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# Limitations on Employer Independent Action

*Robert J. Rabin\**

## INTRODUCTION

An important change appears to be taking place in measuring the limitations upon an employer's independent right to run his business. Where this question was formerly tested under the National Labor Relations Act,<sup>1</sup> which defines the scope of the duty to bargain, recent developments suggest that the scope of independent employer action<sup>2</sup> henceforth will be determined through the arbitration process.

This is a salutary development, since the question of the scope of independent employer action is a complicated one and ought to

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1. National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970) (hereinafter referred to in text as the Act). The key section of the Act for purposes of this article is § 8(a), which provides that

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .

(3) 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 . . .

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

2. Because of the shift in emphasis from statute to contract the term employer "independent action" has been used in this article interchangeably with the more familiar "unilateral action." The latter term in some instances may be misleading, for it suggests that the only relevant limitations stem from 8(a)(5), which requires the opposite of unilateral action—bilateral negotiations between union and management. But in the arbitral forum the limitations, if any, are substantive and absolute rather than procedural and conditional as under 8(a)(5). Use of the term independent action also permits discussion of related restraints upon employer freedom under §§ 8(a)(1) and (3) of the Act. This latter inquiry gives a broader view of the scope of employer unilateral action.

be resolved by application of the surest kinds of guidelines. A carefully drafted collective bargaining agreement can spell out the priorities of the parties and indicate to the arbitrator the limitations on employer action upon which the parties have mutually agreed. In contrast, when employer action is challenged under section 8(a) (5)<sup>3</sup> of the Act, formalistic criteria, permitting unilateral action whenever it comes within the label "basic management prerogative,"<sup>4</sup> have been utilized. If the scope of employer independent action is to be determined by the arbitral process, the parties to the collective bargaining agreement must be given the widest possible latitude in spelling out their priorities in negotiations. For this reason, whatever the validity of a narrow approach to the scope of section 8(a) (5) in dealing with challenges to employer unilateral action, that section should be applied expansively in dealing with the range of subjects that may properly be raised in negotiating a collective bargaining agreement.

Throughout this examination of permissible employer action, two themes constantly recur—one encouraging bilateral allocation of functions in the collective bargaining agreement and the other questioning the management rights doctrine. Because the range of permissible employer independent action turns upon a variety of factors, the subject will be discussed under five categories encompassing different sources of restraint on employer conduct. Part I deals briefly with statutory limitations on employer action in the non-union situation; part II examines 8(a) (1) and (3) restrictions in the organizing phase; part III concerns limitations on employer action imposed by 8(a) (5) once labor relations have reached the bargaining stage; part IV considers contractual restraints; and part V explores the effect of a hiatus between contracts on the employer's right to take independent action.

### I. THE NON-UNION PLANT

When one considers the limitations upon independent employer action, those restraints stemming from a collective bargaining agreement or arising under labor relations statutes such as the

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3. *Supra* note 1.

4. In examining all the potential restraints upon employer independent action, the phrase "management prerogatives" will continually be found. It is an unfortunate term, for it obscures rather than aids the search for a meaningful limitation on management freedom. The phrase is not contained in the Act and is not easy to define, particularly in the context of emerging areas of labor relations. Furthermore, even if one could tell what a management prerogative is, this does not explain why other statutory rights must yield to it.

National Labor Relations Act most readily come to mind. There is, however, a vast panoply of legislative regulation of the employment relationship on both federal and state levels having nothing to do with unionization. These regulations include the obvious, such as wage-hour legislation, child labor restrictions, prohibitions against discrimination on account of race or sex, standards for health and safety under the new Occupational Safety and Health Act, and safeguards for employees called into military service.<sup>5</sup> Perhaps less apparent are the duty imposed upon federal contractors to take affirmative action to hire and promote minority employees, and the ceilings placed on wages and benefits under the recent stabilization acts.<sup>6</sup> On the state level, regulations cover such disparate matters as lie detector tests, wage garnishment, time off for voting, and credit reports.<sup>7</sup> Thus, even before a union organizes, it is incorrect to say that management enjoys an absolute independent right to run its business.

The employer, however, is left unfettered in many basic aspects of the employment relationship, including the right to set wages and benefits, to discharge employees at will except where laws against discrimination are involved, to make promotions and layoffs without regard to seniority unless inconsistent with the Military Service Act, and to terminate some or all of the existing jobs. Significant restraints in each of these areas and others may arise, however, with the advent of a union.

## II. THE ORGANIZING PHASE—SECTION 8(a) (1) AND 8(a) (3) RESTRAINTS

A second layer of restraints upon employer conduct comes into

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5. See, e.g., Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1938); N.Y. LABOR LAW § 652 (McKinney Supp. 1973); Fair Labor Standards Amendments of 1966, 29 U.S.C. § 212 (1966), amending 29 U.S.C. § 212 (1938); N.Y. LABOR LAW § 130 *et seq.* (McKinney Supp. 1973); Tit. VII, Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1970); Military Selective Service Act of 1967, 50 APP. U.S.C. § 459 (1967); N.Y. MIL. LAW § 318 (McKinney Supp. 1973).

6. Exec. Order No. 11,246, 3 C.F.R. 167 (Supp. 1965), as amended by Exec. Order No. 11,375, 3 C.F.R. 320 (1967), as amended by Exec. Order No. 11,478, 3 C.F.R. 133 (1969), as amended by Exec. Order No. 11,590, 3 C.F.R. 153 (1971); Exec. Order No. 11,615, 3 C.F.R. 199 (1971); Exec. Order No. 11,627, 3 C.F.R. 218 (1971); Exec. Order No. 11,730, 38 Fed. Reg. 19345 (1973).

7. See, e.g., Markson, *A Reexamination of the Role of Lie Detectors in Labor Relations*, 22 LAB. L.J. 394, 395 and n.4 (1971); N.Y. GENERAL BUS. LAW § 373 (McKinney 1973) (credit rating); Note, *Arrest & Credit Records*, 24 U. FLA. L. REV. 681, 690 & n.91 (1972); N.Y. CRV. PRAC. § 5205(e)2 (McKinney 1963) (garnishment); N.Y. ELECTION LAW § 226 (McKinney 1964) (time off for voting); N.Y. LABOR LAW § 201-a (McKinney Supp. 1973).

play when union organization of the plant begins.<sup>8</sup> These restrictions stem primarily from sections 8(a) (1)<sup>9</sup> and 8(a) (3)<sup>10</sup> of the Act. Further, the possibility that unilateral changes—even if not violations of 8(a) (1) and 8(a) (3)—may be grounds to set aside a representation election which the union has lost, may provide a real deterrent to employer unilateral action.<sup>11</sup>

The classic statement of the nature of 8(a) (1) and 8(a) (3) violations is that anti-union motivation is an essential element of the latter but not the former.<sup>12</sup> While the text of the two sections supports such an interpretation,<sup>13</sup> case developments over the past

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8. Section 8(a)(5) is not a factor in delineating the scope of employer freedom at this point. It becomes applicable only when the union attains the status of exclusive bargaining agent, which in most cases occurs at the conclusion of the organizing campaign. It may be argued that if the union is able to secure a bargaining order under the *Gissel* doctrine because of employer misconduct that made a fair election impossible, then the 8(a)(5) duty to bargain ought to be applied retroactively to the organizing phase if the union can demonstrate through authorization cards that it had a majority at the time. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). This is an unrealistic approach, however, for as a practical matter it may take years for a definitive adjudication of the union's status under the *Gissel* route. The employer runs the risk that any dealings with the union during this period will violate § 8(a)(2) (prohibiting company domination or interference with formation of union) if it later turns out that the union is not entitled to a *Gissel* type bargaining order. Further, when the union's bargaining status is in doubt and before any trust and communication have been built between the union and management, the likelihood of reversing employer action through bargaining is not great. *But see Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970). The Board refused to hold that employees should be compensated for wages and fringe benefits that they would have obtained through collective bargaining if the employer had not refused to bargain in violation of § 8(a)(5). The dissent argued, however, that a better rule would be to allow retroactive remedies in 8(a)(5) cases in order to accomplish the Act's purpose of encouraging collective bargaining; otherwise, the employer would be able to profit from his unlawful refusal to bargain.

9. *Supra* note 1.

10. *Supra* note 1.

11. *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962). *See, e.g., International Shoe Co.*, 123 N.L.R.B. 682 (1959) (in the absence of violations of §§ 8(a)(1) or 8(a)(3) the employer's announcement of a wage increase the day before the election was held sufficient interference with employee free choice to warrant setting aside the election).

Significantly, in a study of 107 Board directed re-run elections the results of the re-run differed from those of the original election in 40% of the cases. Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C.L. Rev. 209, 215 (1963). An employer thus would not wish to take the substantial risk that the defeat of a union in an election would ultimately be reversed as a result of election interference.

12. *Garment Workers' Union v. NLRB*, 366 U.S. 731, 739 (1961); *Cooper Thermometer Co.*, 154 N.L.R.B. 502, 503 (1965); *see Oberer, The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act*, 52 CORNELL L.Q. 491 (1967).

13. Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 7 . . ." 29 U.S.C. § 158(a)(1) (1970).

Section 8(a)(3) makes it an unfair labor practice "by discrimination . . . to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3) (1970).

ten years, particularly at the Supreme Court level, have blurred much of the supposed distinction between the two provisions as far as motive is concerned. Instead, the Board and the courts have applied a balancing test under both sections, weighing the employer interest in independent action against the impact upon employee rights. Yet, in the benchmark decision of *NLRB v. Burnup & Sims Inc.*,<sup>14</sup> the Supreme Court seemed to adhere to the distinction suggested by the strict letter of the two provisions. The employer discharged two of the most active union adherents in the mistaken belief that they had threatened to dynamite the plant if the organizing campaign failed. Section 8(a) (3) was technically inapplicable, for if the employer's story were believed the essential 8(a) (3) motivation would be lacking.<sup>15</sup> But the Court avoided the 8(a) (3) issue and decided the case solely under 8(a) (1). It held that if an employee who has engaged in protected, concerted activity is discharged in the mistaken view that misconduct occurred, 8(a) (1) is violated regardless of the employer's motive. The Court reasoned that even if the employer's act were motivated by legitimate considerations unrelated to union organizing, the discharge of the key union adherents would nevertheless inhibit other employees in their organizing efforts; thus interfering with their section 7 rights.<sup>16</sup>

#### A. *Changes in Conditions Under 8(a) (1)*

A slavish application of the *Burnup & Sims* approach to all changes made by an employer in working conditions or benefits during an organizing campaign would probably be unfortunate, for the purposes of the Act and interests of employees and employers would not be served by freezing benefits and conditions for the entire pre-election period. For example, a wage increase that the employer had determined to give prior to the organizing campaign ought to be implemented at its scheduled time even though some

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The statutory language "discrimination . . . to . . . discourage" means that the finding of a violation of 8(a)(3) normally requires that the discriminatory conduct was motivated by an antiunion purpose. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). The language of 8(a)(1), however, contains no such motivational requirement.

14. 379 U.S. 21 (1964).

15. Organizing activities lose their protected status if accompanied by unlawful conduct. See Koretz and Rabin, *The Development and History of Protected Concerted Activity*, 24 SYRACUSE L. REV. 715 (1973). Hence discharge on such grounds would not violate 8(a)(3), which runs only to protected concerted activity.

16. Cf. *Cooper Thermometer Co.*, 154 N.L.R.B. 502 (1965) which follows the same approach. See also *Robertshaw Controls Co.*, 161 N.L.R.B. 103 (1966), *enforcement granted in part*, 386 F.2d 377 (4th Cir. 1967).

employees the same wages and benefits in effect in its organized plants. The employer contended that the timing of the announcement of cases, but have instead utilized a motivation test very similar to that of 8(a) (3). Thus, changes during an organizing drive have been held to violate 8(a) (1) or to constitute election interference only if the employer's motivation was to influence the outcome of the election. The balance in these cases has been struck in favor of economically motivated employer action in spite of its impact on section 7 rights.

This is illustrated by *NLRB v. Exchange Parts Company*,<sup>18</sup> the leading case dealing with the promise or grant of benefits during the pre-election period. In *Exchange Parts* it was assumed that the employer's purpose in announcing new fringe benefits during the organizational campaign was to influence employees to vote against the union. The employer contended that since the announced grant of benefits was unconditional and there was no evidence that they would be withdrawn if the union won the election, there could be no tendency to interfere with section 7 rights. Justice Harlan's answer was the often repeated observation that the announcement simply revealed the "fist inside the velvet glove," that is, that the continued grant of such additional benefits would depend on whether the employer was pleased with the outcome of the election. While the opinion in *Exchange Parts* did not state that a motive to influence the outcome of the election is an essential part of an 8(a) (1) violation involving changes in benefits or other working conditions, subsequent cases make clear that such motive is a necessary ingredient of the violation.<sup>19</sup>

The task of showing that a change in benefits or conditions violates 8(a) (1) is not difficult. Some of the cases suggest that the promise or implementation of changes during an organizing campaign establishes the General Counsel's prima facie case, and that the burden then falls on the employer to explain the changes on grounds wholly independent of the union organizing efforts. An example of such an approach is *International Shoe*,<sup>20</sup> a case that involved election interference rather than 8(a) (1). The day before the NLRB election the employer announced that a wage increase would be granted in accordance with its policy of granting its non-union

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17. *NLRB v. Yokell*, 387 F.2d 751, 756 (2d Cir. 1967). Indeed, failure to grant the increase might violate 8(a)(1). *Gates Rubber Co.*, 182 N.L.R.B. 95 (1970).

18. 375 U.S. 405 (1964).

19. See, e.g., *Louisburg Sportswear Co. v. NLRB*, 462 F.2d 380 (4th Cir. 1972).

20. 123 N.L.R.B. 682 (1959).

employees the same wages and benefits in effect in its organized plants. The employer contended that the timing of the announcement turned on the fact that a settlement had just been reached in its other, organized plants. The Board found the explanation specious. It concluded that while a change in benefits during an organizing campaign is not a per se ground for setting the election aside, unless the employer can show that the change and particularly its timing were governed by factors other than the impending election, it will be assumed that the motive was to influence the outcome of the election. The Board held that "the burden of showing these other factors is upon the employer."<sup>21</sup> The "burden" language in these cases varies, ranging from a seeming burden on the General Counsel, to no statement of burden at all, to the suggestion that the very grant of benefits close to the election is in itself evidence of unlawful motive absent a strong showing of business justification unrelated to the election.<sup>22</sup> There is even an occasional drift into the "motive irrelevant" language of *Burnup & Sims*.<sup>23</sup>

The practitioner will, of course, be less interested in the theoretical underpinnings of the application of 8(a) (1) to unilateral action than in a pragmatic guide to the kinds of factors that will make out a violation of the Act. Given the rich variety of fact patterns in the reported cases, an exhaustive survey is beyond the reaches of this article. It is probably a safe generalization to conclude, however, that where the decision to make the change is arrived at before the union campaign begins, or where it is part of a general pattern of improvements in benefits, there is no violation of 8(a) (1) provided the timing of the announcement or implementation of the change can also be explained by factors unrelated to the organizing drive.<sup>24</sup> A good example is *Drug Fair-Community Drug Co.*,<sup>25</sup> in which the employer strengthened its stock option program, improved its sick leave plan and granted raises during the organizing period without violating 8(a) (1). The Board found that all three

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21. *Id.* at 684.

22. *Louisburg Sportswear Co. v. NLRB*, 462 F.2d 380 (4th Cir. 1972); *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490 (4th Cir. 1972); *NLRB v. Orleans Mfg. Co.*, 412 F.2d 94, 98 (2d Cir. 1969) (burden placed upon the employer); *see Drug Fair-Community Drug Co.*, 162 N.L.R.B. 843 (1967) (no statement of burden); *Champion Pneumatic Mach. Co.*, 152 N.L.R.B. 300, 306 (1965) (trial examiner placed burden on the General Counsel).

23. *See Robertshaw Controls Co. v. NLRB*, 386 F.2d 377, 383-84 (4th Cir. 1967); *American Freightways Co.*, 124 N.L.R.B. 146, 147 (1959) (motive held irrelevant to finding violations of § 8(a)(1)).

24. *See* notes 22 & 23 *supra*.

25. 162 N.L.R.B. 843 (1967).



benefits had been contemplated before union activity occurred, and that the timing could be explained in the respective case of each benefit by tax considerations, the relationship to like benefits granted to other employees not in the bargaining unit affected, and an historical pattern of wage increases. On the other hand, the existence of other violations of the Act and the closeness of the change to the election date may demonstrate a motive to influence the outcome of the election.<sup>26</sup>

It remains to inquire why the Board and courts have moved away from the literal reading of 8(a) (1), under which motive is irrelevant, to the imposition of a motive requirement very similar to 8(a) (3). *Burnup & Sims* begins to suggest the answer, for in holding that the discharges in that case violated 8(a) (1) regardless of motive, Justice Douglas, writing for the majority, was careful to point out that "we are not in the realm of managerial prerogatives."<sup>27</sup> Justice Harlan's separate opinion, in which he called for a modification of the majority's remedy, made the same point more precisely, for he distinguished in a footnote 8(a) (1) cases in which he thought the Board could properly find a violation even though the employer was not motivated by anti-union considerations. All the cited cases, in Justice Harlan's view, involved little or no "business justification."<sup>28</sup> Justice Harlan was to amplify this position two years later when, writing for the majority in *Textile Workers Union v. Darlington Manufacturing Co.*, he made clear that interference with section 7 rights will not always support an 8(a) (1) violation:

But it is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a) (1) is violated. . . . A violation of § 8(a) (1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive. Whatever may be the limits of § 8(a) (1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a) (1), whether or not they involved sound business judgment, unless they also violated § 8(a) (3).<sup>29</sup>

In shrinking from a literal application of 8(a) (1) to cases involving changes of conditions during an organizing campaign, the Board and courts have engaged in a weighing and balancing process. The talisman for the employer interests in this equation is the

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26. See *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, (4th Cir. 1972); cf. *Orleans Mfg. Co.*, 412 F.2d 94, 98 (2d Cir. 1969).

27. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 24 (1964).

28. *Id.* at 25 n.2.

29. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965). See Janasosky, *New Concepts in Discrimination and Interference Under the NLRA*, 70 COLUM. L. REV. 81 (1970).

phrase "management prerogative," which in the context of these cases generally outweighs any adverse impact on section 7 rights of employees, although the quoted language from *Darlington* leaves open the possibility of the balance going the other way in individual cases. This will not be the last time we find that the "management prerogative" interest tips the balance in favor of the employer. Nor is this the only context in which the Board or court fails to fully articulate why the employer interest outweighs that of the employees.

### B. Changes in Conditions Under 8(a) (3)

In cases in which changes in conditions are challenged under 8(a) (3) we find the same balancing at work between the employer interest in running its business free of restraints and the employee concern that there be no discrimination because of union activity.<sup>30</sup> Section 8(a) (3) is generally invoked to challenge a decrease in benefits, such as a reduction in hours, or termination of employment through layoffs, discharge or total or partial closing of the business. While 8(a) (1) and (3) have both been interpreted to contain a motivational requirement, a reading of representative decisions under each section leaves the impression that the evidentiary hurdle may be tougher under 8(a) (3), particularly since more significant remedial consequences may be at stake.<sup>31</sup>

As with 8(a) (1), the requirement of motive has been amended through judicial construction of 8(a) (3). Perhaps the best example is *NLRB v. Erie Resistor Corp.*,<sup>32</sup> in which the employer, in order to induce replacements to work during a strike, extended them super-seniority to protect them against subsequent layoff should the volume of business shrink. While the employer gave a plausible, wholly economic justification for this action, thus negating a finding of discriminatory motivation, its conduct plainly had a devastating

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30. Action by the employer in response to added economic burdens brought about by unionization is generally held to be a legitimate economic response rather than prohibited discriminatory conduct. *E.g.*, *Star Baby Co.*, 140 N.L.R.B. 678 (1963); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *Jay Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961); *NLRB v. Missouri Transit Co.*, 250 F.2d 261 (8th Cir. 1957); *Mount Hope Finishing Co. v. NLRB*, 211 F.2d 365 (4th Cir. 1954); *NLRB v. Houston Chronicle Pub. Co.*, 211 F.2d 848 (5th Cir. 1954); *cf. Valley Forge Flag Co. v. NLRB*, 364 F.2d 310 (3d Cir. 1966); *McLoughlin Mfg. Co.*, 164 N.L.R.B. 140 (1967).

31. *E.g.*, compare, *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 493 (4th Cir. 1972), with *DuPont Co. v. NLRB*, 83 L.R.R.M. 2756, 2758-59 (4th Cir. 1973), and *J.A. Hackney & Sons, Inc. v. NLRB*, 462 F.2d 943, 944-45 (4th Cir. 1970).

32. 373 U.S. 221 (1963).

effect upon the strike. This massive impact upon employees' section 7 rights led the Court to conclude that the conduct in *Erie Resistor* carried its own indicia of intent and no further specific proof of unlawful motive was necessary:

his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.<sup>33</sup>

While *Erie Resistor* contains language suggesting that this conclusion may be rebutted by compelling evidence of economic necessity, a later case, *NLRB v. Great Dane Trailers, Inc.*,<sup>34</sup> makes it clear that there is a category of employer misconduct so "inherently destructive" of employee rights that it is unlawful regardless of motive.

There is much excellent literature<sup>35</sup> on the vexing question of the proper role of motive in assessing violations of the Act, not only in the context of *Erie Resistor* and *Great Dane*, but in the lockout cases of *NLRB v. Brown* and *American Ship Building Co. v. NLRB*.<sup>36</sup> Little would be gained by a further discussion of motive in this article. It is important, however, for our purposes to observe, as Justice White did in his majority opinion in *Erie Resistor*<sup>37</sup> and Justice Goldberg did in his concurring opinion in *American Ship*,<sup>38</sup> that what is ultimately involved in these cases is less an assessment of motive than a weighing and balancing of the respective interests of employees in vindicating their section 7 rights and of employers in operating their businesses.<sup>39</sup> In *Erie Resistor* the employer inter-

33. *Id.* at 228.

34. 388 U.S. 26 (1967).

35. Oberer, *supra* note 12; Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Employee Free Choice*, 32 U. CHI. L. REV. 735, 761 (1965).

36. *NLRB v. Brown*, 380 U.S. 278 (1965); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

37. 373 U.S. 221, 236 (1963).

38. 380 U.S. 300, 339-40 (1965).

39. This conclusion is supported by analysis of representative cases decided within the last 4 years involving a form of employer action often challenged under 8(a)(3)—the layoff of a significant number of employees during an organizing campaign. The weight attributed to valid interests of the employer is usually determinative in ascertaining whether a layoff was for discriminatory rather than economic reasons. Thus, the cases indicate that a discriminatory motive is shown if the employer could not have known the economic facts he assertedly relied upon until after the decision to lay off was made, *Colonial Corp.*, 171 N.L.R.B. 1553 (1968); if other workers were forced to work overtime to complete the work of the terminated employees, *Rollins Telecasting*, 199 N.L.R.B. No. 92 (Oct. 10, 1972); if an alleged shortage of raw materials turns out to have no relationship to the layoff of employees, *Scarborough Lumber & Bldg. Supply, Inc.*, 193 N.L.R.B. 791 (1972); *Tesoro Petroleum Corp.*, 174 N.L.R.B. 1285 (1969); or if the adverse financial situation relied upon was deliberately created, *Manilia Mfg. Co.*, 171 N.L.R.B. 1259 (1968). The Board is generally concerned with

est in securing strike replacements through the grant of seniority was subordinated to section 7 rights while in *NLRB v. MacKay Radio & Telegraph Co.*,<sup>40</sup> the employer's right merely to replace strikers was upheld, in spite of its inevitable discouragement of section 7 rights. In the lockout cases and in a case involving the legality of a hiring hall, *Teamsters Local 357 v. NLRB*,<sup>41</sup> no hard lines were drawn, but each case was left to be resolved on a finding of specific motive to discriminate. The picture is not complete, for the Supreme Court has yet to face the issue of the employer's right to lock out employees and replace them.<sup>42</sup> Such a case poses a direct clash between the interdiction in *American Ship* against assessing the economic weapons used by the parties in bargaining and the condemnation in *Erie Resistor* of conduct inherently destructive of employee rights.

The most extreme case of judicial modification of the 8(a) (3) motivational requirement to accommodate employer interests is *Darlington*,<sup>43</sup> which upheld an employer's right to go out of business entirely regardless of motive. The shutdown in response to the

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previous personnel history to see how the employer reacted in the past to similar situations, *Webber Am., Inc.*, 194 N.L.R.B. No. 109 (Dec. 22, 1971); *Martech Corp.*, 169 N.L.R.B. 479 (1968), and will scrutinize subcontracting situations carefully, *NLRB v. Roberts & Sons, Inc.*, 451 F.2d 941 (2d Cir. 1971); *Hownet Corp.*, 197 N.L.R.B. No. 91 (June 13, 1972). Where the reason for the layoff is "hazy," *Drivex Co.*, 203 N.L.R.B. No. 145 (May 31, 1973); *Anderson Mfg. Co.*, 184 N.L.R.B. No. 50 (July 7, 1970); *McGraw-Edison Co.*, 172 N.L.R.B. 1604 (1968), or based upon shifting considerations, *R.G. LeTourneau, Inc.*, 200 N.L.R.B. No. 66 (Nov. 24, 1972); *Steve Alois Ford*, 179 N.L.R.B. 229 (1969), a violation may also be found.

On the other hand a showing of legitimate economic hardship in the business, *Mississippi Tank Co.*, 194 N.L.R.B. No. 166 (Jan. 11, 1972), or the industry generally, *Sequoyah Spinning Mills*, 194 N.L.R.B. No. 179 (Jan. 20, 1972), tends to avoid an 8(a)(3) finding, as does the observance of careful business practices such as respecting order of seniority in layoffs, notification to the union and careful record keeping, *J.A. Hackney & Sons, Inc. v. NLRB*, 426 F.2d 943 (4th Cir. 1970), *enforcing in part* 176 N.L.R.B. 63 (1969); *Hildebrand Co.*, 198 N.L.R.B. No. 96 (Aug. 3, 1972); *Michigan Chem. Corp.*, 197 N.L.R.B. No. 194 (June 28, 1972); *Hoover, Inc.*, 180 N.L.R.B. 1069 (1970); *Slaughter Co.*, 172 N.L.R.B. 60 (1968).

Interestingly, even though the layoff of a substantial number of employees might interfere with § 7 rights because the remaining employees would sense hostility to organizing, 8(a)(1) violations in the absence of a specific finding of motive under a *Burnup & Sims* theory were found in only one case, *Ertel Mfg. Corp.*, 200 N.L.R.B. No. 84 (Nov. 28, 1972), and even then as to only 3 of the more than 20 workers terminated.

40. 304 U.S. 333 (1938).

41. 365 U.S. 667 (1961). Lockout cases, *NLRB v. Brown*, 380 U.S. 278, 287-88 (1965); *American Ship Bldg. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Teamsters Local 449 (Buffalo Linen)*, 353 U.S. 87 (1957).

42. *Inland Trucking Co. v. NLRB*, 440 F.2d 562 (7th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971); *Ralston Purina Co.*, 204 N.L.R.B. No. 43 (June 22, 1973); *Ozark Steel Fabricators, Inc.*, 199 N.L.R.B. No. 136 (Oct. 19, 1972); *Inter Collegiate Press*, 199 N.L.R.B. No. 35 (Sept. 29, 1972); *Ottawa Silica Co.*, 197 N.L.R.B. No. 53 (June 13, 1972).

43. 380 U.S. 263 (1965).

union's victory in the organizing campaign in *Darlington* would appear to present the clearest sort of violation of 8(a) (3). But Justice Harlan found no liability because "[a] proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither."<sup>44</sup> Here employer considerations outweighed what surely was a devastating impact upon employee rights under section 7. Justice Harlan may have concluded that the balance could properly fall on the employer's side since it would be the rare employer who would take such a drastic step, particularly since no future benefit could be derived from it.<sup>45</sup> Even if one agrees with this assessment in cases involving an absolute shutdown of the business, the calculus applied in partial shutdown cases is less compelling. Justice Harlan held that even if the termination of a portion of the business is plainly motivated, as in *Darlington*, by the employees' selection of the union, a violation of 8(a) (3) does not necessarily result. Rather, a further layer is added to the motivation test, whether the shutdown is "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."<sup>46</sup> Justice Harlan gave no explanation for imposing this more particularized motive test in cases of partial shutdowns than in standard 8(a) (3) cases. One can only assume that he was guided by the same considerations that he used in concluding that such shutdowns could not violate 8(a) (1) independently of a showing of unlawful motivation under 8(a) (3) because the shutdown involved an employer decision "peculiarly" a matter of "management prerogative."<sup>47</sup> This tighter test has resulted in few post-*Darlington* violations of 8(a) (3) in partial closing cases.<sup>48</sup> Nor is it

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44. *Id.* at 270.

45. *Id.* at 272-74.

46. *Id.* at 275.

47. *Id.* at 269.

48. See *Morrison Cafeterias Consol., Inc. v. NLRB*, 431 F.2d 254 (8th Cir. 1970), *aff'g* 177 N.L.R.B. 591 (1969) holding that a single integrated enterprise that closed down one of its cafeterias after the union won an election did not have purpose of chilling unionism at its other cafeterias. See also *G.W. Murphy Indus., Inc.*, 184 N.L.R.B. No. 9 (June 30, 1970) where closing of union-organized tool room at the same time union was seeking to organize production and maintenance employees in the same plant did not violate 8(a)(3). Section 8(a)(3) violations were found in the *Darlington* case on remand, *Darlington Mfg. Co.*, 165 N.L.R.B. 1074 (1967), *aff'd*, 397 F.2d 760 (4th Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969), and in *Lee's*

clear to what extent the *Darlington* test may swallow up the traditional motive requirement of 8(a) (3). Hopefully, the closing of a single department in a plant would be tested under the traditional motive rubric, although it would seem that in the case of a single department closing the "chilling" test of *Darlington* would be easier to meet than the closing of a single plant.

Under both 8(a) (1) and (3) a judicial exception has been engrafted upon the otherwise plain language of the respective sections limiting employer freedom. In both cases the exception has been built around the nonstatutory concept of management prerogatives. Further, different levels of management rights have triggered the exception in cases involving 8(a) (1), 8(a) (3), or the special situation of *Darlington*, suggesting that the management rights concept is itself not an absolute one. Yet another variation of the management rights exception will arise in the context of 8(a) (5) and the collective bargaining process.

### III. THE ORGANIZED PLANT DURING COLLECTIVE BARGAINING—SECTION 8(a) (5) RESTRAINTS

The most important statutory limitation upon independent employer action is section 8(a) (5) of the Act. This section, which becomes a significant factor only after the union has obtained bargaining rights,<sup>49</sup> affects the scope of employer independent action in two separate and distinct ways. First, it determines the range of subjects that the union may properly insist upon bringing to the bargaining table. Thus it helps to shape the contours of the bilateral agreement reached by the parties in negotiations. To the extent that 8(a) (5) does not require mandatory bargaining it preserves the status quo. The second application of 8(a) (5) is to limit the employer's right to take unilateral action by prohibiting the employer from making changes without prior negotiation with the union. In this respect the inapplicability of 8(a) (5) gives the employer license to change the status quo.

Both the affirmative use of 8(a) (5)—as a vehicle for proposing bilateral change—and its negative application—to bar unilateral change—are governed by the same statutory language. Section 8(a)

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Shopping Center, 198 N.L.R.B. No. 73 (July 28, 1972), involving closing of 2 of 3 contiguous operations.

49. Bargaining rights may be obtained through NLRB certification of a Board conducted election, voluntary recognition, or a bargaining order, see National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1973); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). For the applicability of 8(a)(5) to the organizing stage see note 12 *supra*.

(5) sets forth the obligation to bargain in both situations, but the dimensions of that duty are contained in section 8(d).<sup>50</sup> The definition of mandatory subjects of bargaining in 8(d) is imprecise and open-ended, requiring bargaining over "wages, hours, and other terms and conditions of employment."<sup>51</sup> Naturally, the Board and courts have fleshed out the statutory definition, but in so doing they have failed to consider the different problems involved in applying the duty to bargain to situations in which the union seeks to change the status quo through bilateral agreement or to preserve the status quo by prohibiting unilateral action. While it is my view that in both situations the definition of mandatory subjects of bargaining has been overly restrictive, the damage caused by too narrow a scope of bargaining is particularly felt when it inhibits mutual allocation of functions through collective bargaining. Indeed, the direction in labor relations is presently to encourage resolution of disputes through the arbitral process, as *Collyer Insulated Wire and Boys Markets, Inc. v. Retail Clerks Local 770*<sup>52</sup> plainly show. In this forum the collective bargaining agreement is the primary source of rights and responsibilities. If the contract is to be definitive, then maximum freedom must be given to the parties in negotiations to deal with all subjects that are likely to be sources of contention later on.

#### A. Application of Bargaining Duty to Unilateral Changes

The seminal decision on employer unilateral action is *NLRB v. Katz*,<sup>53</sup> a case that arose during negotiations for a new agreement. The primary issue in *Katz* was whether unilateral changes in subject areas that plainly fit the 8(d) definition could be held to violate 8(a) (5) where the employer's conduct in negotiations otherwise demonstrated good faith in seeking to reach agreement. The Court held that such changes do violate 8(a) (5) for they tend to frustrate the overall objective of reaching an agreement.<sup>54</sup>

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50. National Labor Relations Act §§ 8(a)(5) and 8(d), 29 U.S.C. § 158(a)(5) & 158(a) (1973).

51. National Labor Relations Act § 8(d); 29 U.S.C. § 158(d) (1973).

52. *Collyer Insulated Wire*, 192 N.L.R.B. No. 150 (Aug. 20, 1971); *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970), discussed in part IV, *infra*.

53. 369 U.S. 736 (1962).

54. *Katz* has since been applied to bar unilateral action when negotiations are not in progress, for example, during the term of a collective bargaining agreement. With the advent of *Collyer* most unilateral action during a contract term will be dealt with under the arbitral process, hence unilateral action cases under 8(a)(5) will probably arise in the future primarily in the negotiating phase. Part V of this article deals separately with unilateral changes during the hiatus between contracts, since that situation poses special problems regarding the effect

*Katz* involved the unilateral grant of a wage increase, merit increases and a change in the existing sick leave program, all plainly involving "terms and conditions of employment." With one exception,<sup>55</sup> *Katz* did not deal with the difficult issues that can arise as to what is a change in wages, hours, or terms and conditions of employment sufficient to trigger the application of 8(a) (5). These close questions, addressing the basic issue of whether a particular change is barred by 8(a) (5), generally fit into three broad categories of inquiry:

(1) Does the change involve the employment relationship? Cases in this category essentially involve an interpretation of the statutory phrase "of employment." Most of the cases in this area deal with changes peripheral to the employment relationship, for example, abolition of parking lot privileges, changes in cafeteria prices, and actions with regard to housing facilities for employees.<sup>56</sup> Since the ultimate question is how close a nexus there is to the employment relationship, the outcome of the cases varies with the factual situation. A recent illustration of the difficulty in deciding these cases is *McCall Corp. v. NLRB*,<sup>57</sup> in which a majority in the Fourth Circuit held that there was no duty to bargain over a change of prices of foods in cafeteria vending machines because the employees were not dependent upon this service. The dissent contended that "the conditions of a person's employment are most obviously the various physical dimensions of his working environment," including where and how he eats.<sup>58</sup> A second issue in this category is whether an employer-employee relationship exists. In the recent Supreme Court decision in *Allied Chemical Workers Local 5 v. Pittsburgh Plate Glass Co.*<sup>59</sup> the Court held that the employer had no duty to bargain over pension benefits for retirees because they were not employees under the Act.

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of past practices and the weight to be given contractual allocations of rights under the expired agreement.

55. See text at 148 *infra*.

56. See, e.g., *Westinghouse Elec. Co. v. NLRB*, 387 F.2d 54 (4th Cir. 1967), *rev'g on rehearing* 369 F.2d 891 (4th Cir. 1966) (cafeteria food prices); *NLRB v. Lehigh Portland Cement Co.*, 205 F.2d 821 (4th Cir. 1953) (rental fees on company-owned houses); *Abingdon Nursing Center*, 197 N.L.R.B. No. 123 (June 20, 1972) (hot lunch service); *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949) (price of meals provided by employer in remote lumber camp). In *Westinghouse* the Board attempted to formulate the test as whether employees would have taken the job without the benefit in question, 156 N.L.R.B. 1080 (1966).

57. 432 F.2d 187 (1972), *rev'g* 172 N.L.R.B. 540 (1968).

58. *Id.* at 189, quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring).

59. 404 U.S. 157 (1971).



(2) Is the "change" really a departure from the status quo? In this category are benefits whose grant is so intermittent or discretionary that the failure to make the grant cannot be considered a departure from the status quo. The most common examples involve year-end bonuses or holiday gifts such as Christmas turkeys. These cases turn upon the frequency of the conferral of the benefit as well as verbal disclaimers as to the continued expectation of the grant.<sup>60</sup> *Katz* raised a related problem with regard to the employer's grant of merit increases during negotiations. The employer contended that these increases were in line with a "long-standing practice" of granting quarterly or semi-annual merit reviews, and thus were "a mere continuation of the status quo."<sup>61</sup> The Court disagreed with the factual assertion, concluding that "the raises here in question were in no sense automatic, but were informed by a large measure of discretion."<sup>62</sup> Subsequent cases have relied upon *Katz* in excusing bargaining where the alleged change was merely a continuation of the status quo.<sup>63</sup>

The most difficult cases in this category involve a continuum of employer conduct, raising the question whether the asserted unilateral action represents a quantitative or qualitative departure from conduct that the employer has been permitted to engage in unilaterally in the past. This issue most frequently arises in subcontracting cases. The leading case, *Fibreboard Paper Products Corp. v. NLRB*,<sup>64</sup> held that certain forms of subcontracting are subject to the duty to bargain, but disclaimed passing upon all variations of contracting out. Subsequently, in *Westinghouse Electric Corp.*,<sup>65</sup> the Board rejected a per se rule for subcontracting situations, holding that the duty to bargain over subcontracting arises only where the proposed action "will effect some change in existing employment terms or conditions within the range of mandatory bargaining."<sup>66</sup> It amplified this statement by noting that a violation could

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60. *E.g.*, *Beacon Journal Publishing Co. v. NLRB*, 401 F.2d 366 (6th Cir. 1968); *Century Elec. Co.*, 180 N.L.R.B. 1051 (1970); *Graveslund Co.*, 175 N.L.R.B. 63 (1968); *K-D Mfg. Co.*, 169 N.L.R.B. 57 (1968); *McCulloch Corp.*, 132 N.L.R.B. 201, 213-14 (1961); *H.E. Fletcher Co.*, 131 N.L.R.B. 474, 484-85 (1961). See the related discussion in part IV(c) *infra*.

61. *NLRB v. Katz*, 369 U.S. 736, 746 (1962).

62. *Id.*

63. *See, e.g.*, *Wisconsin Southern Gas Co.*, 173 N.L.R.B. 483 (1968); *American Smelting & Refining Co.*, 167 N.L.R.B. 209 (1967), *aff'd*, 406 F.2d 552 (9th Cir. 1969); *New Orleans Bd. of Trade, Ltd.*, 152 N.L.R.B. 1258 (1965).

64. 379 U.S. 203 (1964), *aff'g* 332 F.2d 411 (D.C. Cir. 1963), *enforcing* 138 N.L.R.B. 500 (1963). For discussion of *Fibreboard* see text beginning at 150.

65. 150 N.L.R.B. 1574 (1965).

66. *Id.* at 1576.

be found if the subcontracting were a departure from past practice "or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit."<sup>67</sup> This test has been followed in subsequent subcontracting cases.<sup>68</sup>

This multi-factor approach to whether subcontracting violates 8(a) (5) reflects the complexity of the subcontracting issue and suggests that it cannot be resolved by an either/or application of 8(a) (5). This is true of any area which involves frequent and recurrent changes over which bargaining would be cumbersome.<sup>69</sup> The Board's evaluation takes into account not only past practices, but weighs the impact of the action upon bargaining unit employees, thus setting a bottom line on employer unilateral action in this area. The Board's role in the subcontracting cases is very similar to that of the arbitrator who takes into account a wide range of equitable considerations in making his decision.<sup>70</sup> The *Collyer* decision has had the beneficial effect of transferring questions of this sort to the arbitral forum, where more flexible tools can be employed. Rational decision in this area is especially enhanced by careful contractual guidelines provided by the parties.

(3) Does the change involve a term or condition of employment? By far the most controversial category of independent action asserted to violate 8(a) (5) entails changes that are clearly related to the employment nexus and have a demonstrable impact upon employees but have nevertheless been thought to be immune from bargaining because they involve basic managerial prerogatives. These actions usually result in some form of abolition of bargaining unit work, ranging from subcontracting and layoffs to more pervasive and permanent changes such as termination of part or all of the business.

Two preliminary points should be made about these kinds of cases. First, a decision that is exempt from 8(a) (5) because it in-

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67. *Id.*

68. *E.g.*, *Ohio Medical Prods.*, 194 N.L.R.B. No. 1 (Nov. 3, 1971); *Allied Chem. Corp.*, 151 N.L.R.B. 718 (1965). For a comprehensive analysis of this category of cases see Dunau, *Subcontracting and Unilateral Employer Action*, 18 N.Y.U. ANNUAL CONFERENCE ON LABOR 219 (1965).

69. For example, in *Westinghouse Elec. Corp.*, 156 N.L.R.B. 1080 (1966), the Board noted that it would be impractical to require bargaining over every proposed instance of subcontracting, but held that the union could compel bargaining over the extent to which subcontracting would be permitted in the future. This appears to reflect the distinction urged in this article between bargaining over particular employer unilateral action and bargaining to bilaterally set the contours of future management freedom.

70. *See* part IV *infra*.

volves a basic management right may nevertheless be unlawful under 8(a) (3) if a discriminatory motivation can be shown.<sup>71</sup> As indicated in our previous discussion of *Darlington*,<sup>72</sup> however, the more drastic forms of employer discrimination, such as total and partial closings, may escape 8(a) (3) because of the more restrictive test of motivation in those cases. Second, even though bargaining as to the decision itself may not be required under 8(a) (5), it is well settled that the employer must bargain with the union as to the effects of such a decision. Included in the obligation of "effect-bargaining" is the requirement that the employer give prior notice to the union of the intended change. Bargaining would then be limited, for example, to questions such as the impact of the change on severance pay, order of termination of the employees, placement elsewhere and retraining.<sup>73</sup>

The guiding light in defining the scope of mandatory collective bargaining is the Supreme Court's *Fibreboard* decision.<sup>74</sup> In the years before *Fibreboard* the NLRB had taken an open and flexible approach to the question of the scope of the duty to bargain, a position sanctioned in another context by the Supreme Court and reflected in the statutory history of the Act.<sup>75</sup> It had never dealt,

71. A good example is *Summit Tooling Co.*, 195 N.L.R.B. No. 91 (Feb. 22, 1972), in which the Board found an 8(a)(3) but not 8(a)(5) violation in the closing of a division of the company.

72. See part II at 9 *supra*.

73. See, e.g., *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), and cases cited in note 89 *infra*.

74. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). The author has treated the ramifications of *Fibreboard* at length in Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803 (1971).

75. *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944).

The House version of the 1947 Bill spelled out a carefully limited catalogue of subjects for mandatory bargaining and expressly stated that no other subjects need be discussed. H.R. 3020, as reported, 1 Leg. Hist. of LMRA 39-40. H.R. 3020 as passed by the House, 1 Leg. Hist. of LMRA 166-67. The House Report on H.R. 3020 made clear that the purpose of this portion of the bill was to cure the defect in the prior statute of the absence of limitation on the scope of the duty to bargain:

The union has no right to bargain with the employer about who his agents will be, what price he will charge, what his profits will be, or how he shall manage his business, so long as he does not violate the union's contract with him or ignore his obligations under the Labor Act.

1 Leg. Hist. of LMRA 313, 314.

The minority House Report urged rejection of these words of limitation, arguing that they would exclude numerous subjects from bargaining, such as "subcontracting of work, and a host of other matters traditionally the subject matter of collective bargaining in some industries or in certain regions of the country." The report continued:

however, with the precise issue raised in *Fibreboard*, the obligation to bargain with the union before subcontracting on-premises janitorial work. In its first look at the case in *Fibreboard I*,<sup>76</sup> the NLRB held that there was no duty to bargain about the decision itself, reasoning that the statutory language is not "so broad and all inclusive as to warrant an inference that Congress intended to compel bargaining concerning basic management decisions. . . ."<sup>77</sup> One year later *Fibreboard* was reargued before the NLRB, but in the interim both the Board membership had changed and *Fibreboard I* had been overruled in *Town & Country Manufacturing Co.*<sup>78</sup> *Fibreboard II*,<sup>79</sup> elaborating on the rationale in *Town & Country*, held that 8(a) (5) is not incompatible with the asserted right of management to run its business, for the bargaining requirement

in nowise restrains an employer from formulating . . . an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment.<sup>80</sup>

The Supreme Court upheld *Fibreboard II*,<sup>81</sup> but its decision has proven to be a difficult guide, for it points at the same time in conflicting directions. In one sense it is a very broad holding, for the Court applied the language of 8(d) literally to the subcontracting situation and concluded that the statute plainly covered "termination of employment, which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit."<sup>82</sup> This reasoning would, of course, apply to virtually any kind of termination of bargaining unit work. But the Court was careful to point out that it was concerned

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The appropriate scope of collective bargaining cannot be determined for a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors.

1 Leg. Hist. of LMRA 362.

The final bill contained no such restrictions on the scope of bargaining; the wording of the original Act was left unchanged.

Numerous judicial decisions have recognized the propriety of such a flexible, expansive approach, e.g., *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176 (1971); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 358-59 (1958) (Harlan, J., dissenting); *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944); *Fibreboard Paper Prods. Corp. v. NLRB*, 332 F.2d 411, 414 (D.C. Cir. 1963) (Burger, J.).

76. *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558 (1961).

77. *Id.* at 1561.

78. 136 N.L.R.B. 1022 (1962).

79. *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550 (1962).

80. *Id.* at 551, quoting *Town & Country Mfg. Co.*, 136 N.L.R.B. at 1027.

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

82. *Id.* at 210.

only with a limited form of termination of work—subcontracting—and but one variant of contracting out—on-premises maintenance work that continued to be performed on the premises, but by other, non-union employees.<sup>83</sup>

The ultimate consideration of the Court in *Fibreboard* was not the literal language of 8(a) (5), but the more practical question whether collective bargaining made sense in the context of a decision to subcontract. The Court concluded that bargaining was feasible in such a context both because subcontracting restrictions are common in collective-bargaining agreements, indicating that employers and unions recognize the viability of dealing with such a subject in negotiations, and because there was a substantial likelihood that the union could make concessions involving manning, overtime, wage levels and the like that might induce management not to contract out the work in question.<sup>84</sup>

In addition to the broad language quoted above and the ultimate, pragmatic basis for the decision, *Fibreboard* has a narrow aspect, deriving from the concurring opinion of Justice Stewart. He contended that

[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. . . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area [of mandatory bargaining].<sup>85</sup>

Until very recently the Board read *Fibreboard* expansively, generally ignoring the pragmatic considerations set forth in the opinion.<sup>86</sup> It applied 8(a) (5) to almost every kind of employer action whose implementation would curtail bargaining unit work.<sup>87</sup> Per-

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83. *Id.* at 215. The Court noted that its grant of certiorari was limited to but one kind of subcontracting of work.

84. *Id.* at 211, 213-14.

85. *Id.* at 223.

86. Pragmatic factors were occasionally considered, e.g., *McGregor Printing Corp.*, 163 N.L.R.B. 938, 939-40 (1967); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 567-68 (1966).

87. E.g., *McLoughlin Mfg. Co.*, 182 N.L.R.B. 958 (1970), supplementing 164 N.L.R.B. 140 (1967); *Metromedia, Inc.*, 182 N.L.R.B. 202 (1970); *Senco, Inc.*, 177 N.L.R.B. 882 (1969); *Skaggs Drug Center, Inc.*, 176 N.L.R.B. 737 (1969); *Les Schwab Tire Centers, Inc.*, 176 N.L.R.B. 164 (1968); *Weltronic Co.*, 173 N.L.R.B. 235 (1968), enforced, 419 F.2d 1120 (6th Cir. 1969) (transfer of work to another plant); *Witlock Supply Co.*, 171 N.L.R.B. 201 (1968); *General Motors Corp.*, 169 N.L.R.B. 827 (1968); *Dixie Ohio Express*, 167 N.L.R.B. 573 (1967), *rev'd*, 409 F.2d 10 (6th Cir. 1969); *Assonet Trucking Co.*, 156 N.L.R.B. 350 (1965); *Northwestern Publishing Co.*, 144 N.L.R.B. 1069 (1963), enforced, 343 F.2d 521 (7th Cir. 1965); *Renton News Record*, 136 N.L.R.B. 1294 (1962) (automation and reorganization). In *McLoughlin*

haps the clearest explication of the Board's conviction that employee protection is paramount to management's interest in running its business was *Ozark Trailers, Inc.*<sup>88</sup> Meanwhile the reviewing courts took the opposite view, ignoring the pragmatic test of the *Fibreboard* majority and reading the Stewart concurrence as though it were the majority opinion. The courts denied enforcement of Board orders in a series of cases involving various forms of termination of bargaining unit work. Most of the circuit courts had an opportunity to pass on the question, and invariably the rationale for refusing to impose a bargaining order was couched in management rights language.<sup>89</sup>

Then, in 1971, following another change in its membership, the Board in *General Motors Corp.*<sup>90</sup> retreated from its expansive interpretation of *Fibreboard* to the position shared by Justice Stewart and the circuit courts, in which the scope of bargaining under 8(d) is circumscribed by managerial prerogatives. *General Motors* was upheld in a split decision by the District of Columbia Circuit,<sup>91</sup> and

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bargaining was required only as to the termination aspect of the decision and not the relocation of the business. *Cf. McGregor Printing Corp.*, 163 N.L.R.B. 938 (1967) (no duty to bargain over relocation aspect of decision even though employer had signed agreement for construction and lease of new plant).

*Red Cross Drug Co.*, 174 N.L.R.B. 85 (1969); *Drapery Mfg. Co.*, 170 N.L.R.B. 1706 (1969), *rev'd*, 425 F.2d 1026 (8th Cir. 1970); *Thompson Transp. Co.*, 165 N.L.R.B. 746 (1967), *rev'd*, 406 F.2d 698 (10th Cir. 1968); *McGregor Printing Corp.*, 163 N.L.R.B. 938 (1967); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1967); *Transmarine Navigation Corp.*, 152 N.L.R.B. 998, *rev'd*, 380 F.2d 933 (9th Cir. 1967) (closing part of a business).

88. 161 N.L.R.B. 561 (1966): "[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." *Id.* at 567.

89. *See NLRB v. Jackson Farmers, Inc.*, 457 F.2d 516 (10th Cir. 1972); *NLRB v. Acme Indus. Prods.*, 416 F.2d 40 (6th Cir. 1971); *NLRB v. Drapery Mfg. Co.*, 425 F.2d 1026 (8th Cir. 1970); *NLRB v. Thompson Transp. Co.*, 406 F.2d 698 (10th Cir. 1968); *NLRB v. Transmarine Navigation Co.*, 380 F.2d 933 (9th Cir. 1967); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965). *But see ILGWU v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972), in which the District of Columbia Circuit, in contrast with the trend in the other circuits, held that a decision to relocate a plant is a mandatory subject of bargaining. The same court, however, subsequently followed the Board's seemingly more restrictive view in affirming the Board's decision in *General Motors* in *Local 864, UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972). Judge Bazelon dissented, finding no significance in the Board's characterization of the form of termination of work involved in *General Motors* as a "sale" as opposed to subcontracting.

90. 191 N.L.R.B. No. 149 (July 8, 1971). *General Motors* involved the sale of part of the business. *But see* the dissenting opinion of Judge Bazelon on review of *General Motors, Local 864, UAW*, 470 F.2d 422, 425 (D.C. Cir. 1972) (Bazelon, J., dissenting). The Board's view in *General Motors* is further amplified in *Summit Tooling*, 195 N.L.R.B. No. 91 (Feb. 22, 1972). *See Triplex Oil Ref. Div. of Pentac Corp.*, 194 N.L.R.B. No. 86 (Dec. 10, 1971). *But cf. Johnson's Indus. Caterers, Inc.*, 197 N.L.R.B. No. 60 (June 9, 1972).

91. *Local 864, UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972).

the Supreme Court has indicated in a footnote an inclination to follow the Stewart approach in *Fibreboard*.<sup>92</sup>

The current view of the scope of the duty to bargain seems to me to be unwarranted and unwise, wholly failing to consider the concrete, practical factors relied upon in *Fibreboard*. A review of the post-*Fibreboard* cases indicates that bargaining did have a fair chance of succeeding under the pragmatic *Fibreboard* test.<sup>93</sup> The possibility of constructive resolution of problems at the bargaining table, however slight, appeared to justify giving greater weight to the interests of employees about to be thrown out of jobs than to an asserted managerial need for freedom, particularly when it was not clear that bargaining would unduly interfere with the prerogatives asserted.<sup>94</sup> As the agency primarily charged with enforcing the Act, the Board's duty lies in making a comprehensive empirical study of whether bargaining is realistic in the kinds of situations involved in the post-*Fibreboard* cases;<sup>95</sup> for the Board to simply abandon the area upon the finding of management prerogatives is to fail to meet the issue presented.<sup>96</sup>

Rather than criticizing further the present view under *Fibreboard*, consideration will be given to the applicability of the *Fibreboard* doctrine to contract negotiations as opposed to unilateral action, and then to the viability of the *Fibreboard* approach in dealing with recent trends in labor relations.

#### B. Application of the Bargaining Duty to Contract Negotiations

Most of the cases in the *Fibreboard* line, including the Board's recent *General Motors* decision, dealt with attempts by the employer to make unilateral changes,<sup>97</sup> usually in response to some

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92. *Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. at 179 n.19.

93. See Rabin, *supra* note 74, at 823-26.

94. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. at 214. "[A]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." *Id.*

95. See Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970).

96. See note 19 *supra*. The Board and courts have applied a concept—management rights—that is not mentioned in the Act and that played no significant part in the legislative history. Indeed, if the legislative history is at all significant, it shows that Congress rejected a rigid containment of bargaining subjects in the interest of management prerogatives, and opted instead for an evolutionary development of the scope of mandatory bargaining, in accordance with actual bargaining needs and practices.

97. See cases cited *supra* notes 87 & 89. Several cases have dealt with the duty to bargain in the context of demands for new contract terms, e.g., *NLRB v. Wooster Division*

pressing economic circumstance. In my view the considerations that are thought to justify employer unilateral action in such cases do not apply to the contract negotiation stage, in which the parties are endeavoring to allocate bilaterally their rights and responsibilities.

In holding that the employer is under no duty to bargain with respect to a unilateral decision involving the direction of the business, the Board and courts have necessarily concluded that the bargaining obligation is inconsistent with managerial freedom. This may be a tenable position in the context of some unilateral action, where time is of the essence and the bargaining obligation therefore an impediment to action. Moreover, secrecy may be critical, and too early a disclosure to employees could result in morale and discipline problems and even pilfering and other plant disruption if the employees felt that their jobs were about to be terminated. These considerations were stressed by the Board majority in *General Motors*.<sup>98</sup> They are not entirely convincing, however, for the employer is concededly under a duty to notify the union in advance of the action in order to bargain about the effects of the decision. This obligation by itself is inconsistent with secrecy and expediency. It also has been suggested that a determination to take unilateral action eliminating bargaining unit work is often based on such compelling factors that it would be futile to attempt to reverse it through bargaining.<sup>99</sup> This proposition has not been empirically demonstrated and is refuted by the occasional situations in which employees agree to a wage cut rather than suffer a plant closure.<sup>100</sup> There is undoubt-

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of Borg-Warner Corp., 356 U.S. 342 (1958) (clause requiring pre-strike vote of employees held not mandatory subject); *NLRB v. American Compress Warehouse Div.*, 350 F.2d 365 (5th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966) (performance bond held not mandatory subject); *Mobile Oil Co.*, 147 N.L.R.B. 337 (1964) (continuation of seniority while in supervisory position held mandatory subject); *Detroit Resilient Floor Decorators*, 136 N.L.R.B. 769 (1962), *enforced*, 317 F.2d 269 (6th Cir. 1963). Cases in the negotiating state are common in the public sector, e.g., *West Irondequoit Teachers Ass'n v. Helsby*, 42 App. Div. 2d 808, 346 N.Y.S.2d 418 (1973), *aff'g* 4 PERB Official Decisions ¶ 5013 (1971); *West Hartford Educ. Ass'n v. DeCourcy*, 162 Conn. 566, 295 A.2d 526 (1972).

98. 191 N.L.R.B. No. 149 (July 8, 1971). If the Board is concerned with secrecy and speed, there is no reason why it cannot modify the employer's bargaining duty to permit quick resolution of the problem.

99. See generally O'Connell, *The Implications of "Decision Bargaining,"* 16TH ANNUAL N.Y.U. CONFERENCE ON LABOR LAW 99 (1963). In cases in which the employer's unilateral action was dictated by circumstances so compelling that they could not possibly be reversed by collective bargaining, the Board has excused bargaining. E.g., *Central Rufina*, 161 N.L.R.B. 696 (1966); *New York Mirror*, 151 N.L.R.B. 834 (1965).

100. For example, it was reported that employees of Swift & Co. in San Antonio, Texas, agreed to accept pay cuts in order to prevent the announced closing of the plant, *N.Y. Times*, Jan. 17, 1971, § 4, at 13, col. 3.



edly some room in these situations for employees to make concessions that might forestall management's action.<sup>101</sup> Finally, the kinds of issues involved in these decisions are thought to be unfamiliar to employees and unions and beyond their expertise.<sup>102</sup>

But when the parties are negotiating for new contract terms many of the above considerations do not apply. Time and expediency are certainly not a factor, as the union will undoubtedly be seeking restraints on future conduct rather than in response to imminent employer action. Nor is secrecy at stake, since the employer will probably not be contemplating any concrete action at the time. Most importantly, the bargaining phase affords the union numerous possibilities to make concessions to obtain the job security it seeks. For example, if a guaranteed retraining and placement program is deemed essential by the union, it may be willing to forego a wage increase to obtain this safeguard. Management freedom is not threatened by bargaining on these issues, for it is free to reject any limitation it chooses to. The possibility of economic action by the union of course makes this freedom somewhat illusory. But, as a practical matter, a compromise solution can probably be found in any area that truly threatens management freedom. Although the union may begin by demanding an absolute restraint on employer action, it may ultimately settle for protective devices against impact, such as adequate notice, retraining, or severance pay. The problem of expertise is also less significant in the contract negotiation stage, for if the union is incapable of making constructive suggestions this will quickly come out in the course of negotiations and lessen the union's effectiveness. In short, the greater scope of subjects with the possibility of trade-offs and the absence of time pressure in negotiations for a new contract militate against many of the reasons urged for granting the employer the right to take unilateral action.

The only major case dealing with the scope of bargaining during contract negotiations, *Railroad Telegraphers v. Chicago & N.W. Ry.*,<sup>103</sup> upheld the right of a union to seek protective clauses in

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101. Concessions that a union might make in order to avoid job losses are suggested in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 570 (1966), and *Dixie Ohio Express Co.*, 167 N.L.R.B. 573. Seidman, *The Union Agenda for Security*, 86 MONTHLY LAB. REV. 636 (1963), enumerates such protective devices as job and income protection agreements, prohibitions against dislocation through automation, joint funds to ease the impact of automation, such as the Armour Automation Fund, union label drives to promote industry sales, wage cuts, severance pay, retraining programs and pressure on government to restrict imports of competing goods.

102. *General Motors Corp.*, 191 N.L.R.B. No. 149 (July 8, 1971).

103. 362 U.S. 330 (1960). The case arose under the Railway Labor Act which has a

restricting a most cherished management prerogative, the right to eliminate railroad stations and abolish jobs. This suggests that there is indeed a fundamental distinction between the scope of bargaining as it applies to the two situations.<sup>104</sup> The strongest basis for this distinction is that voluntary agreement in these difficult areas should be encouraged. Rather than put the Board or a court to the impossible task of deciding whether an employer's interest in shutting down a portion of the business outweighs the employees' concern for job security, these priorities should be agreed upon by the parties and spelled out in their collective bargaining agreement.

### C. *Fibreboard and Recent Trends in Labor Relations*

*Fibreboard* was decided in 1964. Since then there has been an explosion of collective-bargaining activity in areas virtually unknown at the time of *Fibreboard*, such as public employment, secondary and higher education, and bargaining by professional employees. In addition, workers' concerns in the traditional private sector have changed in focus from better wages and benefits to greater job security, stronger health and safety standards, and an improved quality of industrial life. These recently evolved areas of collective bargaining now will be carefully examined to determine whether the *Fibreboard* doctrine is adequate to deal with these new and important needs.

(1) *Secondary Education in the Public Schools.*—With the enactment of statutes in many states giving public employees the right to organize and bargain, collective bargaining activity has burgeoned in the public schools.<sup>105</sup> The definition of mandatory subjects of bargaining varies with the particular statutory scheme, but in many states the vague definition "terms and conditions of employment" is the relevant standard.<sup>106</sup> Application of a management

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comparable provision to § 8(a)(5), requiring bargaining as to "conditions of employment."

104. An outspoken critic of *Fibreboard* insofar as it required "decision bargaining" appears to have recognized this distinction, see O'Connell, *supra* note 99, at 109-10. In urging that the *Railroad Telegraphers* decision did not support the result in *Fibreboard*, O'Connell argued that the *Telegraphers* case "simply set the stage for bargaining" over whether such a clause limiting the railroad's right to close stations would in fact be agreed to, while *Fibreboard* had the effect of actually "reading" such a clause into existing agreements.

105. See D. WOLLETT & R. CHANIN, *THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS* 1:6, 2:1-5 (1970).

106. See Sabghir, *The Scope of Collective Bargaining in Public Sector*, PERL No. 33 (1971), for a useful catalogue of the various statutory definitions of the scope of the duty to bargain. See also Blair, *State Legislative Control Over the Conditions of Employment*, 26 VAND. L. REV. 1 (1973).

rights exception to the scope of bargaining in education poses great difficulties, because the managerial concerns central to the "mission" of the employer also have a direct impact on the terms and conditions of employment. A good example of this dilemma is class size.<sup>107</sup> A paramount concern of teachers is to place a contractual limitation upon the size of classes they are required to teach. The number of pupils in the classroom vitally affects teaching conditions and may be as important to the teacher as salaries. Moreover, teachers plainly have the expertise to participate intelligently in negotiations over this subject. But the school board, asserting that it is charged by the electorate with the fundamental responsibility of running the schools in a fiscally sound way, will respond that it cannot share such a basic managerial decision with the teachers. This issue has been faced by the Public Employment Relations Board (hereinafter PERB) and a reviewing court in New York State in *West Irondequoit Teachers Association v. Helsby*.<sup>108</sup> The school board refused to bargain over a teacher proposal seeking ceilings on class size, asserting this was a managerial prerogative. PERB agreed with the school board, holding that the issue of class size involved a "basic decision as to public policy" that "should be made by those having the direct and sole responsibility therefor, and whose actions in this regard are subject to review in the electoral process," and that the decision should not be made "in the isolation of a negotiation table."<sup>109</sup> PERB rested its decision on the earlier case of *City School District of New Rochelle*,<sup>110</sup> which upheld the right of a public employer to make unilateral budget cuts that resulted in substantial elimination of jobs. An intermediate appellate court upheld PERB in *West Irondequoit*<sup>111</sup> on the authority of *Fibreboard*, equating the school board's action with a basic managerial prerogative exempt from the bargaining duty.

A Connecticut court reached the opposite conclusion in *West Hartford Education Association v. DeCourcy*,<sup>112</sup> holding that class size was a mandatory subject of bargaining. That court also relied

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107. See Wellington & Winters, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 852-57 (1970).

108. 42 App. Div. 2d 808, 346 N.Y.S.2d 418 (1973), *aff'g* 4 PERB Official Decisions ¶ 4-3070 (1971).

109. 4 PERB Official Decisions ¶ 4-3070 at 3728 (1971).

110. *City School District of New Rochelle & Local 280 New Rochelle Federation of Teachers*, 4 PERB 3060, 3704 (New York State, 1971).

111. *West Irondequoit Teachers Ass'n v. Helsby*, 346 N.Y.S.2d at 419.

112. 162 Conn. 566, 295 A.2d 526 (1972).

upon *Fibreboard*, but looked to the pragmatic aspects of that case and noted that provisions limiting class size are common in collective bargaining agreements. The court also pointed out that to attempt to set up mutually exclusive categories of "conditions of employment" and "educational policy" and then to exempt bargaining in the latter is impossible since so many problems, including class size, fit both categories.<sup>113</sup>

The *West Hartford* result makes far more sense than *West Irondequoit*. Particularly where there is no statutory mandate to bar collective bargaining over management prerogatives,<sup>114</sup> application of that concept will emasculate collective bargaining in areas of genuine teacher concern. PERB appears to have recognized this in *West Irondequoit*, for it observed that even though bargaining on this subject was not required it "should be encouraged so as to take advantage of the teachers' professional expertise."<sup>115</sup> PERB and the reviewing court in *West Irondequoit* failed to see that the concerns in cases of unilateral employer action, as in the *New Rochelle* and *Fibreboard* decisions which they relied upon, do not necessarily apply to bilateral negotiations seeking to allocate functions. Negotiation on the subject of class size in no way obligates the public employer to agree to class size limitations. But healthy ventilation of the subject may in the long run produce better morale than artificially cutting off all discussion on the asserted technicality that it involves "educational policy."<sup>116</sup> No rational line can be drawn between subjects that are and are not exempt from the bargaining obligation because "educational policy" is involved. Therefore the decision whether to incorporate a particular contractual restraint upon the employer ought to be left to the bargaining process itself.<sup>117</sup>

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113. *Id.* at 584-86, 295 A.2d at 536-37.

114. *See, e.g.,* State College Educ. Ass'n v. Pennsylvania Labor Relations Board, 83 L.R.R.M. 3079 (1973), for a summary of the Pennsylvania statute regulating public sector labor relations, which excludes matters involving "inherent managerial policy" from the scope of mandatory bargaining, but requires the parties to "meet and discuss" with regard to such matters.

115. *West Irondequoit Teachers Ass'n v. Helsby*, 4 PERB Official Decisions ¶ 4-3070 at 3728 (1971).

116. R. DOHERTY & W. OBERER, *TEACHERS, SCHOOL BOARDS, AND COLLECTIVE BARGAINING*, 90-93 (1967). *See* Wollett, *The Bargaining Process in the Public Sector: What Is Bargainable?*, 51 ORE. L. REV. 177, 178: "If [the negotiator] approaches the table in a spirit of meeting problems rather than avoiding them, and of trying to find ways to reach agreement rather than identifying obstacles which make a negotiated settlement impossible, I submit that the question of scope of bargaining becomes of little significance." *Id.*

117. The scope of the bargaining duty in the public sector is influenced by the fact that unlike the private sector the authority of the negotiator may be limited by law. In *Board of Educ. v. Associated Teachers of Huntington, Inc.*, 30 N.Y.2d 122, 282 N.E.2d 109, 331

The employer may of course prefer to keep the item off the table altogether as a tactical bargaining device or to keep the subject from going into mediation or fact-finding where there may be a recommendation adverse to the employer's position. Where such a recommendation is purely advisory, however, and there is no right to strike in support of the demand,<sup>118</sup> the ultimate decision whether to accept a limitation on employer freedom remains with the public employer. In such circumstances bargaining ought to be preferred.

(2) *Higher Education.*—The task of drawing the line between conditions of employment and managerial prerogatives is even more difficult in higher education. For the principle of "collegiality" controls governance in higher education, resulting in shared decision making by faculty and administration.<sup>119</sup> Indeed, in some of the initial higher education cases under the NLRA, the college or university sought to avoid coming under the Act on the theory that in view of these shared responsibilities the requisite employer-employee relationship did not exist.<sup>120</sup> In this area administrative

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N.Y.S.2d 17 (1972), the New York State Court of Appeals made clear that the power to negotiate with regard to a particular subject is to be presumed unless there is an express statutory command to the contrary. Occasionally such a restriction is found, e.g., *Farrigan v. Helsby*, 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (1973) (demand for agency shop contrary to Taylor Law). *But see* *Syracuse Teachers Ass'n v. Board of Educ.*, 42 App. Div. 2d 73, 343 N.Y.S.2d 239 (1973) (no statutory prohibition against negotiation of "sick leave bank"). For articles on the scope of bargaining in the public sector see Blair, *State Legislative Control over Conditions of Public Employment: Defining the Scope of Collective Bargaining*, 26 VAND. L. REV. 1 (1973); *Collective Negotiations in Higher Education: A Symposium*, 1971 WIS. L. REV.; Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885 (1973); Wellington & Winters, *supra* note 107. For other cases on the duty to bargain see *North Dearborn Heights School Dist.*, 1 MERC Lab. Op. 434 (Mich. 1966); *Burlington County College Faculty Ass'n v. Board of Trustees*, 119 N.J. Super. 276, 291 A.2d 150 (1972); *Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ.*, 82 L.R.R.M. 2287 (S.D. Cir. Ct. 1972).

118. In spite of the prohibition on strikes the matter may become a strike issue. The recent strike of the Detroit Federation of Teachers involved, among other issues, the matter of class size, *Syracuse Herald-Journal*, Oct. 16, 1973, at 2. *But see* *Burlington County College Faculty Ass'n v. Board of Trustees*, 119 N.J. Super. 276, 291 A.2d 150 (1972), in which the court concluded that, since the decision whether or not to include the proposed term in the agreement rested in the discretion of the school board and could not be mandated through mediation or fact-finding, there was no problem in treating it as a mandatory subject.

119: See, e.g., CARR, *THE TROUBLED PROFESSOR*, PROCEEDINGS OF 1972 CONFERENCE OF NEW ENGLAND BOARD OF HIGHER EDUCATION 45, 47-48 (Hewitt, ed.); Finkin, *Collective Bargaining and University Governance*, 1971 WIS. L. REV. 125; Moskow, *The Scope of Collective Bargaining in Higher Education*, 1971 WIS. L. REV. 33, 34, 38-39; Sands, *The Role of Collective Bargaining in Higher Education*, 1971 WIS. L. REV. 150, 153-59.

120. The National Labor Relations Board first exercised jurisdiction over private colleges and universities in 1970, in *Cornell University*, 183 N.L.R.B. No. 41 (June 12, 1970). The assertion that college and university professors were not entitled to the protection of the Act because their "collegiality" amounted to supervisory status was first raised in *C.W. Post*, 189 N.L.R.B. No. 109 (Apr. 20, 1971), where it was rejected. Subsequently, in *Adelphi Univer-*

agencies and courts must be extremely cautious about denying bargaining rights on the strength of a management rights label.

This may be illustrated by a hypothetical example involving bargaining by a faculty of a law school.<sup>121</sup> The faculty of the law school, in accordance with past practice, undertakes a search for a new dean. Its choice is rejected by the University, which unilaterally imposes its own designee as dean. The faculty bargaining agent claims that this unilateral action violates 8(a)(5). In the private sector the selection of a supervisor would undoubtedly be considered a managerial prerogative exempt from the duty to bargain.<sup>122</sup> This model, however, is inapposite in law school governance since the accreditation standards of the Association of American Law Schools, reflecting the actual practices in most member institutions, require as a condition of accreditation that the faculty have "primary responsibility for determining institutional policies."<sup>123</sup> One of the enumerated criteria of such responsibility for controlling policies is that the faculty be consulted prior to the recommendation of a dean and that "except in rare cases and for compelling reasons, no decanal . . . appointment . . . shall be made over the expressed opposition of the faculty."<sup>124</sup> In a recent decision granting law faculties the right to choose separate representative status, the Board dealt with the question of what requires bargaining in the higher education employment context and observed that "the industrial

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sity, 195 N.L.R.B. No. 107 (Feb. 29, 1972), the Board said "the concept of collegiality, wherein power and authority is vested in a body composed of all of one's peers or colleagues, does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world . . . . Because authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory exclusion of our Act was designed, a genuine system of collegiality would tend to confound us." 79 L.R.R.M. at 1555-56. Later, in *New York University*, 205 N.L.R.B. No. 16 (July 20, 1973), the Board tempered its consternation in *Adelphi* by noting merely that "certain difficulties might be attendant upon applying the Act to a true collegial system." While such a "true" collegial system has apparently not yet been found, different considerations have in fact been applied to higher education cases than industrial cases under the NLRA. See, e.g., *New York University*, 205 N.L.R.B. No. 16 (July 20, 1973); *Syracuse University*, 204 N.L.R.B. No. 85 (June 29, 1973); *Fordham University*, 193 N.L.R.B. No. 23 (Sept. 14, 1971).

121. A case involving some of the same considerations as the hypothetical is *Syracuse University & SU-AAUP*, 204 N.L.R.B. No. 85 (June 29, 1973). Pursuant to the order in that case the faculty of the College of Law was permitted to determine by secret ballot whether it wished to be included in a university-wide unit or one limited to the College of Law. The faculty voted for a separate unit, but as of this writing has not sought to engage in collective bargaining.

122. See *Pacific Am. Shipowners Ass'n*, 98 N.L.R.B. 582 (1952).

123. Articles of Association of the Association of American Law Schools, art. 6, § 6-1 (4).

124. *Id.*

model cannot be imposed blindly on the academic world."<sup>125</sup> The *Fibreboard* test, particularly when read as a rigid exception for managerial rights, should not be applied in higher education without careful consideration of its relevance. At best, *Fibreboard* is a useful guideline in the area of higher education only in its general approach of taking into account applicable bargaining practices. Under this approach, adequate weight would have to be given to past practice and AALS standards in dean selection.

(3) *Professional Employees*.—The increasing unionization among professional public employees is well known. A recent article published by New York's Public Employment Relations Board<sup>126</sup> surveyed some key, nontraditional bargaining demands in public employment disputes, several of which gained notoriety because they resulted in strikes or serious strike threats. These included a strike of museum curators over a decision to reduce the number of exhibits, a demand by welfare employees to improve service to clients, demands by teachers in the 1967 New York City school strike for educational reforms, an effort by hospital residents and interns to remove a chief of pediatrics, and a successful effort by legal aid attorneys to involve themselves in policy decisions of the Legal Aid Society.<sup>127</sup> It is by no means evident that these disruptions would not have occurred had bargaining been confined within its traditional limitations; on the contrary, such critical issues would probably be better resolved by discussing them rather than ignoring them.

(4) *Traditional Private Industry*.—The walkouts in major automobile plants over the past two years in protest over the drudgery and pace of the assembly line and the efforts to correct those conditions in bargaining demonstrate a changing focus of employee concern even in the traditional private sector.<sup>128</sup> If continued opera-

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125. Syracuse University & SU-AAUP, 204 N.L.R.B. No. 85 (June 29, 1973).

126. Lefkowitz, *Professional Employees and Collective Bargaining*, New York State PERB News, vol. 6, No. 6 at 2-3.

127. For more detailed accounts of these situations see N.Y. Times, Dec. 16, 1966, at 48, col. 1 (welfare workers); N.Y. Times, July 13, 1967, at 26, col. 5 (New York City teachers); N.Y. Times, May 2, 1970, at 35, col. 1; N.Y. Times, May 5, 1970, at 35, col. 1 (legal aid attorneys).

128. See Farrell, *Safety and Health—Key Chrysler Issues*, N.Y. Times, Aug. 19, 1973, § 1, at 54, col. 1; N.Y. Times, Aug. 12, 1973, at 22, col. 1; Editorial, *Strike at Chrysler*, N.Y. Times, Sept. 16, 1973, § 4, at 14, col. 1; Salpukas, *Breakthrough in the Chrysler Agreement*, N.Y. Times, Sept. 21, 1973, at 17, col. 3. The issues included demands for joint union-management committees to deal with safety and health issues. The New York Times editorial characterized the strikes as follows: "The real area of contention lies in what to do about worker discontent over the drudgery of the assembly line and the conflict between job require-

tion of the conventional assembly line becomes intolerable to employees it is plain that management must consider alternative forms of production, such as the team production system in Scandinavian countries. Attempting to resist bargaining about new production techniques because they assertedly involve a "management prerogative" will not make the problem go away.

Ultimately the critical concerns of employees will make their way to the bargaining table no matter what the scope of bargaining is defined to be. It is the unwise labor relations counsellor who recommends that a serious problem not even be discussed because it impinges management's right to run the business.<sup>129</sup> Apparently, in their zeal to safeguard treasured prerogatives, management in the automobile industry preferred to pay higher wages and other benefits in order to avoid discussion of such core problems as health, safety, and morale.<sup>130</sup> These finally came to the fore in an explosive fashion. When the scope of bargaining is narrowly defined it provides a refuge for management to avoid discussion of what ultimately turn out to be critical issues. Labor relations policy would be better served if an expansive bargaining agenda were encouraged,

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ments and the desire of unionists for a fuller life outside the auto plants." The editorial concluded by exhorting the parties to "avoid digging in on a holy war over 'who is boss'" and to resolve "disputes that go to the heart of the quality of factory life." While the resulting Chrysler agreement made no changes in the nature of the assembly line, the union was to be included in future efforts to improve the quality of work, 83 LAB. REL. REP. (News and Background) 323. For accounts of wildcat strikes and other disruptions because of poor working conditions see N.Y. Times, Mar. 7, 1973, at 38, col. 2 (editorial); N.Y. Times, Apr. 2, 1973, at 34, col. 3; Jenkins, *Democracy in the Factory*, Atlantic Monthly, Apr. 1973, at 78. Evidence at least of the fact that observers think that worker discontent on the assembly line is a major contemporary issue may be found in the number of symposiums devoted to this subject, e.g., Seminar on Outlook for Labor Relations, sponsored by Federal Mediation and Conciliation Service, in 82 LAB. REL. REP. (News and Background) 75, 77; Seminar sponsored by Pennsylvania State University and FMCS, 82 LAB. REL. REP. (News and Background) 130; but cf. New York Conference Board program, 82 LAB. REL. REP. (News and Background) 254. A Special Task Force report to former HEW Secretary Richardson on worker discontent revealed a high level of worker dissatisfaction with their jobs. 82 LAB. REL. REP. (News and Background) 35, 36. The report concluded that "most workers want to participate in decisions affecting the outcome of their work and the design of their work tasks." *Id.* at 36.

129. Wollett, *The Bargaining Process in the Public Sector*, 51 ORE. L. REV. 177 (1971).

130. Salpukas, *Breakthrough in the Chrysler Agreement*, N.Y. Times, Sept. 21, 1973, at 17, col. 3, stated with regard to the union's demands for economic security: "In past negotiations, company bargainers were often willing to make major concessions in economic demands to have the union put off demands in these areas." For an example of the new directions taken by labor unions in bargaining see Oldbam, *Organized Labor, the Environment and the Taft-Hartley Act*, 71 MICH. L. REV. 935 (1973), which includes a summary of contract clauses actually negotiated dealing with environmental protection. See, in the area of industrial safety, the 5-part article, Brodeur, *Annals of Industry (Industrial Casualties)*, NEW YORKER, vol. 49, Nos. 36-40 (1973).



with management then deciding which items of unilateral action to reserve to itself after the priorities of both parties have been explored.<sup>131</sup>

While an expanded bargaining agenda could conceivably lead to a greater number of strike issues, this is not necessarily the case. For example, if employees are not satisfied in critical areas of health, safety and security, they may be forced to turn to higher wages to compensate for adverse working conditions, and this could in turn become a strike issue. In the final analysis, the only rational determinant of what items are properly reserved for managerial discretion may be what each party is prepared to live with as a minimum. If management finds restrictions on subcontracting intolerable, it may have to use economic leverage to secure its continued independent right to so act. In a totally free bargaining model this should be the decisive factor.

In this part we have urged a consensual model for allocation of functions between management and union. The next two parts illustrate the effect of such voluntary determination on subsequent arbitration and Board cases involving unilateral action.

#### IV. THE ORGANIZED PLANT DURING THE CONTRACT TERM— CONTRACTUAL RESTRAINTS

During the effective period of the contract the principle restraints upon employer action derive from the agreement itself. While action taken by the employer during this period may be challenged under section 8(a) (1), (3) or (5), the forum for testing such conduct has increasingly become the grievance and arbitration mechanism under the contract, particularly with the advent of the *Collyer* doctrine.<sup>132</sup>

To explore this aspect of the problem, we studied some 30 cases decided by arbitrators in the past three years involving the question of the employer's right to subcontract work.<sup>133</sup> These cases involve managerial actions similar to those passed upon by the Supreme Court in *Fibreboard*, but with different approaches and results—particularly since the fundamental issues posed in the two forums differ greatly. A challenge to employer subcontracting under 8(a) (5) raises only the "procedural" question whether the employer

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131. For example, although the union sought changes in the production line, none were actually made. Salpukas, *supra* note 130. 83 LAB. REL. REP. (News and Background) 323.

132. See part IV(b), *infra*.

133. See cases cited notes 145-50.

must first bargain before taking such action, while the contractual challenge is generally to the substantive right of the employer to subcontract at all. Questions involving subcontracting are among the most difficult faced by arbitrators because the legitimacy of the competing claims is strong<sup>134</sup> and the contractual guidelines often slender. We have also reviewed recent cases involving more drastic forms of employer termination of bargaining unit work, such as transfer of work to other plants and termination of part or all of the business usually through sale to another concern.

Most collective bargaining agreements define the scope of managerial freedom through two polar clauses. There is invariably a management rights clause that, in its simplest form, states that management retains the exclusive right to run the business,<sup>135</sup> although specific examples of management's authority may be spelled out in the clause. Often the union will qualify the management rights clause by providing that it is subject to other provisions of the agreement. At the other end of the spectrum is the union's claim, made under the contractual recognition clause, that certain rights flow from the very act of recognition of the union as bargaining representative. The same kind of restraint is said to arise from the seniority clause or wage provisions listing job categories; by implication, if not explicitly, these clauses preclude reduction of work out of seniority order<sup>136</sup> and abolition of the enumerated positions. This is not, however, the place for the interesting theoretical discussion of whether it is appropriate to view management's right to run the business as absolute and residual, save as expressly abridged by contract, or as deriving from the consent of the union,<sup>137</sup> for what-

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134. Subcontracting is a crucial area of overlap of employee and employer interests. Most employers feel a need for freedom to subcontract because of economic necessity, while employees fear the impact of such conduct, through layoffs or a reduction in wages or benefits. See P. PRALOW & E. PETERS, *ARBITRATION AND COLLECTIVE BARGAINING* 42 (1970).

135. See R. SMITH, L. MERRIFIELD, & D. ROTHSCHILD, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 314-16 (1970) for examples of such clauses.

136. See, e.g., *Allied Employers, Inc. v. Meat Cutters Local 81*, 70-2 CCH LAB. ARB. AWARDS ¶ 8812 (1970), where the arbitrator stated that

[t]he fact that the contract contains no express provision preventing or limiting contracting out should not be taken to mean that the Company can lay off employees and hire the work done by independent contractors for any reason, however arbitrary, capricious, or unreasonable. . . . Though there is no express prohibition or limitation on employing independent contractors, the very nature of the agreement and its primary purpose imply certain limitations and that the nature and extent of such implied limitations are a matter of interpretation and a proper subject for arbitration.

137. See Goldberg, *Management's Reserved Rights: A Labor View*, *PROCEEDINGS OF NINTH ANNUAL MEETING OF NATIONAL ACADEMY OF ARBITRATORS*, 118-29 (1956). For a lively discussion of the "reserved-rights" theory, and its critics, see P. PRALOW & E. PETERS, *supra*

ever the philosophical views of arbitrators on this rather fundamental question, the cases appear to turn upon more pragmatic factors.

The parties may, of course, spell out more thoroughly in negotiations the catalogue of rights reserved to management or shared with the union. A thesis of this article is that such voluntary advance allocation of responsibilities ought to be encouraged as the most constructive form of labor relations. To the extent that 8(a) (5) removes certain subjects from the ambit of mandatory bargaining it inhibits advance allocation of functions. Indeed it has been suggested that the primary impetus for the emergence of specific clauses dealing with subcontracting was the decision in *Fibreboard*, clearing the way under 8(a) (5) for raising such matters.<sup>138</sup>

Courts have not been reluctant to compel arbitration over these kinds of matters. *United Steelworkers v. Warrior & Gulf Navigation Co.*, one of the cases in the Supreme Court "trilogy" that created a major role for arbitration in dispute resolution,<sup>139</sup> involved this precise issue—the employer resisted arbitration over a subcontracting claim on the basis of a strong management rights clause exempting from arbitration "matters which are strictly a function of management."<sup>140</sup> The Court nevertheless compelled arbitration, holding that such an order should be denied only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."<sup>141</sup> The Court thought the management rights clause did not necessarily preclude arbitration of the particular dispute. The same approach and result has obtained in cases involving the more fundamental "management right" of termination of all or part of a business.<sup>142</sup> It is submitted that these decisions reflect, apart from a general presumption in favor of arbitration, a recognition that resolution may turn on factors more complex and subtle than illuminated by the bare label of "management

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note 134, at 30-31. The reserved-rights theory has been influential in arbitrator decisions on subcontracting and other unilateral employer activities, when labor agreements have remained silent on those issues. The result in most such situations has been accordingly favorable to management.

138. See BLS BULLETIN 1425-10, at 6.

139. 363 U.S. 574 (1960). The other 2 cases are *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

140. 363 U.S. at 576.

141. *Id.* at 582-83.

142. See Feinberg, *Transfer and Sale of Plant Operations in Arbitration*, 13 LAB. L.J. 625, 637-38, 644-45 (1962).

rights” and that these other considerations may satisfy the arbitrability requirement as well as resolve the matter on the merits.<sup>143</sup>

#### A. *Experience in Arbitration Cases*

(1) *Subcontracting*.—In a number of cases studied the arbitrator had only the basic recognition and management rights clauses with which to work. While it is probably fair to say that in the absence of any other factors the subcontracting would have been permitted under the management rights clause,<sup>144</sup> most of the cases did involve some other determinative factor. A significant one is whether the subcontracting significantly impairs bargaining unit work, since it then conflicts with the recognition clause and threatens the union’s status as exclusive representative. This consideration was found controlling primarily in cases in which the right to subcontract was upheld because no significant bargaining unit impairment was found.<sup>145</sup> Other factors of importance include whether the bargaining unit employees possess the requisite skills to do the job in question; whether the contracting out is intermittent and of a special nature or recurrent; whether additional capital expenditures or training would be required to keep the work within the unit; the ability of the proposed subcontractor to provide better supervision; whether the job is extensive enough to justify the services of a bargaining unit employee as opposed to part time services of independent employees; a review of the business justification in general for the action; a consideration of past practices; and a determination whether the purpose of the action is to undercut the union wage scale.<sup>146</sup> Some arbitrators sum up the test of management’s right to

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143. Justice Douglas, speaking for the Court in *Warrior & Gulf*, observed that: Gaps may be left to be filled in by reference to the practices of the particular industry and by the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown except in hazy form, even to the negotiators . . . [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise . . .

363 U.S. at 580 quoting Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955). In *Warrior & Gulf*, Justice Douglas relied heavily on Shulman, *id.*

144. PRASOW & PETERS, *supra* note 134, at 42.

145. Typical of this rationale is *Brunswick Pulp & Paper Co. v. Pulp Workers Local 400*, 71-1 CCH LAB. ARB. AWARDS ¶ 8114 (1970), where a charge by the union of company subcontracting of bargaining unit work was rejected because no union employee was found to be injured in any way.

146. For a summary of some of the various arbitrators’ approaches to the problem, see *Symposium—Labor Arbitration: Arbitration of Subcontracting Disputes: Management Discretion vs. Job Security*, 37 N.Y.U.L. REV. 523, 528-29 (1962). Some typical cases in which

subcontract where no detailed contract restrictions are involved as one of "good faith, reasonableness and sound business reasons."<sup>147</sup>

The arbitrator's role in these cases is a complex and difficult one. Interpretation of the agreement ideally calls for the arbitrator to reconstruct the probable positions of the parties in negotiations and to divine the likely compromise they would have reached had they squarely dealt with the precise issue. This degree of insight is usually impossible, and the arbitrator must be content to work with other general equitable considerations, including the economic justifications on management's side and job security on the employee side. The arbitrator may draw inferences from the failure of management to spell out its rights more fully or the union's inability to restrict those rights. As an outer limit the arbitrator will probably avoid a result destructive of the bargaining agent or unduly restrictive of management freedom, but in between these extremes he exercises a great deal of subjective, unfettered judgment. In spite of such discretion, channelled somewhat by the reality that an arbitrator who exceeds the bounds of reasonable judgment will not continue to receive appointments, the arbitral technique has significant advantages over the wooden approach taken by the Board and courts in 8(a)(5) cases, in which the mere existence of a management right removes the case from the bargaining arena without any careful consideration of the magnitude of the employer interest in unilateral action or the impact upon employees. The pragmatism of the arbitrator restores to the decisional process some of the practical considerations suggested by *Fibreboard*, although in the context of substantive limitations rather than procedural bargaining re-

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arbitrators upheld employer subcontracting, and their reasons, include: *Mead Corp. v. Local 12943, UMW*, 70-2 CCH LAB. ARB. AWARDS ¶ 8455 (1970) (subcontractor had special knowhow re contracted job); *Textron, Inc. v. Local 682, UAW*, 71-2 CCH LAB. ARB. AWARDS ¶ 8541 (1971) (negotiating history); *Robertshaw-Fulton Controls Co. v. Machinists Lodge 555*, 70-2 CCH LAB. ARB. AWARDS ¶ 8738 (1970) (past practice); and *Interspace Corp. v. United Brick & Clay Workers Local 774*, 71-1 CCH LAB. ARB. AWARDS ¶ 8397 (1971) (valid business justifications).

The various factors involved in subcontracting cases generally are thoroughly analyzed and categorized in F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS*, 501-17 (3rd ed. 1973). For earlier studies compare the arbitration award of G. Allen Dash in *Celanese Corp. of America*, 33 Lab. Arb. 925 (1959), and Crawford, *The Arbitration of Disputes over Subcontracting*, PROCEEDINGS OF 13TH ANNUAL MEETING OF NATIONAL ACADEMY OF ARBITRATORS 51-88 (1970).

147. In an apparently harsh application of this "test," an arbitrator in *Allied Employers, Inc. v. Meat Cutters Local 81*, 70-2 CCH LAB. ARB. AWARDS ¶ 8812 (1970), warned the union that, in the absence of an express contract provision, even if subcontracting were to result in large-scale layoffs, the company's demonstration of "good faith and reasonableness" is enough to warrant denial of any grievance on the issue.

straints.

Greater fidelity to the parties' intent and priorities can be achieved if the parties have provided more exact guidelines in the form of contract clauses. The arbitrator then is able to make a better assessment of the parties' priorities in reaching what ultimately is a compromise of positions irreconcilable in their extreme form. For example, management may be unwilling to give up the right to subcontract, but may agree to a provision calling for notice and discussion prior to any action, thus essentially incorporating into the agreement the *Fibreboard* requirement of bargaining, though perhaps on a less formal and legalistic level.<sup>148</sup> The union may recognize management's needs but permit subcontracting only if there is no resultant displacement of employees or only if the work is not "customarily performed by the employer in its own plant with its own employees," thus preserving traditional bargaining unit work but giving the employer flexibility in unusual cases.<sup>149</sup> Clauses might spell out with particularity the type of work that may be subcontracted. Even with clauses of this specificity, arbitrators may be guided by the more general factors already discussed, but their discretion is limited.<sup>150</sup> The allocation of rights through contract clauses of this sort should be encouraged, since it more clearly reflects the priorities of the parties at the bargaining table.

(2) *Other Termination of Bargaining Unit Work.*—The cases involving termination of work through means other than subcontracting are not nearly as numerous. Where the agreement is silent on these points the prevailing view is to allow management to take

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148. An example of such a contract agreement is found in *Chamherlain Mfg. Corp. v. Machinists Lodge 1318*, 70-2 CCH LAB. ARB. AWARDS ¶ 8681 (1970), where the clause in question said, "When such work is to be let out, it will be discussed by [union and management] prior to sub-contracting such work."

149. In *Alabama By-Products Corp. v. International Union Allied and Technical Workers*, 72-1 CCH LAB. ARB. AWARDS ¶ 8091 (1972), the union prevailed because of relatively unequivocal terms in the agreement to the effect that "All production and maintenance work customarily performed by the employer in its own plant with its own employees shall continue to be performed by the employer with its own employees." The union also prevailed in *New York Univ. v. Teamsters Local 810*, 72-2 CCH LAB. ARB. AWARDS ¶ 8524 (1972), where the agreement stated: "There shall be no subcontracting of any work heretofore performed by bargaining unit employees which results in a layoff of a bargaining unit employee provided the employee was employed by the employer on February 15, 1971."

150. Though specific clauses existed governing the issue of subcontracting, the arbitrator in *Robertshaw-Fulton Controls Co. v. Machinists Lodge 555*, 70-2 CCH LAB. ARB. AWARDS ¶ 8738 (1970), used the negotiation history and past practice as the basis for his decision. Similarly in *Oxford Paper Co. v. United Papermakers & Paperworkers Local 19*, 72-2 CCH LAB. ARB. AWARDS ¶ 8686 (1973), notwithstanding a subcontracting provision in the contract, the arbitrator relied on "good faith" and "reasonableness" test to find the company's activities no violation of the contract.

the action in question.<sup>151</sup> Many of the factors discussed in the sub-contracting cases also are relevant in these cases.<sup>152</sup> Specific clauses prohibiting the transfer of work to other plants or confining work to within a specific radius are not uncommon, and arbitration awards in this area often turn upon them.<sup>153</sup>

Cases involving the termination of a business are a separate category and involve what is generally considered to be an absolute management right absent contractual provision to the contrary. Where the termination is brought about by sale or merger, however, employee rights may continue under the successor corporation. The leading case of *Wiley v. Livingston*<sup>154</sup> holds that the extent of survivorship of employee rights is an arbitrable question (although application of the doctrine may have been somewhat restricted by the Supreme Court's recent *Burns*<sup>155</sup> decision). The thrust of *Wiley* is to protect the employer who is absorbed by the successor entity rather than to guarantee continued employment. This subject is treated in greater detail in another article in this symposium.<sup>156</sup>

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151. See Feinberg, *supra* note 142, at 637-40, in particular noting the list of cases that nearly consistently support Feinberg's claim that moves and/or transfers by employers "may be within management perogatives, if made in good faith and for economic reasons." *Id.* at 639.

152. See, e.g., *Mead Corp. v. Lithographers Local 251*, 71-1 CCH LAB. ARB. AWARDS ¶ 8391 (1971) (temporary shutdown held to be justified because of "economic and safety" considerations, during wildcat strike by another division of the plant); *Pearl Brewing Co. v. Brewery Workers Local 100*, 71-2 CCH LAB. ARB. AWARDS ¶ 8580 (1971) (shutdown of one-man division allowed, because the job was not extensive enough to justify the services of a full-time bargaining unit employee); *Ex-Cell-O Corp. v. Local 49, UAW*, 60 Lab. Arb. 1094 (1973) (employer's shutdown of a number of plants had to include preferential transfer rights for displaced employees; the arbitrator questioned the motive and good faith behind the shutdown).

153. Some clauses in such agreements go as far as prohibiting construction of additional facilities or relocation without the consent of the union, see BLS BULLETIN 1425-10, at 8. Others permit relocation within a restricted geographical radius, so workers are not displaced by distance, see BLS BULLETIN 1425-10, at 14-6. Still others provide for impact bargaining, which requires companies to at least discuss the employee effects of otherwise permissible plant relocation or shutdown, e.g., BLS BULLETIN 1425-10, at 8-10, 16-19 (*Harbison-Walker Refractories Co. and Stone Workers*; agreement expired July 1969). A noted case involving a prohibition clause against such moves by the plant, upheld by the courts, was *Shoe Workers Local 127 v. Brooks Shoe Mfg. Co.*, 183 F. Supp. 568 (E.D. Pa. 1960), *modified on other grounds*, 298 F.2d 277 (3d Cir. 1962).

154. 376 U.S. 543 (1964).

155. *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). Under *Burns* the duty to bargain continues in a successor situation, which, according to a recent Board decision, entails the duty to bargain over the effects of the change in business arrangement upon the employees, *All State Factors*, 205 N.L.R.B. No. 131 (Sept. 7, 1973); cf. *Machinists v. Northeast Airlines*, 80 L.R.R.M. 2197 (1st Cir. 1972).

156. Bakaly & Bryan, *Survival of the Bargaining Agreement: The Effect of Burns*, 27 VAND. L. REV. 117 (1974).

### B. *The Effect of the Collyer Doctrine*

A major dimension of the problem of employer unilateral action was added with the Board's decision in *Collyer Insulated Wire*.<sup>157</sup> *Collyer* holds essentially that questions involving employer conduct challenged under the Act will be deferred to arbitration if the employer contends that his action is privileged under the collective bargaining agreement and is willing to go that route to test the propriety of his conduct. The Board will retain jurisdiction and proceed further if the arbitrator's decision does not generally accord with the policies of the Act under the older case of *Spielberg Manufacturing Co.*<sup>158</sup> The *Collyer* doctrine, which has not been endorsed by a full majority of the Board nor reviewed by a significant number of courts, is still in its infancy and fraught with procedural and substantive complexities.<sup>159</sup> As it applies to the question of unilateral employer action, *Collyer* represents a desirable development because it encourages the kind of case-by-case, pragmatic approach to employer action exemplified by the arbitral decisions discussed above. The doctrine is not without its difficulties, however, since the possibility remains that employee rights will not be fully vindicated by the arbitral process, leaving residual rights to be asserted under the Act. Whether these rights will be adequately redressed after deferral is an open question. The *Collyer* doctrine also presents a challenge to the current view of the scope of the bargaining duty under the Act. As a result of *Collyer* the principal forum for questions involving independent employer action is arbitration, which functions best when the parties are left free to allocate carefully the functions of exclusive and shared management control. A restrictive view of 8(a)(5) is inconsistent with this approach.

It is not clear that all cases of employer conduct challenged under 8(a)(5) will be deferred under *Collyer*. *Collyer* involved the propriety of unilateral rate changes during the life of an agreement, a problem that turned closely upon the language of the agreement and the negotiations leading up to it; further, it was clear that the arbitration clause of the contract contemplated resolution of such a dispute. Since *Collyer* the Board has deferred to arbitration in a

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157. 192 N.L.R.B. No. 150 (Aug. 20, 1971).

158. 112 N.L.R.B. 1080 (1955) (the Board held that if the following standards were met by the arbitrator, that decision would be honored by the Board: (1) the proceedings were to be fair and regular; (2) the parties agreed to be bound; and (3) the decision was not repugnant to the purpose and policies of the Act).

159. A detailed discussion of *Collyer* is found in a separate article in this symposium. Nash, Wilder & Banov, *The Development of the Collyer Deferral Doctrine*, 27 VAND. L. REV. 23 (1974).



variety of cases involving employer unilateral action, including subcontracting, changes in hours of work, revocation of parking privileges, changes in wages and fringe benefits, installation of an incentive wage system, and changing rules with regard to access by union officials.<sup>160</sup> All of these cases appear to be consistent with the General Counsel's recently issued revised guidelines on deferral, which call for "broadening the application of . . . Collyer . . . to all cases in which (a) the issues are susceptible to resolution under the contract grievance-arbitration procedures, and (b) there is no reason to believe that this machinery will not resolve the issues in a matter compatible with Spielberg standards."<sup>161</sup> The General Counsel amplified this position by stating that deferral is likely to be warranted "if the unfair labor practice issues and the arbitration issues both turn on the meaning or application of disputed contract provisions, and particularly so if the contract provisions amount to a 'fleshing out' of statutory obligations."<sup>162</sup> The only reservation indicated in the General Counsel's statement is with reference to changes that result in "the substantial or total elimination of the bargaining unit"; these cases are to be submitted to the General Counsel for advice before the Regional Director determines whether to proceed with the 8(a)(5) charge or defer to arbitration.<sup>163</sup> Presumably the exception for these classes of cases has to do with the doubts raised earlier—whether the action involves a mandatory subject over which the union might have negotiated a protective clause and whether the deferral route will adequately protect the union.<sup>164</sup>

The difficulty presented by deferral is that a union's challenge to unilateral action proceeds along very different lines under the Act than in an arbitration proceeding. A grievance filed in response to unilateral action such as subcontracting seeks to bar that conduct absolutely. As the arbitral decisions on subcontracting reveal, absent the factors discussed in the subcontracting cases above, only a fairly explicit restrictive clause will bar management from acting.

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160. See *Peerless Pressed Metal Corp.*, 198 N.L.R.B. No. 5 (July 31, 1972); *Urban N. Patman, Inc.*, 197 N.L.R.B. No. 150 (June 30, 1972); *Bethlehem Steel Corp.*, 197 N.L.R.B. No. 121 (June 21, 1972); *Titus-Will Ford Sales, Inc.*, 197 N.L.R.B. No. 4 (May 26, 1972); *Great Coastal Express, Inc.*, 196 N.L.R.B. No. 129 (May 2, 1972); *Coppus Eng'r Corp.*, 195 N.L.R.B. No. 113 (Feb. 28, 1972).

161. 83 LAB. REL. REP. 42 (1973).

162. *Id.* at 43.

163. *Id.* at 50.

164. The only reported case in which deferral might have been a problem involved the unilateral conversion to artificial turf challenged by the football players' union, *National Football League*, 203 N.L.R.B. No. 165 (May 30, 1973); because the case was decided on other grounds, the *Collyer* issue was not faced.

The union may not be able to secure such a protective clause in negotiations, but this does not necessarily mean that the union has thereby acquiesced in management's unilateral determination to subcontract. The union could legitimately assume from the Board's decision in *Cloverleaf Division of Adams Dairy Co.*<sup>165</sup> that its right to invoke 8(a)(5) remains open. In *Adams Dairy*, a pre-*Collyer* decision, the union filed an 8(a)(5) charge in response to the employer's unilateral subcontracting of truck driver work to independent contractors. The employer argued that the union had waived any right to be consulted because it had failed in negotiations to secure a clause that would have required the employer to notify the union and discuss any proposed changes with it, and would have given the union a veto over such action. The Board, adhering to its familiar rule that a waiver of a statutory right "must be clearly and unmistakably established and is not lightly to be inferred,"<sup>166</sup> concluded that the failure to secure a substantive veto on employer action could not be taken as a waiver of its statutory right to bargain over the same action. Nor did the unsuccessful attempt to include in the contract the equivalent of its statutory right amount to an abandonment of the union's 8(a)(5) right. In amplifying its rationale the Board concluded that the challenge under 8(a)(5) involved changes in working conditions "not covered by the contract" and that "disposition of the controversy is quite clearly within the competency of the Board, and not of the arbitrator who would be without authority to grant the Union the particular redress it seeks and for which we provide below in our remedial order."<sup>167</sup> It is difficult to square *Adams Dairy* with *Collyer*, for the question reached by the Board in *Adams Dairy* of whether the union acquiesced in the employer's unilateral right to subcontract raises exactly the sort of question that *Collyer* held was appropriate for arbitral resolution because of the arbitrator's familiarity with the contract, past practices, and negotiating history.<sup>168</sup> Indeed, deferral was not ordered in

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165. 147 N.L.R.B. 1410 (1964).

166. *Id.* at 1412.

167. *Id.* at 1415.

168. *Collyer* explicitly stated the desire of the Board to allow arbitrators to deal with issues where, for instance, the disposition involves determinations as to "(a) the extent to which these actions were intended to be reserved to the management, subject to later adjustment by grievance and arbitration; . . . (d) the extent to which any of these issues may be affected by the long course of dealing between the parties. The determination of these issues, we think, is best left to discussions in the grievance procedure by the parties who negotiated the applicable provisions or, if such discussions do not resolve them, then to an arbitrator chosen under the agreement and authorized by it to resolve such issues." 192 N.L.R.B. at —, 77 L.R.R.M. 1931, 1934 (1971).

*Adams Dairy* only because the matter had not yet been the subject of an arbitration award, which, under the then prevailing *Spielberg* doctrine, was the only basis for deferral.<sup>169</sup> Under *Collyer's* expanded bases for deferral, a case like *Adams Dairy* probably would now be resolved by arbitration.

A union in the position of the union in *Adams Dairy* would today face a dilemma. If it challenged the subcontracting under 8(a)(5), the Board could be expected to defer to arbitration. If there had been a demand in negotiations for only a substantive restriction on subcontracting, the arbitrator probably would deny the grievance. The union could then come back to the Board claiming that the arbitrator's award failed to consider the "penumbral" and independent question of the union's statutory right to be consulted. The Board's policy of retention of jurisdiction under *Collyer* indicates that it would entertain such a charge,<sup>170</sup> but whether the Board would require bargaining is more doubtful now in view of the inevitable psychological influence upon the trier of fact of the arbitrator's finding of no substantive limitation. Furthermore, if the arbitrator had been required to consider the significance of a rejected "notify and discuss" clause of the sort found in *Adams Dairy*, he might have concluded that the union thereby acquiesced in employer unilateral action. It is doubtful the Board would subsequently find no waiver. Even if the Board were to agree with the union that its 8(a)(5) rights were preserved and that improper unilateral action was taken, the delay attendant upon proceeding through two different forums might make any remedy illusory.<sup>171</sup> Ironically, this would have made no difference in *Adams Dairy*, for the Eighth Circuit refused to enforce an 8(a)(5) order because, in its view, the change to independent contractors involved a fundamental change in the direction of

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169. 147 N.L.R.B. at 1415-16.

170. See *National Radio Co.*, 198 N.L.R.B. No. 1 (July 31, 1972).

171. The Board has made some attempt to make its remedies in § 8(a)(5) situations meaningful. For instance, see *Summit Tooling Co.*, 195 N.L.R.B. No. 91 (Feb. 22, 1972), where the Board awarded employees with whom the company refused to bargain as to the effects of a partial closing of company's plant, back pay and reinstatement from the time the company refused to negotiate over those effects until such time as an agreement was reached or a bona fide impasse arrived at. In another "make-whole" situation, the Board awarded employees in a similar situation back pay and preferential hiring, only to have the Ninth Circuit Court of Appeals reverse on the grounds that the Board had erroneously found the company's refusal to bargain over the actual move itself to be a violation of 8(a)(5). *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967). On remand the Board ordered the employer to bargain about the effect of the closing and to pay backpay for a period commencing 5 days after the Board's order until agreement or impasse was reached with a minimum of 2 weeks backpay for each affected employee. 170 N.L.R.B. 389 (1968).

the business, immune from bargaining under *Fibreboard*.<sup>172</sup>

The juxtaposition of *Collyer* and *Adams Dairy* may well prompt unions to attempt to secure not only substantive restrictions upon employer action in collective bargaining but also a set of procedural safeguards that closely track those of 8(a)(5)—the latter becoming doubly important if the union fails to obtain the substantive restrictions it seeks. This raises the possibility of the paradoxical situation in which a union, unable to secure substantive restrictions upon employer freedom because the employer contends that a mandatory subject of bargaining is not involved, discovers that when it subsequently challenges such action under 8(a)(5) the case is deferred to arbitration where the union loses because there is no restrictive clause. I suggest that deferral under *Collyer* is inappropriate where the contract is silent on the subject matter in question solely because the employer contended in negotiations that it was outside the scope of bargaining. Even if the employer's position in negotiations were incorrect, and the matter was a mandatory subject of bargaining, deferral should not be ordered subsequently; otherwise, a union would be required to file an 8(a)(5) charge everytime such an assertion was made in negotiations in order to avoid a subsequent problem of waiver. This would encourage the unhealthy situation of interrupting collective bargaining by filing charges and would place an unnecessary administrative burden on the Board. This kind of situation would be less likely to arise if a broad scope were given to the duty to bargain.

### C. *The Jacobs Doctrine and the Effect of Waivers During a Contract Term*

Closely related to *Collyer* is the effect that the union's failure during negotiations to secure some contractual restriction on management's freedom has upon the union's ability later to challenge successfully such action under 8(a)(5). As indicated in the discussion of *Adams Dairy*,<sup>173</sup> the Board is reluctant to imply waivers of statutory rights absent the clearest of intention. It is unclear how this rule will apply to cases in which the waiver question itself is deferred to arbitration.

A useful departure point is *Jacobs Manufacturing Co.*,<sup>174</sup> since it illuminates and re-emphasizes a key difference in the position of

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172. NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965).

173. Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410, 1413-14 (1964).

174. 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952).

labor and management in regard to the function of 8(a)(5): employers invoke 8(a)(5) to prevent a union from seeking to bilaterally add or clarify contract terms in negotiations, while unions use 8(a)(5) to challenge management's attempts to unilaterally remove certain areas from joint determination. In *Jacobs* the union sought in mid-contract to negotiate for new group insurance and pension benefits. The employer refused to negotiate on the ground that under the Act neither party is obliged to "discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period."<sup>175</sup> The basic question before the Board was how to construe this language to preserve stability during a contract term while at the same time providing for a means of resolving genuinely new matters that may arise during the contract term. In the earlier case of *Tide Water Associated Oil Co.*<sup>176</sup> the Board took a mechanistic approach to this question, holding that the only items immune from further bargaining are those actually "integrated and embodied in a writing."<sup>177</sup> Two Board members were prepared to adhere to this view in *Jacobs*, which would have meant that both items were open to negotiation, since neither had been embodied in the agreement.<sup>178</sup> A third member took virtually the opposite position, that no further negotiations are permitted during the contract term on any subject,<sup>179</sup> while a fourth would have barred negotiations on both matters because he saw the case as turning on the narrower question of the scope of a reopener clause, under which neither matter could be raised.<sup>180</sup> It thus fell to Chairman Herzog to cast the decisive vote.<sup>181</sup> He concluded that *Tide Water* provided too narrow and rigid a test of exclusion and that further bargaining should be precluded over any subject that had been "fully discussed" and "consciously explored" in negotiations.<sup>182</sup> Thus the pension program, never discussed or put into writing, could be raised by the union, but the insurance program, fully discussed but not embodied in the contract, could not be the subject of further negotiations.

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175. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1964): "[T]he 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 . . . does not compel either party to agree to a proposal or require the making of a concession. . . ."

176. 85 N.L.R.B. 1096 (1949).

177. *Id.* at 1099.

178. *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1217 (1951).

179. *Id.* at 1228, 1231.

180. *Id.* at 1234-35. The majority result did not turn on this "reopener clause."

181. *Id.* at 1227-28.

182. *Id.* at 1227.

The "fully discussed" and "consciously explored" test was not the majority view of the Board, nor did the Second Circuit's affirmation rest upon it.<sup>183</sup> Yet the test enunciated in *Jacobs* appears to have been followed by the Board.<sup>184</sup> It is a sound one insofar as it pertains to new matters sought to be raised during a contract term since it permits resolution of truly new issues that come up for the first time without opening the gates too wide, as was the case under the more rigid *Tide Water* rule.

There is inherent imprecision in a rule that turns on expressions like "fully discussed" and "consciously explored." Where the effect of this rule is to preclude a union from seeking a bilateral change in a contract that appears to have been set to rest, erroneous application of the rule is not as harsh as when it is used to grant an employer a unilateral right to change the status quo. Even though the *Jacobs* doctrine arose in the former context, its language has been applied in cases in which the employer sought to justify unilateral action on the strength of a waiver.<sup>185</sup>

The problem is compounded by a second aspect of *Jacobs*. The "majority" opinion suggested quite explicitly that negotiation over new matters could be precluded by the inclusion of a "zipper" clause in the agreement. Such a clause generally bars negotiation during the life of the agreement as to new matters, whether or not contemplated or raised by the parties at the time of negotiations.<sup>186</sup> As with the main holding of the case, this "zipper clause" doctrine was designed to deal with cases involving the raising of new matters during a contract term and not cases involving employer unilateral action.

The Board's and the courts' application of the *Jacobs* doctrine and related rules with regard to waiver have not been entirely consistent. This may be explained simply by the marked factual differences between cases. An important case in this line of development, because it is often cited to support employer unilateral action during a contract, is *Speidel Corp.*<sup>187</sup> The Board held that 8(a)(5) was

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183. The Second Circuit affirmed the Board's conclusion that the pension program was a proper subject of negotiation because it had been neither discussed nor embodied in the agreement. Since no appeal was taken on the insurance issue, the court found it unnecessary to reach the question of subjects discussed but not put into writing. 196 F.2d 680 (2d Cir. 1952).

184. See, e.g., *Skyway Luggage Co.*, 117 N.L.R.B. 681, 695-97 (1957).

185. E.g., *Press Co.*, 121 N.L.R.B. 976, 978 (1958).

186. A sample clause was included in the opinion, *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1220 n.13 (1951).

187. 120 N.L.R.B. 733 (1958).

not violated when the employer unilaterally discontinued an Easter bonus which had regularly been given for many years but which was always accompanied by the statement that it "was voluntary and was not to be construed as establishing a precedent."<sup>188</sup> In the negotiations leading to the contract in question the union sought to add a "Maintenance of Privileges" clause that would in effect guarantee the continuance of all benefits already enjoyed by employees. The employer rejected the clause and made explicit to the union that it did so because it was fearful of thereby perpetuating the bonus and other benefits that management claimed were discretionary. The union remained silent, neither contradicting management's position nor insisting further upon such a clause.

While the *Speidel* result probably is sound, it raises some serious questions. It is hard to see how a long standing and recurrent benefit, otherwise a term and condition of employment, loses that status merely because the employer says so. The union ought to be able to clarify such a situation without fear that a waiver may be found if it makes a demand—like a "Maintenance of Privileges" clause—that is rejected by management. To hold otherwise would place pressure upon the union to strike in order to avoid a finding of waiver on such a critical term. It appears, however, that *Speidel* turned on the close factual finding that the union had in fact previously acquiesced in management's unilateral right to remove the bonus and that its proposal clause was an unsuccessful attempt to change the status quo rather than to clarify an ambiguous situation.

*Speidel* should be compared with *Nash-Finch Co.*,<sup>189</sup> in which the Board held the unilateral discontinuance of insurance programs and a Christmas bonus a violation of 8(a)(5). As in *Speidel*, the union was unable to secure a maintenance of standards clause, but there was lacking in *Nash-Finch* the strong evidence in *Speidel* that the union had previously acquiesced in management's right to make these changes. Expressly using the *Jacobs* language the Board found the subject not "fully discussed or consciously explored," hence there was no waiver. On appeal, the court reversed in the belief that the dropping of the maintenance of benefits demand was significant.<sup>190</sup>

The Board appears to have shied away from the "fully discussed/consciously explored" language of *Jacobs* in most unilateral action cases and has instead applied the more precise "clear and

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188. *Id.* at 734.

189. 103 N.L.R.B. 1695 (1953), *enforcement denied*, 211 F.2d 622 (8th Cir. 1954).

190. 211 F.2d 622 (8th Cir. 1954).

unequivocal" test, which is less of a snare for statutory waivers.<sup>191</sup> For example, in *Beacon Piece Dyeing & Finishing Co.*,<sup>192</sup> a split decision, the Board refused to infer waiver of the right to challenge the employer's unilateral change of workloads from the failure of the union to secure a clause prohibiting workload changes. The Board distinguished the dropping of a demand for a contractual restraint, particularly in exchange for other concessions, from an acquiescence in employer unilateral action as in *Speidel*.

Significantly, the Board recently held that cases involving questions of waiver fall within the *Collyer* doctrine and will be deferred to arbitration. This determination was made in a split decision in *Radioear Corp.*,<sup>193</sup> in which the employer justified the unilateral discontinuance of a "turkey money" bonus at Christmas time on a zipper clause agreed to by the parties. Both the Trial Examiner and dissenting Board members argued that the zipper clause did not amount to a "clear and unequivocal" waiver and that the employer's action was thus barred under 8(a)(5). The majority, however, although conceding that in some cases the evidence would be so plain that there was no "clear and unequivocal" waiver barring an 8(a)(5) challenge, reasoned that most factual situations are too varied to make such a confident determination. Instead, the waiver question also would be deferred to arbitration, permitting a fuller inquiry into the entire bargaining process leading up to the contract in question.

Since the post-*Jacobs* cases on waiver contain such variant fact patterns, deferral under *Radioear* may yield fairer results than Board decisions relying upon the more rigid "clear and unequivocal" or "consciously explored" tests.

A full discussion of the advantages of the arbitral route over Board adjudication is the subject of another article<sup>194</sup> in this symposium. It is appropriate to note, however, that the speed of the process, flexibility of the hearings, and familiarity of the arbitrator with the contract and its negotiating history probably put the arbitrator in a better position than the Board to make an intelligent evaluation on the waiver question. Further, a charge filed with the Board cannot proceed to formal hearing unless the Regional Direc-

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191. New York Mirror, 151 N.L.R.B. 834, 839 (1965); C. MORRIS, *THE DEVELOPING LABOR LAW* 462-63 (1971); see *Century Elec. Motor Co.*, 180 N.L.R.B. 1051, 1055-56 (1970), using both "clear and unmistakable" and "consciously explored" test, but finding no waiver merely from silence on the part of the union during negotiations with regard to the issue in question.

192. 121 N.L.R.B. 953 (1958).

193. 199 N.L.R.B. No. 137 (Oct. 30, 1972).

194. *Nash et al.* n.159, *supra*.



tor finds from his investigation probable cause to issue a complaint. It is difficult to conceive of an adequate exploration of these complex issues in the investigation.

The difficulty with deferral, as already pointed out, is that even though an arbitrator may find waiver on a substantive contract restriction, this does not necessarily conclude the question whether the union thereby agreed that the employer was free to take unilateral action under the statute as well. The Board cases dealing with waiver recognize this distinction in theory. It remains to be seen whether the Board will insist upon fidelity to this doctrine when cases deferred under *Collyer* come back to the Board for review. The deferral route may produce salutary results, since the arbitrator's award will probably resolve both the substantive question of the employer's contractual right to engage in the conduct in question and the union's procedural right to prior negotiations.<sup>195</sup> This will force the parties to consider in negotiations the full ramifications — contractual and statutory — of proposed employer unilateral action.

#### D. *The Influence of Boys Markets*

There is a further dimension of the question of unilateral action during a contract term. Even if unilateral action is permitted under 8(a)(5) because it does not involve a term and condition of employment or because of waiver, this is not conclusive of the union's ability to strike over such conduct. The scope of the no-strike clause will, of course, determine whether the union has the contractual right to strike. Furthermore, the *Jacobs* decision suggests that such a strike would not be prohibited under 8(d), although it leaves open whether the procedural requirements of 8(d) must be complied with.<sup>196</sup> This is of only secondary interest to the employer, whose main objective is to secure a prompt and certain injunction against such a strike. Whether he can do this depends upon the applicability of *Boys Markets*.<sup>197</sup>

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195. See *Oxford Paper Co.*, 72-2 CCH LAB. ARB. AWARDS ¶ 8686 (1973).

196. *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1218 (1951). It is doubtful that such action would be held to violate the union's duty to bargain in good faith under 8(b)(3). The source of the speculation to the effect that it might be unlawful is *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), which held that an employer's insistence upon negotiating a contract containing non-mandatory subjects of bargaining violates 8(a)(5). It is doubtful that this reasoning extends to a strike, however, especially in view of *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960), holding that strike action by a union during negotiations did not per se violate 8(b)(3), even if the strike would not be considered protected activity.

197. *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

*Boys Markets*, a major decision in regard to employer injunctive relief, established the power of federal courts to issue injunctions against certain kinds of strikes in violation of a no-strike clause. Ten years earlier, in *Sinclair Refining Co. v. Atkinson*,<sup>198</sup> the Court had held that the Norris-La Guardia Act prohibited a federal court from issuing an injunction in such a dispute, and in the interim the Court made clear that an action seeking an injunction in state court could be removed to federal court, where, under *Sinclair*, it would generally be dissolved.<sup>199</sup> In granting federal courts the power to issue injunctions, *Boys Markets* did not entirely overrule *Sinclair* since the authority to issue injunctions extends only to strikes in breach of a no-strike clause over issues that are themselves referable to arbitration.<sup>200</sup> Like *Collyer*, *Boys Markets* is a decision strongly supportive of the arbitral process. In cases involving strikes over matters such as subcontracting, lay offs, and more drastic terminations of business, the critical question is whether the underlying dispute is referable to arbitration. Before *Boys Markets* an employer would have been reluctant to entrust an arbitrator with deciding its right to close down a portion of the business. But now, with the ability to enjoin a strike in the balance, an employer might want such matters referable to arbitration provided the contract is constructed in a way favorable to the employer's right to take necessary action.

*Boys Markets* thus provides an impetus for broader arbitration clauses and for more careful consideration and draftsmanship of areas formerly resisted at the table because they involve management rights. With broad arbitration clauses in contracts, deferral under *Collyer* will be possible in 8(a)(5) cases involving asserted management rights.<sup>201</sup> Additionally, when cases are deferred, increased guidance will be provided for the arbitrator. *Boys Markets* thus completes the circle and provides a further impetus for contractual rather than statutory resolution of questions involving the employer's right to take independent action.

#### V. *The Organized Plant After the Contract Expires—Restraints During the Hiatus*

With the expiration of a collective bargaining agreement, the

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198. 370 U.S. 195 (1962).

199. *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560-61 (1968).

200. *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 253 (1970).

201. Unless, of course, the Board decides not to go the deferral route in cases involving termination of a substantial part of the bargaining unit work. See part IV(b) *supra*.

contractual allocation of responsibility ceases to be of direct effect. Section 8(a)(5) is reinstated as the primary tool to govern the propriety of unilateral employer conduct; nevertheless, its application is often significantly shaped by the practices that grew up under the now expired contract. Since deferral under *Collyer* is not possible during the hiatus between contracts because no arbitration mechanism is in effect,<sup>202</sup> this period offers a good vantage point for exploring the impact of past practices upon the scope of 8(a)(5). In many respects, of course, the employer's right to take unilateral action during the hiatus period will not be significantly different than in the negotiation phase of the first contract or during a contract term where arbitration under the *Collyer* doctrine is not available.<sup>203</sup>

The most fertile areas of litigation concerning independent employer action during the break between contracts involve layoffs, subcontracting, and refusals to process grievances. *NLRB v. Frontier Homes Corp.*<sup>204</sup> is an excellent example of the first category. The expired collective bargaining agreement had permitted the employer to consider ability rather than strict seniority in making layoffs. The employer, however, failed to take advantage of this provision during the contract term and continued, as in the past, to lay off employees on the basis of seniority. Shortly after the expiration of the agreement the employer sought to apply a newly developed merit rating system to layoffs, asserting its contractual right to do so. The Board, affirmed by the court, held that this unilateral change violated 8(a)(5).

It is difficult to determine from the Board opinion the precise status of the expired contract in *Frontier Homes*. The majority, disagreeing with the employer that the contract language sanctioned a layoff procedure that ignored seniority, observed that "whatever meaning this clause might have in the abstract need not be considered by us" in the face of the employer's consistent practice of using seniority to determine order of layoffs.<sup>205</sup> Its opinion is thus susceptible to the interpretation that the contractual allocation of rights continued to be determinative, although actual prac-

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202. *Borden, Inc.*, 196 N.L.R.B. No. 172 (May 19, 1972).

203. Past practices will generally not be as well developed in cases arising during the negotiation of the first contract as in cases arising after one or more collective bargaining agreements have been negotiated. In particular, union acquiescence in management rights will rarely be found prior to the first contract. Unilateral changes in the hiatus period may also be tested against the overall conduct of the employer if it is alleged that the employer has not bargained in good faith for the renewal of the contract.

204. 371 F.2d 974 (8th Cir. 1967), *enforcing in part*, 153 N.L.R.B. 1070 (1965).

205. *Frontier Homes Corp.*, 153 N.L.R.B. at 1072.

tice had changed the meaning of the terms to require that seniority be observed. Indeed, Chairman McCulloch, dissenting, made plain that the contractual reservation to management of the right to consider merit in making layoffs survived the expiration of the agreement. Thus his quarrel with the majority was over the interpretation of the clause itself, McCulloch contending that the clear contract language precluded evidence of any contrary practice.<sup>206</sup> The court, however, in agreeing with the majority result, left no doubt that any contractually enlarged sphere of employer rights died with the agreement: "the fruit of these past negotiations must end with the expiration of the contract."<sup>207</sup> Without the contract to aid the employer its action was a plain departure from the status quo.<sup>208</sup>

It would appear from Board decisions dealing with the problem in other contexts<sup>209</sup> that the court's view of the effect of the expired contract in *Frontier Homes* comports with present Board thinking. That is, the critical determinant of the scope of employer independent action is not the language of the expired contract but the actual allocation of rights prior to the unilateral action in question. Past practice controls, although the content of that practice will probably be shaped by contractual language. *Frontier Homes* is unusual in that the actual practice ran counter to the contractual language.<sup>210</sup>

We have already examined in another context the effect of past practices in determining whether employer conduct departs sufficiently from the status quo to constitute a violation of 8(a)(5).<sup>211</sup> In *Frontier Homes* the Board set forth a somewhat more detailed test

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206. *Id.* at 1076-77.

207. *NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 980 (8th Cir. 1967).

208. *Id.* It is not clear whether the decision to lay off is within the scope of § 8(a)(5) or is exempt as a "fundamental" management prerogative. Compare *Burns Ford Inc.*, 182 N.L.R.B. 753 (1970) with *Southern Coach & Body Co.*, 141 N.L.R.B. 80 (1963). The reported cases generally involve a claim of failure to bargain over the impact of the layoff. See, e.g., *Miller Import, Wholesale Beer Distribut.*, 157 N.L.R.B. 1262, 1271 (1966). For example, whether seniority should be followed in making layoffs may turn on past practices, *Frontier Homes Corp.*, 371 F.2d 974 (8th Cir. 1967), or may be tied to the issue of subcontracting, itself a mandatory subject, *Weston & Broker Co.*, 154 N.L.R.B. 747 (1965), *enforced*, 373 F.2d 741 (4th Cir. 1967).

209. Subcontracting and grievances, discussed in this section, *infra*. See also *McCulloch Corp.*, 132 N.L.R.B. 201, 213-14 (1961) (employer's contribution to existing profit sharing plan); *H.E. Fletcher Co.*, 131 N.L.R.B. 474, 484-85 (1961) (granting unilateral wage increases).

210. For other layoff cases see *NLRB v. United Nuclear Corp.*, 381 F.2d 978 (10th Cir. 1967); *NLRB v. Cone Mills Corp.*, 373 F.2d 595 (4th Cir. 1967); *Purilator Prods. Inc.*, 160 N.L.R.B. 80, 81, 104-05 (1966).

211. See the discussion of *NLRB v. Katz* and related cases, part III *supra*.

for determining whether unilateral action violates 8(a)(5) during the hiatus between contracts: "it must involve a departure from previously established operating practices or result in a significant impairment of job tenure, employment security, or work opportunities for those in the bargaining unit."<sup>212</sup> At first blush this test is puzzling because it fails to encompass certain kinds of unilateral action that would violate 8(a)(5) in periods other than the hiatus. For example, the unilateral introduction of a pension program would violate 8(a)(5) even though it does not impair job tenure under the *Frontier Homes* test nor fit, except by a cumbersome reading of the test, the criterion of "a departure from previously established operating practices."<sup>213</sup>

Perhaps the reason for this seemingly different test is that the Board in *Frontier Homes* was dealing with a peculiarly complex area of unilateral action involving recurrent day to day changes that, if covered by 8(a)(5), would entail an impossible burden of negotiations. In this respect it is very much like the subcontracting situation;<sup>214</sup> indeed, the cited authority for the quoted test in *Frontier Homes* is a leading subcontracting case.<sup>215</sup> In these categories of cases involving a continuum of employer conduct rather than an isolated change that clearly represents a departure from past practice, the Board appears to have developed a more sophisticated test. Rather than make an either/or choice of hindering employer flexibility by requiring bargaining in every instance of subcontracting or layoff, or jeopardizing employee security by never requiring bargaining in these cases, the Board has struck an accommodation very similar to that of the arbitration cases discussed in part IV. In those cases, in the absence of detailed contractual allocation of rights, the arbitrator, relying upon a variety of factors, including past practices and the impact on bargaining unit employees, essentially made an equitable, individual judgment in each case. It appears that in subcontracting and layoff cases that arise during the hiatus between contracts, in the absence of a deferral policy under *Collyer*, the Board decisions resemble those of arbitrators dealing with the same issue under a contract.

But where the change involves a single action affecting a term

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212. *Frontier Homes Corp.*, 153 N.L.R.B. 1070, 1072 (1965).

213. The Court of Appeals used the traditional test, *NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 980-81 (8th Cir. 1967). See also *NLRB v. United Nuclear Corp.*, 381 F.2d 978, 979 (10th Cir. 1967).

214. See cases discussed in part III *supra*.

215. *Westinghouse Elec. Corp.*, 150 N.L.R.B. 1574 (1965).

and condition of employment, the *Katz* test would still appear to be fully applicable even during the hiatus period.<sup>216</sup> As indicated, however, in the earlier discussion of *Katz*, the employer's past practice would have to be a fairly automatic one, with little or no room for discretion, for continuation of that practice not to be treated as a unilateral change.<sup>217</sup>

The Board's treatment of subcontracting during the interval between contracts follows both the *Frontier Homes* approach and the earlier cases dealing with subcontracting, such as *Westinghouse Electric Corp.*<sup>218</sup> A good illustrative case is *Shell Oil Co. (Norco, La.)*.<sup>219</sup> The expired collective bargaining agreement embodied a compromise on the question of subcontracting, requiring that all subcontracted work be performed at rates of pay similar to those under the agreement but, at least by implication from that restriction, permitting the employer to unilaterally determine whether to subcontract. In negotiations leading to the subsequent contract the union sought further limitations upon management's right to subcontract; however, the employer resisted, insisting upon the freedom it enjoyed under the existing clause.<sup>220</sup> During the break between contracts the employer continued to subcontract unilaterally, although at the prevailing rate as required by the expired clause. The union challenged the unilateral right to subcontract during the hiatus period and the Trial Examiner found a violation of 8(a)(5) based upon his view that the clause in question did not sanction a unilateral right to subcontract. The Board disagreed with this contractual interpretation, finding in both the language and practice an implied acquiescence in the employer's unilateral right to subcontract.

The important issue for our purposes is the effect of this expired clause, whatever its interpretation. The Board's General Council, in agreement with the Trial Examiner, urged that once the contract expired so too did any management right created by the agreement. The Board, however, took a broader view, holding that the respective rights and duties of the parties may derive from sources other than the formal agreement, and that although the employer's claim of favorable past practice may have been predicated upon the con-

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216. *NLRB v. Katz*, 369 U.S. 736, 746-47 (1962).

217. See part III *supra* at 146.

218. 150 N.L.R.B. 1574 (1965).

219. 149 N.L.R.B. 283 (1964).

220. Indeed, when a new contract was ultimately negotiated, the old clause was retained.

tract, it had also become an "established employment practice, and, as such, a term and condition of employment."<sup>221</sup> The union could, of course, seek to change this condition of employment through negotiations, as it in fact did, but pending an agreement the employer's right to subcontract remained.<sup>222</sup>

Had a situation like *Shell Oil (Norco)* arisen during the contract term, it would have been deferred to arbitration under *Collyer*, which might have provided a more apt forum for resolution of the complex issues presented. In deciding the case under 8(a)(5), the Board essentially gave the employer the benefit of the bargain it struck through negotiations, thus presenting a clear example of an employer's ability to enlarge its scope of independent action beyond its naked statutory limits. Had the employer in *Shell Oil (Norco)* increased the pace of its subcontracting during the hiatus period this probably would have violated 8(a)(5) under the reasoning of a later *Shell Oil Co.* case.<sup>223</sup> In such a situation both the departure from the status quo and the adverse impact on bargaining-unit employees tests of *Frontier Homes* would have been satisfied.

The results in grievance cases parallel the other two areas discussed, although no clear case of court approval has been found. *Kingsport Publishing Corp. v. NLRB*<sup>224</sup> is the most instructive case. The Board concluded that, since the processing of grievances was a practice under the contract, the employer violated 8(a)(5) by refusing to process grievances when the contract expired. The Board's reasoning was not fully spelled out. The Sixth Circuit reversed, largely on the strength of *Frontier Homes*, and held that there was insufficient evidence to demonstrate that through usage the grievance process had become "part of the established operational pattern."<sup>225</sup> In the later case of *Hilton-Davis Chemical Co.*,<sup>226</sup> however, the Board suggested that the rationale for extending the duty to process grievances into the hiatus period stems from the bargaining obligation itself, which embodies the processing of grievances.<sup>227</sup>

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221. *Shell Oil Co. (Norco, La.)*, 149 N.L.R.B. at 287.

222. *Id.* at 287-88.

223. 166 N.L.R.B. 1064, 1066 (1967).

224. 399 F.2d 660 (6th Cir. 1968), *denying enforcement to* 165 N.L.R.B. 694 (1967).

225. *Id.* at 661.

226. 185 N.L.R.B. 241 (1970).

227. For a similar approach in the public sector, that the duty to bargain includes the duty to process grievances, see *Antonopoulou v. Beame*, 32 N.Y.2d 126, 296 N.E.2d 247, 343 N.Y.S.2d 346, (1973). See also *Heart of America Meat Dealers Ass'n*, 168 N.L.R.B. 834, 843 & n.15 (1967); *Celotex Corp.*, 147 N.L.R.B. 48, 60 (1964); *Motor Research Co.*, 138 N.L.R.B. 1490, 1492 (1962).

While the grievance process continues into the hiatus period, the obligation to resolve grievances through arbitration does not. The Board so concluded in *Hilton-Davis*, observing that "arbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize. Absent mutual consent, the parties revert to the scheme of 'free' collective bargaining."<sup>228</sup> While the majority refused to extend arbitration into the interval between contracts because arbitration is essentially a consensual process and here mutual consent was lacking, Member Brown based his concurrence upon a different consideration. He concluded that since arbitration and the no-strike pledge are thought to be the *quid pro quo* for each other, binding arbitration could not be extended into the hiatus period, when the union was free to strike.<sup>229</sup> This approach is similar to that taken in a series of cases in which the Board held that such items as union security and checkoff could not be continued past the expiration of a contract because their viability turned upon the existence of an agreement.<sup>230</sup> Member McCulloch, dissenting in *Hilton-Davis*, took the position that the duty to arbitrate survives the expiration of an agreement on the same theory of the cases discussed earlier, that the past practice controls even upon the termination of the contract that provided the initial impetus for it.<sup>231</sup>

The decisions refusing to extend binding arbitration into the hiatus period should be contrasted with cases that permit the arbitration of grievances that arise during the collective bargaining agreement but that come to arbitration only after the agreement terminates.<sup>232</sup> In addition there is a separate line of cases that holds

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228. *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241 (1970).

229. *Id.* For the exact opposite result in the public sector in which the duty to go to arbitration during a contract hiatus was spelled out from the statutory prohibition on strikes, see *Connetquot Bd. of Educ.*, 74 Misc. 2d 336, 342 N.Y.S.2d 701 (S. Ct. 1972). Compare *Triborough Bridge & Tunnel Authority*, 5 P.E.R.B. ¶ 5-4505 April, 1972.

230. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964); *Heart of America Meat Dealers Ass'n*, 168 N.L.R.B. 834 (1967); see *Standard Oil of Calif., W. Operations, Inc.*, 144 N.L.R.B. 521 (1963).

231. *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241 (1970). Other cases dealing with arbitration include: *Taft Broadcasting Co. v. NLRB*, 441 F.2d 345 (6th Cir. 1969); *Printing Pressmen v. Piedmont Publishing Co.*, 393 F.2d 221 (4th Cir. 1968); *Piano & Musical Instrument Workers Local 2459 v. W.W. Kimball Co.*, 333 F.2d 761 (7th Cir. 1964); *M.K. & O. Transit Lines Inc. v. Division 892, Street Elec. Ry. & Motor Coach Employees*, 319 F.2d 488 (10th Cir. 1963); *Food Handlers Local 425 v. Arkansas Poultry Cooperative, Inc.*, 199 F. Supp. 895 (W.D. Ark. 1961).

232. *E.g.*, a grievance arising after the expiration of a collective agreement is not arbitrable. *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963), but a grievance filed after a contract's lapse



that certain rights essentially "vest" under a collective bargaining agreement and survive its expiration. These rights have generally been vindicated through the arbitration process.<sup>233</sup>

Although the employer in all these categories of cases may secure immunity from 8(a)(5) on the strength of past practices deriving from consensual arrangements under an expired contract, it is unlikely that a management rights clause alone will support such a claim of practice. In *Borden, Inc.*<sup>234</sup> the Board rejected a claimed unilateral right to cancel an insurance program on the basis of a management rights clause in an expired agreement. The Board, adopting familiar language, reasoned that "a union must clearly and unmistakably waive its right to bargain on mandatory subjects before an employer has a right to make unilateral changes."<sup>235</sup>

Nevertheless, the prohibition against unilateral action under 8(a)(5) does not absolutely bar the employer from making changes. The employer is merely required to bargain in good faith to impasse before taking unilateral action. Impasse is largely a factual and judgmental matter, entailing, in general terms, the exhaustion of the possibility of reaching agreement. A comprehensive catalog of the factors indicating impasse is set forth in *Taft Broadcasting Co.*,<sup>236</sup> one of the leading cases dealing with the impasse question.<sup>237</sup> Before unilateral action on a particular matter is permitted, impasse must have been reached on that issue.<sup>238</sup> Whether impasse need be reached on all open issues before unilateral action may be

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is arbitrable where the claim matured during the life of the agreement, *General Tire & Rubber Workers, Local 512*, 191 F. Supp. 911 (D.R.I.), *aff'd per curiam*, 294 F.2d 957 (1st Cir. 1961).

233. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *Holly Sugar Corp. v. Distillery Workers*, 412 F.2d 899 (9th Cir. 1969); *Machinists Local Lodge 595 v. Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965); *Automobile Workers v. Defiance Indus. Inc.*, 251 F. Supp. 650 (N.D. Ohio 1966); *Steelworkers v. H.K. Porter Co.*, 190 F. Supp. 407 (E.D. Pa. 1966); *In re Brooklyn Eagle, Inc.*, 32 Lab. Arb. 159 (1959) (Willard Wirtz, arb.). *See also Zdanok v. Glidden Co.*, 288 F.2d 99 (2d Cir. 1961).

234. 196 N.L.R.B. No. 172 (May 19, 1972).

235. *Id.* at —, 80 L.R.R.M. 1240, 1243 (1972).

236. 163 N.L.R.B. 475, 478 (1967), *petition for review dismissed*, 395 F.2d 622 (8th Cir. 1968). These factors include the bargaining history, the good faith of the parties in the negotiations, the length of the negotiations and number of bargaining sessions, the significance of the items to the parties in light of particular bargaining objectives, the absence of movement on the open issues, the use of mediation or conciliation especially when the mediator has split the parties up, making of a final offer, absence of counter proposals to such an offer, and the stated positions and understandings of the parties that there is impasse.

237. *Taft* is cited in numerous cases dealing with impasse. *E.g.*, *Subpak & Sons v. NLRB*, 470 F.2d 998 (6th Cir. 1972); *Wantagh Auto Sales, Inc.*, 177 N.L.R.B. 153 (1969).

238. *Tesoro Petroleum Corp.*, 192 N.L.R.B. No. 56 (July 29, 1971); *Laclede Gas Co.*, 171 N.L.R.B. 1392 (1968).

taken on a particular issue is unclear.<sup>239</sup> It may be argued that impasse can never be reached on a single issue as long as the total "package" is unsettled since concession on one of the open items may produce further movement on the item on which unilateral action is sought. Where it can be shown, however, that unilateral action is necessary with regard to a particular matter,<sup>240</sup> it may make better sense to permit such action even though impasse has not even been reached on all items.

Upon impasse the employer may grant benefits or make other changes that improve the terms and conditions of employment, so long as they do not exceed those offered by the employer in negotiations.<sup>241</sup> A reduction in benefits is also permitted after impasse, provided the possibility of such an action was discussed in negotiations.<sup>242</sup> In evaluating the propriety of unilateral employer conduct allegedly warranted by impasse, the overall good faith of the employer in negotiations is relevant.<sup>243</sup>

The impasse doctrine applies not only to full scale negotiations between contracts but also to unilateral action taken during a contract term with regard to mandatory subjects of bargaining. Although an expansive scope of subjects on which such bargaining is required has been urged in this article, the need for speed and efficiency in making and implementing such decisions suggests that a more flexible standard of impasse should be applied in those cases arising during a contract term.<sup>244</sup>

Unilateral action involving elimination of employees through layoffs and other terminations of positions may fall into the category of lockouts, in which case employer action prior to impasse may be permitted on the justification that it is in support of a legitimate bargaining position.<sup>245</sup>

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239. See *Sioux City Bottling Works*, 156 N.L.R.B. 379, 385 (1966); *Hartman Luggage Co.*, 173 N.L.R.B. 1254 (1968).

240. *Southern Wipers Inc.*, 192 N.L.R.B. No. 135 (Aug. 19, 1971) (merit increases economically necessary to prevent loss of employees).

241. *Compare Manor Mining & Contracting Corp.*, 197 N.L.R.B. No. 146 (June 28, 1972); *Falcon Tank Corp.*, 194 N.L.R.B. No. 50 (Nov. 24, 1971); *Terry Indus.*, 188 N.L.R.B. No. 102 (Feb. 26, 1971), where the unilateral increases exceeded pre-impasse proposals, *with Continental Nut Co.*, 195 N.L.R.B. No. 158 (Mar. 13, 1972); *Midwest Casting Corp.*, 194 N.L.R.B. No. 91 (Dec. 14, 1971); *Chemical Producers Corp.*, 183 N.L.R.B. No. 18 (Jan. 9, 1970), where the increases did not exceed them.

242. *Teamsters Local 745 v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966); *DuPont & Co.*, 189 N.L.R.B. No. 144 (Apr. 14, 1971).

243. See, e.g., *Molders Local 155 v. NLRB*, 442 F.2d 746 (D.C. Cir. 1971).

244. See *Rabin, Fibreboard and the Termination of Bargaining Unit Work*, 71 *COLUM. L. REV.* 803, 832-34 (1971).

245. *Laclede Gas Co. v. NLRB*, 421 F.2d 610 (8th Cir. 1970); *Darling & Co.*, 171

A further factor in the propriety of employer unilateral action in the hiatus stage is whether the union continues to enjoy a majority support of the employees it represents. With the expiration of an agreement the union's majority status is usually open to challenge by a decertification petition or a refusal to bargain because of a good faith doubt as to its continued majority status.<sup>246</sup> If the union's majority in fact no longer exists, the duty to bargain ceases and unilateral action is permitted.<sup>247</sup>

### Conclusion

As demonstrated in parts IV and V of this article, the contractual allocation of responsibilities presents the most certain guideline for deciding difficult questions concerning the scope of an employer's right to take independent action. *Collyer* and other developments will increasingly make arbitration the preferred forum for resolving cases of this sort. But since the arbitrator must have adequate contractual guidance from the parties, full freedom is needed in the negotiating stage to make the appropriate allocations of functions. For this reason, the rigid management rights exception in the *Fibreboard* line of cases makes little sense. At least when applied to negotiations for the terms of a new agreement, the widest practicable scope should be given to the statutory duty to bargain.

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N.L.R.B. 801 (1968), *aff'd*, 418 F.2d 1208 (D.C. Cir. 1969).

246. See C. MORRIS, *supra* note 191, at 346-47.

247. The factors involved in cessation of bargaining because of a loss of union majority are numerous. A few representative cases are NLRB v. United Nuclear Corp., 381 F.2d 978 (10th Cir. 1967); NLRB v. Cone Mills Corp., 373 F.2d 595 (4th Cir. 1967); Sioux City Bottling Works, 156 N.L.R.B. 379 (1965).