferred to another plant or location.<sup>24</sup> The "runaway shop" cases, long preceding the *Darlington* doctrine, have always held that the *removal* of a plant from one site to another to avoid dealing with a union is a violation of section 8(a)(3).<sup>25</sup> In a "runaway shop" situation, unlike a *Darlington*-type case, proof of a purpose to "chill unionism" elsewhere is not required. All that need be established is that the employer relocated in order to avoid dealing with the union. The reason

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<sup>21</sup> 177 N.L.R.B. No. 113, 71 L.R.R.M. 1449 (1969).

<sup>22</sup> 65 L.R.R.M. at 1401.

<sup>23</sup> These examples were given by the Board in *Darlington, Id.*

<sup>24</sup> No work of the *Darlington* mill was transferred to any other plant belonging to Roger Milliken. 380 U.S. at 273 n.17.

<sup>25</sup> *Ladies Garment Workers Local 57 v. NLRB*, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967) (employer closed his New York shop and relocated in Florida for the sole purpose of escaping the "union terrorism"). See also *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961). In *Rapid Bindery* the employer's old plant had been a money loser for years and plans to move had long preceded any union activity. However, the actual decision to move was not made until after the union was certified. The court held that where a change in location is dictated by sound business reasons, there is no § 8(a)(3) violation even where the move was prompted or accelerated by union activity. An employer is entitled to take his relationship with a union into consideration as one factor in determining whether to relocate.

for the avoidance is immaterial, as it is sufficient that the employer intend the discriminatory result.<sup>26</sup>

## II. REFUSAL TO BARGAIN: SECTION 8(a) (5)

Absent any illegal motive for plant closure or removal, an employer may still violate the National Labor Relations Act if he unlawfully refuses to bargain with the union representing his employees.<sup>27</sup> The general rule, as enunciated in *NLRB v. Rapid Bindery, Inc.*,<sup>28</sup> provides that an employer must bargain with his employees' representative about the *effects* of a decision to remove or close the plant. Issues common to the effects of a decision to close include questions concerning the transfer of employees to the new plant, payment of moving expenses, employee rights at the new plant, severance pay, and methods of distributing fringe benefits.<sup>29</sup> Although it is well settled that the employer must bargain concerning the *effects* of such a decision, there is a sharp controversy over whether the employer must also bargain over the actual *decision* to close or relocate.

*The Fibreboard Doctrine.* In *Fibreboard Paper Products Corp. v. NLRB*<sup>30</sup> the employer, at the expiration of the contract term, notified the union of its decision to hire an independent contractor to do the work of the employees in the maintenance unit. The company offered to bargain over the effects of the decision, but not over the decision itself. The Board's determination that this decision to subcontract was a mandatory subject of bargaining was upheld by the Supreme Court. The Court justified mandatory bargaining in this instance because it promoted industrial peace, and because the great majority of collective bargaining contracts have some sort of provision concerning subcontracting.<sup>31</sup> Fibreboard argued that the decision to subcontract was a management prerogative. The Court disagreed.

The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be per-

<sup>26</sup> Cf. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

<sup>27</sup> Section 8(d) defines "to bargain collectively" as "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 . . ."

<sup>29</sup> U.S.C. § 158(d) (1965).

<sup>28</sup> 293 F.2d 170 (2d Cir. 1961).

<sup>29</sup> Comment, *supra* note 8, at 1103.

<sup>30</sup> 379 U.S. 203 (1964). The Court cited its decision in *Railroad Telegraphers Union v. Chicago & N.W.R.R.*, 362 U.S. 330 (1960), where a union successfully challenged an employer injunction against a work stoppage arising from a management decision to close down several unprofitable stations. The Court held that the decision was a "bargainable issue" under the Railway Labor Act. The Court also cited *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959), where it was held that the amount of the rental paid to drivers who owned and operated their own trucks in the service of the employer was a mandatory collective bargaining subject. The majority in *Fibreboard* argued that the only difference between *Oliver* and the present situation was that in the former the work of the employees was let out piecemeal while in the latter it was all contracted out at once. 379 U.S. at 212.

<sup>31</sup> The existence of such provisions was not "determinative," but the Court felt it was "appropriate" to consider this fact. The *Fibreboard* case also could have been considered as a § 8(a) (3) violation because of its similarity to the situation where an employer fires all of the employees in a certain unit and replaces them with workers who are willing to work without the expensive fringe benefits. 379 U.S. at 224-25.

formed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.<sup>32</sup>

The employer also cited the high cost of the maintenance unit as the reason for subcontracting. However, the Court pointed out that this is an area particularly suitable for collective bargaining in that the union is given a chance to accommodate the employer. The Court then made an attempt to place its holding in a proper perspective.

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 section 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy.<sup>33</sup>

Justice Stewart, joined by Justices Douglas and Harlan, concurred because of this broad and sweeping language.

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 contractor to do the same work under similar conditions of employment' is subject to the duty to bargain collectively.<sup>34</sup>

The concurring opinion believed that the term "conditions of employment" obviously includes the employees' physical surroundings, safety regulations, and hours of work. In other words, the term includes the more settled things which affect the security of one's employment. However, every decision which affects job security is not a mandatory subject of bargaining. As Justice Stewart implied, some such decision may only indirectly affect employment security, and, for that reason, may not be mandatory subjects of bargaining.

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 the conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of section 8(d) is to describe a limited area subject to the duty of collective bargaining, those

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<sup>32</sup> *Id.* at 213.

<sup>33</sup> *Id.* at 215.

<sup>34</sup> *Id.* at 218.



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 the area.<sup>35</sup>

*The Scope of Fibreboard.* There is a great dispute over the question of whether *Fibreboard* is authority for the proposition that an employer has a duty to bargain over non-subcontracting decisions, such as a decision to close down a plant. Basically, there are two schools of thought concerning the *Fibreboard* decision, both of which resolve to a question of whether one takes the concurring opinion of Justice Stewart seriously. On the one hand is a group relying exclusively on the majority opinion and urging it as a bargaining beachhead in management prerogatives. Quite naturally, this approach is supported by union representatives and is sometimes referred to as the "union" view in this Article. On the other side is a group believing that the *Fibreboard* decision is limited to its unusual facts, and its scope can only be realized from a careful reading of Justice Stewart's concurring opinion. This approach is supported by management representatives and is sometimes referred to as the "management" view in this Article.

The National Labor Relations Board has embraced the union interpretation. Decisions subsequent to *Fibreboard* have found section 8(a)(5) violations in the refusal to bargain over the decision to relocate a plant,<sup>36</sup> to close a plant,<sup>37</sup> and partially to close a plant.<sup>38</sup> The leading case espousing the union view is the Board's *Ozark Trailers* decision.<sup>39</sup> In March of 1963, Ozark's plant was organized by the industrial worker's union, and a collective bargaining contract was signed the following month. In January of 1964, the board of directors decided to close the plant because of the high cost of labor and poor quality of workmanship. The plant was closed by the end of February with no notice being given to the union. Although the Board found no unlawful motivation involved, it held that the employer not only unlawfully refused to bargain over the effect of the decision to close, but also over the decision itself.

[W]e see no reason why employees should be denied the right to bargain about a decision directly affecting terms and conditions of employment which is of profound significance for them solely because that decision is also a significant one for management. . . . It was our view in *Fibreboard*, and the view of the Supreme Court . . . that bargaining about contracting out might appropriately be required because to do so effected one of the primary purposes of the Act—to promote the peaceable settlement of industrial dis-

<sup>35</sup> *Id.* at 223.

<sup>36</sup> *Standard Handkerchief, Inc.*, 151 N.L.R.B. 15 (1965).

<sup>37</sup> *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966); *Royal Plating & Polishing Co.*, 148 N.L.R.B. 545 (1964), *enforcement denied*, 350 F.2d 191 (3d Cir. 1965).

<sup>38</sup> *Schnell Tool & Dye Corp.*, 162 N.L.R.B. 1313 (1967).

<sup>39</sup> *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966). In that case, three corporations, found by the Board to be a single employer, operated an integrated, multi-plant enterprise that made refrigerated truck bodies. One company's business was sales, service, and repair of truck trailers. The Ozark company built truck trailers for sale to the public, and the third company supplied Ozark with materials and was its principal purchaser. The first company did repair work for the third as well as selling items to it. There was some interchange of personnel between the three, and the stock of all three companies was owned by three individuals. The third company financed the operations of the other two and was its principal creditor.

puts. . . by subjecting labor and management controversies to the mediatory influence of negotiation.'

. . . .

'We think it plain the same may be said about a management decision to terminate a portion of the enterprise—termination, just as contracting out, is a problem of vital concern to both labor and management, and it would promote the fundamental purpose of the Act to bring that problem within the collective bargaining framework set out in the Act.'<sup>40</sup>

As additional grounds to support its holding, the Board pointed to the economic factors motivating the plant closure. As in the *Fibreboard* case, the economic factors prompting the employer's decision were primarily related to the cost of labor, a matter long regarded as particularly suitable for collective bargaining. If management decided to contract out work for these reasons, the decision would be a mandatory subject of bargaining. The Board reasoned that the situation is no different where management decides to close down for the same reasons. Bargaining over decisions to close entails less of an inroad on any management prerogative than bargaining over decisions to subcontract, because plant closure decisions arise less frequently.

In subsequent decisions the Board has continued to follow its *Ozark Trailers* doctrine as "gospel,"<sup>41</sup> and the District of Columbia Circuit has indicated its approval in dictum.<sup>42</sup> However, in its interpretation of the *Fibreboard* doctrine the Board has not held that every refusal to bargain on a decision to close is unlawful. In *A. C. Rochat Co.*<sup>43</sup> the employer refused to bargain with his newly organized employees on the grounds that it was against his religion. Although the Board endorsed its *Ozark Trailers* doctrine, it did not feel that one's religious convictions were an apt subject for bargaining. However, it is difficult to see how concessions can be made over an employer's religious convictions as contrasted with the concessions that can be made where the closing is for economic reasons. Nevertheless, the Board has adhered religiously to the *Ozark Trailers* decision, and it has experienced substantial difficulty in winning court of appeals acceptance of its position where a major change in the nature of the business is involved. The Second Circuit, before *Fibreboard*, rejected the Board's position in its *Rapid Bindery* decision.<sup>44</sup> After the *Fibreboard* decision, the Third Circuit,<sup>45</sup> the Eighth Circuit,<sup>46</sup> the Ninth Circuit,<sup>47</sup> and the Tenth Circuit<sup>48</sup> all refused to sanction the union view.

<sup>40</sup> 161 N.L.R.B. at 567.

<sup>41</sup> *Morrison Cafeterias Consol., Inc.*, 177 N.L.R.B. No. 113, 71 L.R.R.M. 1449 (1969); *Drapery Mfg. Co.*, 170 N.L.R.B. No. 199, 68 L.R.R.M. 1027 (1968); *Thompson Transp. Co.*, 165 N.L.R.B. No. 96, 65 L.R.R.M. 1370, *enforcement denied in part*, 406 F.2d 698 (10th Cir. 1969).

<sup>42</sup> *Ladies Garment Works Local 57 v. NLRB (Garwin Corp.)*, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967).

<sup>43</sup> 163 N.L.R.B. 421 (1967).

<sup>44</sup> *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961).

<sup>45</sup> *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).

<sup>46</sup> *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); *NLRB v. William J. Burns Int'l Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965).

<sup>47</sup> *NLRB v. Transmarine Navig. Corp.*, 380 F.2d 933 (9th Cir. 1967).

<sup>48</sup> *NLRB v. Thompson Transp. Co.*, 406 F.2d 698 (10th Cir. 1969).

In *NLRB v. Royal Plating & Polishing Co.*<sup>49</sup> the Board had determined that the employer was guilty of an unlawful refusal to bargain over a decision not to open up a plant elsewhere when the city condemned the original facility. The Third Circuit disagreed and held *Fibreboard* to be inapplicable. The employer had no choice on whether to shut down its Bleeker Street plant, and therefore there was nothing to discuss. The only thing the union could do was to attempt to persuade the company to move operations to a new site. The *Fibreboard* case was distinguished on the basis of Justice Stewart's concurring opinion. Here, there was a "change in the economic direction of the company,"<sup>50</sup> whereas in *Fibreboard* the same functions of the former employees were done by subcontractors. The management decision in *Fibreboard* involved no "decision respecting commitment of capital investment,"<sup>51</sup> while the decision as to the Bleeker Street plant did: "The decision to close down the Bleeker Street plant rather than move the operations to another location involved a management decision to recommit and reinvest funds in the business."<sup>52</sup>

In *NLRB v. William J. Burns International Detective Agency, Inc.*<sup>53</sup> the employer was in the business of supplying guard service by contract to various businesses and institutions in several Midwestern cities. Within two months after the Plant Guards Union organized the employees, the employer decided to cancel the sole remaining contract in the Omaha area. The Board found a section 8(a)(5) violation in the employer's refusal to bargain over the decision to terminate the last remaining contract, but the Eighth Circuit denied enforcement. *Fibreboard* was distinguished by the court of appeals on the basis that Burns completely discontinued operations in Omaha while *Fibreboard* continued operations under the same working conditions in the same area. No contracting out was involved in the *Burns* situation. The Eighth Circuit also rejected the union view in *NLRB v. Adams Dairy, Inc.*<sup>54</sup> The court's earlier decision in this case had been vacated by the Supreme Court with instructions to reconsider it in light of *Fibreboard*.<sup>55</sup> The Eighth Circuit affirmed its earlier holding that the employer-dairy did not unlawfully refuse to bargain over its decision to terminate all driver-salesmen and replace them with independent contractors, and the Supreme Court denied an application for writ of certiorari.<sup>56</sup> The Adams Dairy had for some time been concerned with the extremely high cost and inefficient operations of its employee-drivers. When contract negotiations opened up in 1959, management tried to lower costs while the union attempted to insert a clause in the new contract which would prevent the employer from terminating routes and replacing drivers with independent contractors. Neither succeeded in their demands. After

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<sup>49</sup> 350 F.2d 191 (3d Cir. 1965).

<sup>50</sup> *Id.* at 195.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 196.

<sup>53</sup> 346 F.2d 897 (8th Cir. 1965).

<sup>54</sup> 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

<sup>55</sup> *NLRB v. Adams Dairy, Inc.*, 379 U.S. 644 (1965).

<sup>56</sup> 382 U.S. 1011 (1966).

the collective bargaining contract was signed, management again talked with the union about reaching some sort of solution over the driver-salesmen, but the union said its hands were tied because the contract had been executed. A few months later the employer terminated its driver-salesman division, sold all the equipment, and contracted with independent contractors to do the work. The court distinguished *Fibreboard* by pointing out that both the majority and concurring opinions limited that case to its facts. The decision to contract out work in *Fibreboard* did not change the basic operation of the company, whereas in *Adams Dairy* it did. A basic operational change took place when the employer decided to alter completely its existing distribution system by selling its products to independent contractors. *Adams Dairy* did not finance the sale. The new drivers picked their own routes and took title to the goods at dockside. The Dairy also was not concerned whether any independent contractor made a profit or loss on the sales, whereas the *Fibreboard* company was. The dairy liquidated that part of the business handling distribution and this was a change in the capital structure resulting in a partial liquidation and a recouping of capital investment. In *Fibreboard* the subcontractor performed the same work previously performed by the company employees on company premises with company machines and under the direct control of the employer. Also, in *Fibreboard* the employer directly enjoyed the benefits of the subcontractor's work.

In *NLRB v. Transmarine Navigation Corp.*<sup>57</sup> the employer operated a dock in Los Angeles which employed guards represented by a union. In order to avoid losing its largest customer, the company signed an agreement whereby it became a minority partner in a joint venture to build larger dock facilities in Long Beach, California. The Board found, on the authority of *Fibreboard*, that the employer unlawfully refused to bargain about the decision to terminate operations and enter into a joint venture elsewhere. The Ninth Circuit refused to enforce the Board's order. As opposed to the *Fibreboard* situation, the court held that the navigation company made fundamental changes in the direction and operations of the corporate enterprise.

Although its won-lost record in the appellate courts is 0-6, the Board, undaunted, continues as if its *Ozark Trailers* decision had been affirmed by the Supreme Court of the United States.<sup>58</sup> The Board's reliance on *Fibreboard* as authority for holding that a decision to shut down a plant is a mandatory subject of bargaining seems unwarranted in several respects.

First, it is important to realize that the *Fibreboard* case had very unusual and rather outrageous facts. The employer did not alter the basic operation of the plant. He merely hired the employees of an independent contractor to do the identical work of the former unit employees, under the identical conditions of employment (in the same plant on the same machines), and under the same control and direction that was exercised over the former employees. The result was the same as if the company had fired all the

<sup>57</sup> 380 F.2d 933 (9th Cir. 1967).

<sup>58</sup> The *Ozark Trailers* decision was never appealed.

employees and replaced them with people who were willing to work without the expensive fringe benefits.

Second, both the majority and concurring opinions in the *Fibreboard* case made special efforts to limit the scope of the decision.

Third, one must consider the effect or hardship upon the company in complying with the various interpretations of the *Fibreboard* decision. The Supreme Court in *Fibreboard* said their holding would not constitute a hardship on the employer because he changed nothing in the factory except the employees. In other words, to require him to bargain would not significantly abridge his freedom to manage his business. The Board, apparently without thinking, took up this argument in its *Ozark Trailers* case and stated that a requirement to bargain over a decision to close would be even less of an inroad on the employer's right to run his business than bargaining over a decision to subcontract, because it arises less frequently.<sup>59</sup> This reasoning, however, is absurd. If any management decision ever created "changed conditions," it is certainly the plant closure situation. If an employer unlawfully refuses to bargain in a subcontracting situation, the Board may recreate the status quo without imposing too great a hardship upon the employer. The subcontracts that an employer may be required to break are small stuff compared to the innumerable problems that would be generated in a plant closure situation.

Fourth, the Supreme Court in the *Fibreboard* decision said its holding was justified in that it would promote industrial peace, which is one purpose of the National Labor Relations Act. Although the concurring opinion took issue with that justification, the Board adopted the same reasoning in support of its *Ozark Trailers* decision. In a *Fibreboard* subcontracting situation it is not too difficult to imagine some sort of industrial strife resulting from a decision to contract out either part or all of the work of the unit employees. There very well could be tension when out-of-work union members watch new workers do the same work under the same conditions of employment in the same location and on the same machines as they previously had done themselves. However, it is very difficult to see how industrial strife would arise from a decision to shut down an entire plant, or to remove it to another location, when there are no job opportunities left at the original site.

Finally, reliance by supporters of the union view on two Supreme Court cases as authority for the Board's *Ozark Trailers* doctrine is not entirely justified. In *Order of Railroad Telegraphers v. Chicago & Northwestern Railway*<sup>60</sup> management sought to eliminate stations where agents only had about one hour of daily work, while the union wanted to amend the contract to add a clause which would require collective bargaining before any job could be eliminated. The union struck to achieve its demands, and the

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<sup>59</sup> The Board stated that the plant closure facts presented a proper case for requiring the employer to reinstate operations at the old site, but the Board refused to do so because it would be impractical considering how long the plant had been shut down. 161 N.L.R.B. 561, 571-72 (1966).

<sup>60</sup> 362 U.S. 330 (1960).

employer sought an injunction. Section 4 of the Norris-LaGuardia Act<sup>61</sup> was pleaded by the union as a defense. Management's position was that the subject of the dispute (the decision to close the stations) was not a bargainable issue and therefore not a "labor dispute" within the meaning of the Norris-LaGuardia Act. The Supreme Court held that the federal district court did not have authority to enjoin the strike. Section 13(c) of the Norris-LaGuardia Act defines a labor dispute to include any "controversy concerning terms or conditions of employment,"<sup>62</sup> and the Court felt the dispute fell into this category. In *Teamsters Union v. Oliver*<sup>63</sup> the state brought an antitrust action against the enforcement of a clause in the collective bargaining contract that regulated the minimum rental and terms of leases when a motor vehicle was leased to a carrier by an owner-driver. The Supreme Court held that the National Labor Relations Act precluded the Ohio courts from applying the Ohio antitrust laws to the collective bargaining contract. The Court noted that the purpose of the clause was to prevent piecemeal subcontracting of work, and that this was not remote and indirect to the subject of wages, nor was it "outside the range of matters on which the federal law requires the parties to bargain."<sup>64</sup>

The *Railroad Telegraphers* case does not necessarily establish the proposition that any decision resulting in job elimination is a *mandatory* subject of bargaining. It is more likely that the case considers such decisions only *permissible* subjects of bargaining.<sup>65</sup> It is entirely possible that a strike to compel concessions on a merely permissive bargainable issue could not be enjoined by a federal court, even if it were an unfair labor practice strike. Despite the similarity between the language defining a duty to bargain under the National Labor Relations Act and that limiting injunctions under the Norris-LaGuardia Act, the Acts have different purposes.<sup>66</sup> The question in the *Oliver* case was whether the NLRB had exclusive jurisdiction over the contract and the parties. There was no holding that the subcontracting involved was a mandatory subject of bargaining. Later, of course, the Supreme Court held that the *Fibreboard* brand of subcontracting was a mandatory subject of bargaining and cited *Oliver* as authority.<sup>67</sup> But this does not infer that all decisions affecting job security, particularly decisions to close down factories, are mandatory subjects of bargaining.

The most significant argument advanced in favor of the union view, or the *Ozark Trailers* doctrine, is the proposition that economics are an apt subject for the collective bargaining process because the union has an opportunity to make concessions and to accommodate the employer. In

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<sup>61</sup> 29 U.S.C. § 104 (1965). Section 4 provides that "no court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: (a) ceasing or refusing to perform any work . . . ."

<sup>62</sup> 29 U.S.C. § 113(c) (1965).

<sup>63</sup> 358 U.S. 283 (1959).

<sup>64</sup> *Id.* at 293.

<sup>65</sup> Comment, *supra* note 8, at 1109.

<sup>66</sup> *Id.* at 1104.

<sup>67</sup> See note 30 *supra*.

*Fibreboard* the company's reasons for subcontracting were the high labor costs and inefficient operations of the unit. In *Ozark Trailers* the plant was shut down and relocated elsewhere because of the high wage costs and sloppy workmanship. These matters are at the core of collective bargaining in that each party has some power to alter the situation. The same reasoning, however, does not apply when other factors lie behind the decision to close down or transfer operations. The Board seemed to recognize this proposition when it held that one's religious conviction is not an apt subject for collective bargaining. It seems that the same should be true of economic reasons which the parties have no power to change. For example, if the plant site is not near adequate transportation facilities, if there have been radical changes in technology resulting in obsolescence of the old plant, if the old site is not near market outlets or sources of supply, or if there is no longer an adequate labor supply at the old site,<sup>68</sup> then bargaining should not be required.

*Fibreboard and Darlington Confused.* Sometimes the *Darlington* and *Fibreboard* doctrines are applicable to the same facts. When the doctrines are mixed together in the same plant closure situation, considerable confusion in the Board and courts is often the result. In the *Burns Detective Agency* case, where the section 8(a)(3) and section 8(a)(5) issues were not completely distinguishable, the court seemed to state that *Fibreboard* could be distinguished because the detective agency completely discontinued operations in the city of Omaha.<sup>69</sup> However, the question of whether a closing is partial or complete is only relevant in a *Darlington*-type case. Also in *Burns*, the opinion contained a lengthy discussion of the *Darlington* doctrine since the union had alleged a section 8(a)(3) violation in addition to the unlawful refusal to bargain. After correctly distinguishing the *Darlington* case on the grounds that there was no showing of a motivation aimed at chilling unionism elsewhere, the Eighth Circuit noted that a finding as to  *motive* on a section 8(a)(3) charge also applied to the facts relevant to a section 8(a)(5) violation: "Under *Darlington*, the finding of lack of anti-union motivation . . . precludes a finding of unfair labor practice in refusing to bargain with the union on . . . the closing of the Omaha division."<sup>70</sup>

It has been suggested that the Eighth Circuit in the *Adams Dairy* and *Burns Detective Agency* cases, and the Third Circuit in the *Royal Plating & Polishing Co.* case, used the *Darlington* doctrine to invalidate Board orders in a *Fibreboard* situation, and that the *Darlington* partial closing test was applied and imposed upon a *Fibreboard* case.<sup>71</sup> However, this view fails to recognize that even though the Eighth Circuit confused the *Darlington* doctrine in a *Fibreboard* situation, the court nevertheless used correct

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<sup>68</sup> Reubenstein, *Plant Relocation and Its Effects on Labor Management Relations*, 18 LAB. L.J. 544, 550-51 (1967).

<sup>69</sup> 346 F.2d at 901.

<sup>70</sup> *Id.* at 902. See similar language in *NLRB v. Adams Dairy, Inc.*, 379 U.S. 644 (1965).

<sup>71</sup> Platt, *The Duty To Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143, 155 (1968).

reasoning on the *Fibreboard* issue. The *Darlington* discussion came only after a decision was reached on the *Fibreboard* issue. The Third Circuit in the *Royal Plating & Polishing Co.* case did not use *Darlington* in a *Fibreboard* situation, but merely distinguished *Fibreboard* on the basis of Justice Stewart's concurring opinion.

The confusion between the two doctrines is not limited to the federal courts of appeals. Consider the following excerpt from the Board's recent opinion in *Morrison Cafeterias Consolidated, Inc.*:<sup>72</sup>

Chairman McCulloch and Members Brown and Zagoria all agree with the Trial Examiner's 8(a)(1) findings, conclusions, and order. Chairman McCulloch and Member Brown agree with the Trial Examiner's findings, conclusions, and order as to section 8(a)(5). Chairman McCulloch and Member Zagoria agree with the Trial Examiner's dismissal of the 8(a)(3) allegations of the complaint. Member Zagoria agrees with Chairman McCulloch's separate opinion as to the 8(a)(3) aspects of the case, and Member Brown agrees with Chairman McCulloch's separate opinion on the 8(a)(5) aspects of the case.<sup>73</sup>

In *Morrison* Member Zagoria argued that the *Darlington* doctrine completely foreclosed any finding of an unlawful refusal to bargain, and that a section 8(a)(5) violation was wholly dependent upon a finding of an 8(a)(3) violation.<sup>74</sup> The Supreme Court in its *Darlington* decision only considered the section 8(a)(3) violation. The additional section 8(a)(5) violation found by the Board was based in part on a determination that the closing violated section 8(a)(3). A section 8(a)(3) violation must be supported by a finding that anti-union animus motivated the company's action, while a section 8(a)(5) violation is shown when the company fails to bargain with the union, whether or not the failure to bargain was motivated by anti-union bias. The *Darlington* case involved section 8(a)(3) while *Fibreboard* involved section 8(a)(5). Under the *Fibreboard* doctrine anti-union animus is irrelevant. To require anti-union bias in a section 8(a)(5) violation would effectively reduce it to an alternative form of section 8(a)(3).

There is a possibility that the *Darlington* case is authority for invalidating a finding of an unlawful refusal to bargain. In *Darlington* the Supreme Court stated: "We hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness towards the union, such action is not an unfair labor practice."<sup>75</sup> The management interpretation of this statement is that an employer has an absolute right to close down a plant, whether it is his entire business or merely a part of his business, and such a closing is not an unfair labor practice under any section of the National Labor Relations Act except for the narrow situation where the closing was for the purpose of chilling unionism in other plants. This appears to be the reasoning of Member Zagoria in his dissent in

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<sup>72</sup> 177 N.L.R.B. No. 113, 71 L.R.R.M. 1449 (1969).

<sup>73</sup> 71 L.R.R.M. at 1451.

<sup>74</sup> *Id.* at 1452.

<sup>75</sup> 380 U.S. at 273-74.



the *Morrison Cafeterias* case.<sup>76</sup> However, the Supreme Court explained its statement in footnote 20 of the opinion and made no mention of an unlawful refusal to bargain. The Court did mention section 8(a)(5) in another footnote, but merely stated that no argument was made that section 8(a)(5) required an employer to bargain concerning a purely business decision to terminate his enterprise, and the Court cited *Fibreboard* as authority.<sup>77</sup>

### III. INTERFERENCE WITH ORGANIZATIONAL RIGHTS: SECTION 8(a)(1)

In addition to the sections 8(a)(3) and 8(a)(5) violations mentioned above, it is possible that an employer could unlawfully interfere with his employee's organizational rights, and therefore violate section 8(a)(1) of the Act,<sup>78</sup> by announcing a decision to close the plant. This interesting proposition was discussed in footnote 20 of the *Darlington* case.<sup>79</sup> The Supreme Court, in distinguishing the issues that they were *not deciding*, stated that "[w]e hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."<sup>80</sup> The Court then amplified this statement in the footnote.

Nothing we have said in this opinion would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority in power to make such a decision. We recognize that this safeguard does not wholly remove the possibility that our holding may result in some deterrent effect on organizational activities independent of that arising from the closing itself. An employer may be encouraged to make a definite decision to close on the theory that its mere announcement before a representation election will discourage the employees from voting for the union, and thus his decision may not have to be implemented. Such a possibility is not likely to occur, however, except in a marginal business; a solidly successful employer is not apt to hazard the possibility that the employees will call his bluff by voting to organize. We see no practical way of eliminating this possible consequence of our holding short of allowing the Board to order an employer who chooses so to gamble with his employees not to carry out his announced intention to close. We do not consider the matter of sufficient significance in the overall labor management relations picture to require or justify a decision different from the one we have made.<sup>81</sup>

Recently the Supreme Court in dicta commented again on the right of an employer during a union organizational campaign to announce a decision

<sup>76</sup> 71 L.R.R.M. at 1452.

<sup>77</sup> 380 U.S. at 267 n.5.

<sup>78</sup> 29 U.S.C. § 158(a)(1) (1965). Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 (29 U.S.C. § 157 (1965)) provides that "employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

<sup>79</sup> 380 U.S. at 274 n.20.

<sup>80</sup> *Id.* at 273-74.

<sup>81</sup> *Id.* at 274 n.20.

already reached by a board of directors to close in the event the plant is unionized.

Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.<sup>82</sup>

The Court cited footnote 20 of the *Darlington* case as authority for its statement.

Other than these two statements of dicta by the Supreme Court, only one case has been found where an employer urged this defense. In *Essex Wire Corp.*<sup>83</sup> the employer, through his attorney, threatened to close the plant if the collective bargaining contract the parties had been negotiating was not accepted by the rank and file members. The trial examiner found no section 8(a)(1) violation, relying in part on the *Darlington* decision. The employer relied upon footnote 20 of *Darlington*, and upon the fact that there was no union organizational campaign under way, but rather only the question of the ratification of a contract. The Board, however, reversed the trial examiner's decision and commented upon its interpretation of *Darlington's* footnote 20.

Contrary to the Trial Examiner, we do not believe that the court intended by this language to sanction such conduct when directed at non-organizational employee activities which are also protected by Section 7 of the Act. Indeed, it is apparent that the court was drawing a distinction between unlawful threats to close a plant and the announcement of a decision to close 'already reached by the board of directors or other management authority empowered to make such a decision.' We believe the trial examiner failed to give proper recognition to this distinction in concluding that respondent's threat to close his plant did not constitute a violation of the Act.<sup>84</sup>

Footnote 20 raises an obvious question: What is the difference between threatening to close down a plant in the event of unionization, and announcing a decision already made by the board of directors to close down the plant in the event of unionization? It seems that the Supreme Court is drawing a very fine line between a spur-of-the-moment and a premeditated threat. This distinction simply rewards the diligent, anti-union employer who has the foresight to declare in the corporate records an intent to shut down in the event of unionization. However, this result is apparently what the Court intended.

The Court remarked in footnote 20 that there might be some problems of enforcement. Such problems were, however, deemed to be unimportant

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<sup>82</sup> NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

<sup>83</sup> 164 N.L.R.B. No. 48, 65 L.R.R.M. 1077 (1967).

<sup>84</sup> 65 L.R.R.M. at 1078.

because "a solidly successful employer is not apt to hazard the possibility that the employees will call his bluff by voting to organize."<sup>85</sup> In the event the employees do call the bluff, and the employer does decide to close down, the Court envisioned "no practical way of eliminating this possible consequence of the holding short of allowing the Board to order an employer who chooses so to gamble with his employees not to carry out his announced intention to close."<sup>86</sup> This writer interprets the Court's statement to mean that it will not allow the Board to order the employer to keep his business open. Since the entire rationale of the *Darlington* decision is that an employer has an absolute right to go out of business, as opposed to a partial closing, it is highly unlikely that the NLRB could order an employer to continue operations.

Another question that arises from footnote 20 is whether it is an unfair labor practice for an employer to announce an already reached decision to close in the event of unionization, and then renege on that decision after the union is voted in. The employer is trying to interfere with the employee's section 7 rights,<sup>87</sup> and has obviously failed. Perhaps the Board could argue that this is a violation of section 8(a)(1) and does not come within the footnote 20 defense because the employer had never made a "definitive" decision to close in the event of unionization. Therefore, the remarks prior to the election are removed from the "already reached" decision, and placed in the group of spur-of-the-moment threats. However, this raises yet another question. Since the Supreme Court spoke of a decision "already reached," how far in the past must the decision have been made in order to remove it from the threat classification? Must the decision have been made prior to the first union organizational attempts or just a reasonable time before the remark is made? If the Court is attempting to distinguish between spur-of-the-moment threats and bona fide decisions to shut down, the fact that the union has already begun organizational activities should be immaterial.

The Supreme Court appears to be distinguishing between insincere and bona fide, or premeditated, threats. The reason for this distinction appears to be an attempt to avoid a troublesome fact question and to balance the employee's section 7 rights against the employer's right to shut down for any reason. Does an employer have a right to threaten what he in fact has a legal right to do? Apparently, in answering this question in the affirmative, the Court has sought to balance the employer's right to say he will close down with the employee's rights to organize free from coercion. One method for employers who are inclined to shut down an entire plant when it is unionized is to declare in the corporate minute book an intention to terminate completely all operations if the employees ever vote in a union,

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<sup>85</sup> 380 U.S. at 274 n.20.

<sup>86</sup> *Id.*

<sup>87</sup> 29 U.S.C. § 157 (1965). Section 7 provides in part as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through concerted activities for the purposes of collective bargaining or other mutual aid and protection . . ." It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of these rights. 29 U.S.C. § 158(a)(1) (1965).

but to wait and see how the election campaign develops before determining whether to engage in "brinkmanship." If the employer makes the announcement during the election campaign, it may be that the employees will not call his bluff and thus he will never be forced to implement the decision. Of course, it must always be remembered that the Board does have subpoena powers,<sup>88</sup> and it may want to take a look at the minutes in the event someone files a section 8(a)(1) charge. Presumably, if there is no decision on the minute books, there would be a violation of the Act unless the employer could prove by some other means that his decision was "definitive."

#### IV. ENFORCEMENT OF CONTRACTUAL RIGHTS

Some collective bargaining contracts have provisions either expressly prohibiting plant closure or removal, or impliedly limiting the right of the employer to do so. Also, a few contracts contain a clause prohibiting unfair labor practices. Where an employer makes a decision to close without first discussing it, the union may seek arbitration under the contract and then enforcement of any award in a federal district court under section 301 of the Labor Management Relations Act.<sup>89</sup>

In *Textile Workers Union v. Lincoln Mills*<sup>90</sup> the Supreme Court held that federal district courts in section 301 suits have the power to enforce agreements to arbitrate in spite of the Norris-LaGuardia Act's section 7 prohibition against the issuance of injunctions in cases involving "labor disputes."<sup>91</sup> The court also held that section 301 suits authorize federal courts to fashion federal substantive law as opposed to following state contract law. This decision introduced the now famous *quid pro quo* doctrine, which provides that an arbitration clause is the *quid pro quo* for a no-strike clause. It was assumed by a "parity of reasoning" that the *Lincoln Mills* doctrine also gave federal district courts power to enforce awards the arbitrator might make.<sup>92</sup> However, in *Sinclair Refining Co. v. Atkinson*<sup>93</sup> the Court held that the Norris-LaGuardia Act prohibited fed-

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<sup>88</sup> 29 U.S.C. § 161 (1965).

<sup>89</sup> 29 U.S.C. § 185 (1965). Section 301(a) provides as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

<sup>90</sup> 353 U.S. 448 (1957).

<sup>91</sup> 29 U.S.C. § 107 (1965). Section 7 of the Norris-LaGuardia Act provides that no court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute unless certain strict requirements are met. The person requesting the injunction must show the following: (1) that unlawful acts have been threatened and will be committed unless restrained, (2) that substantial and irreparable injury will result, (3) that greater injury will be inflicted upon the person seeking the injunction by the denial of it rather than upon the defendant by the granting of it, or that the person seeking the injunction has no adequate remedy at law, and (4) that the public officers charged with the duty to protect the property of the person seeking the injunction are unable or unwilling to furnish adequate protection.

<sup>92</sup> *Textile Workers Union v. Cone Mills Corp.*, 268 F.2d 920 (4th Cir.), cert. denied, 361 U.S. 886 (1959); *A.L. Korman Co. v. Clothing Workers Union*, 264 F.2d 733 (6th Cir.), cert. denied, 361 U.S. 819 (1959).

<sup>93</sup> 370 U.S. 195 (1962).

eral district courts from enjoining the breach of a no-strike clause. The employer in that case by-passed arbitration and went directly to a federal district court to seek an injunction. Although no cases have been found involving a plant closure situation, presumably the same reasoning would apply in prohibiting an injunction preventing an employer from closing his plant.

Subsequent to the *Atkinson* decision, the Supreme Court received a broadside of criticism.<sup>94</sup> In 1967, the Court had an opportunity to re-examine its *Atkinson* decision, but passed it up by basing its holding on procedural grounds.<sup>95</sup> In 1968, the Supreme Court in *Avco Corp. v. Machinist's Local 735*<sup>96</sup> held that actions filed in a state court to enforce no-strike provisions in collective bargaining contracts are removable to a federal district court, and, once removed, the injunction could be dissolved because of the Norris-LaGuardia Act. Justice Stewart, in a concurring opinion joined in by Justices Harlan and Brennan, pointed out that the court was not considering the validity of the *Atkinson* decision and would have an opportunity to do so "upon an appropriate future occasion."<sup>97</sup>

Shortly before the *Avco* decision was handed down, the Fifth Circuit had created an important distinction between enforcing a contract and enforcing an arbitrator's award. In *New Orleans Steamship Ass'n v. Longshore Workers Local 1418*<sup>98</sup> an arbitrator's award that a union cease and desist from violating a no-strike clause was enforced. Although the case was decided before the *Avco* decision, the Supreme Court denied certiorari some six months after *Avco* was decided. The no-strike, no-lockout clause in the agreement between the New Orleans Steamship Association and the Longshoremen had an expedited grievance and arbitration procedure providing for an arbitration hearing within 72 hours after receipt of notice. One of the arbitrators from a panel of six issued a cease-and-desist order in the required period of time. The Fifth Circuit distinguished *Atkinson* on the basis that it involved an attempt to obtain an injunction to enforce a no-strike clause where there had been no arbitration, as opposed to merely enforcing an arbitrator's award. The court pointed to the national labor policy favoring arbitration,<sup>99</sup> as well as to the fact that it has become commonplace for federal courts to enforce arbitration awards where matters other than strikes, work stoppages, and picketing are involved. The court's order was held not to involve a "labor dispute" within the meaning of the Norris-LaGuardia Act.

If a collective bargaining contract contains a requirement to bargain over decisions to relocate, or a prohibition against plant closure or relocation, and the contract also contains an expedited arbitration procedure, it

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<sup>94</sup> See, e.g., Bakaly & Pepe, *And After Avco*, 20 LAB. L.J. 67 (1969).

<sup>95</sup> *Longshoremen's Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967).

<sup>96</sup> 390 U.S. 557 (1968).

<sup>97</sup> *Id.* at 562.

<sup>98</sup> 389 F.2d 369 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968).

<sup>99</sup> *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 575 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

must be assumed that a federal district court would enforce an arbitrator's cease-and-desist order and enjoin an employer from closing down his plant. However, where no expedited arbitration procedure is available, a difficult question arises concerning whether a party can seek a temporary restraining order in a federal district court to maintain the status quo pending the arbitration hearing. Once again, there arises a conflict between section 7 of the Norris-LaGuardia Act and section 301 of the Labor Management Relations Act. As the Supreme Court has noted, this is an unsettled question.<sup>100</sup> Presumably, the same reasoning that applies to enforcing contracts (as opposed to arbitration awards) involving no-strike clauses would also apply to temporary restraining orders protecting the status quo pending arbitration. In fact, several courts have reached just such a conclusion.

In *International Union of Electrical Workers v. General Electric Co.*<sup>101</sup> the union filed suit in federal district court seeking to compel arbitration and to secure a temporary restraining order enjoining the employer from changing over from paying employees on a piece rate system to paying on an hourly basis pending the outcome of the arbitration hearing. The temporary restraining order was denied, the court holding that section 7 of the Norris-LaGuardia Act requires a finding that the threatened acts are unlawful, and this the union failed to establish. The district court felt that it should not issue a temporary restraining order enjoining the threatened action pending the outcome of arbitration when it would not be the court to hear the case on the merits. In *Publishers Ass'n v. New York Mailers Local 6*<sup>102</sup> the employer sought a temporary restraining order to enjoin the union from trying one of its members, a foreman, for disciplining another union member. The employer sought the temporary restraining order pending the outcome of a grievance it had filed. The Second Circuit held that the district court had the power to compel arbitration, but could not temporarily enjoin the threatened action pending the arbitration because of section 7 of the Norris-LaGuardia Act. The Ninth Circuit, however, has reached a different conclusion.<sup>103</sup> This "unsettled question" may soon be resolved by the Supreme Court. Recently, the Ninth Circuit held that the Norris-LaGuardia Act prohibited federal district courts from issuing injunctions to prohibit violations of no-strike clauses where the parties have not proceeded to arbitration.<sup>104</sup> On January 12, 1970, the Supreme Court granted certiorari.<sup>105</sup>

Assuming a union could not compel arbitration in time to prevent a plant closure or removal, or could not obtain an injunction securing the status quo pending arbitration, there still might exist a right to damages for breach of the collective bargaining contract. However, the question of whether arbitrators have the power to award damages for violations of

<sup>100</sup> NLRB v. C & C Plywood Corp., 385 U.S. 421, 429 n.15 (1967).

<sup>101</sup> 56 L.R.R.M. 2891 (S.D.N.Y. 1964), *aff'd per curiam*, 341 F.2d 571 (2d Cir. 1965).

<sup>102</sup> 317 F.2d 624 (2d Cir.), *vacated in part and dismissed as moot*, 376 U.S. 775 (1964).

<sup>103</sup> Retail Clerks Local 1222 v. Alfred M. Louis, Inc., 327 F.2d 442 (9th Cir. 1964).

<sup>104</sup> Boys Markets, Inc. v. Retail Clerks Local 770, 416 F.2d 368 (9th Cir. 1969), *cert. granted*, 90 S. Ct. 572 (1970) (No. 768).

<sup>105</sup> *Id.*

collective bargaining contracts is still not completely settled. The Fifth Circuit has held, where the arbitration clause was somewhat limited, that the arbitrator only has the authority to award damages where the contract expressly provides for it.<sup>106</sup> However, the Supreme Court has indicated that an arbitrator would necessarily have such authority,<sup>107</sup> and most arbitrators will award damages under proper circumstances even in the absence of express contractual authority to do so.<sup>108</sup>

#### V. SUMMARY

An employer who closes down a factory may commit a series of unfair labor practices under the National Labor Relations Act, as well as a breach of any collective bargaining contract. The announcement of a decision to close may be held to constitute illegal interference with the employees' organizational rights and an unlawful refusal to bargain with the employees' union. The actual closure of the plant may be held to be unlawful anti-union discrimination. In addition, the plant closure may violate provisions of a collective bargaining contract between the employer and union, giving rise to a suit under section 301 of the Labor Management Relations Act for either damages or an injunction.

The *Darlington* doctrine deals with a plant closure and not a plant removal. That decision held that an employer may close down his entire business for *any* reason, but that he is guilty of unlawful anti-union discrimination if he: (1) has a substantial interest in another business so as to give promise of reaping a benefit from the discouragement of unionism, (2) closes the plant with the intention of producing that result, and (3) is in such a relationship to the other business as to make it realistically foreseeable to the employees that their plant may also be closed if they engage in union activities.

The "runaway shop" cases, long preceding the *Darlington* doctrine, have always held that the *removal* of a plant from one site to another to avoid dealing with a union is unlawful anti-union discrimination in violation of section 8(a)(3) of the National Labor Relations Act. There is no requirement to prove any intent to "chill unionism" elsewhere, as under the *Darlington* doctrine. All that need be shown is that the employer relocated in order to avoid dealing with the union. The reason for this desire is immaterial; it is enough that the employer intends the discriminatory result.

The decision to close or remove a plant may be held to constitute an

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<sup>106</sup> *Refinery Employees Union v. Continental Oil Co.*, 268 F.2d 447 (5th Cir.), *cert. denied*, 361 U.S. 896 (1959).

<sup>107</sup> *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960):  
When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsman may never have thought of what specific remedy should be awarded to meet a particular contingency.

<sup>108</sup> *See, e.g., P.P.G. Indus., Inc.*, 51 Lab. Arb. 500 (1968).

unlawful refusal to bargain with the employees' union in violation of section 8(a)(5) of the National Labor Relations Act. The general rule prior to the *Fibreboard* decision was that an employer was under a duty to bargain with a union about the *effects* of a decision to close or relocate a plant, but not as to the *decision* itself. The Supreme Court of the United States held in the *Fibreboard* case that an employer unlawfully refused to bargain with the employees' union when he decided to replace the employees in the maintenance unit with those of an independent contractor who were to do substantially the same work as the former employees. Since the Supreme Court's opinion, the National Labor Relations Board has consistently maintained that the *Fibreboard* decision concerning subcontracting applies equally to other management decisions, such as plant closure or removal, which affect the job security of the maintenance-unit employees. The Board's interpretation seems unjustified. Five circuits have held, contrary to the Board's interpretation of *Fibreboard*, that decisions which concern the commitment of investment capital in the basic scope of the enterprise (*i.e.*, decisions fundamental to the basic direction of the corporate enterprise) are not mandatory subjects of bargaining under the Act.

Some confusion has resulted in the Board and the federal courts of appeals when the *Darlington* doctrine and the *Fibreboard* doctrine have been applied to the same fact situation. The *Darlington* case deals with section 8(a)(3) of the Act (unlawful anti-union discrimination), but only in a plant closure situation. The *Fibreboard* doctrine deals with section 8(a)(5) violations (unlawful refusal to bargain). In a refusal-to-bargain case, there is no need to distinguish between a plant closure and a plant removal, as is necessary under section 8(a)(3). Nor is it necessary to distinguish between a partial and complete closing, as is required under the *Darlington* doctrine. In a section 8(a)(3) situation, the *Darlington* doctrine applies only when there is a plant closure.

The announcement of a decision to close or move a plant may result in a section 8(a)(1) violation (unlawful interference with the employees' organizational rights). An employer illegally interferes with his employees' organizational rights if, prior to a union election, he threatens to close the plant if the union is voted in. However, an employer may announce a definitive decision that the plant will be shut down in the event it is unionized, and he will not be guilty of illegal interference. Apparently, the Supreme Court has made a distinction between spur-of-the-moment threats and bona fide decisions to shut down or move a plant.

Even in the absence of unfair labor practices in a plant closure or removal situation, there may be contractual provisions limiting the right of an employer to shut down or remove the factory. If an employer has a collective bargaining contract with his employees' representative to the effect that he may not shut down or remove the plant during the term of the contract, the union may have a right to sue for damages in the event the contract is breached. However, based upon analogous decisions holding that federal courts may not enjoin breaches of no-strike clauses, it is



doubtful that a union could enjoin an employer from closing down or removing a plant in violation of the collective bargaining contract.

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