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E. Walter Bowman

area of foreign commerce antitrust law, and thus lead to a more accurate determination of the intended extraterritorial reach of the Sherman Act.

W. BRADFORD REYNOLDS

Plant Relocation: Viewed After Denial of Enforcement of Board's "Runaway Shop" Remedy in *Garwin*

I. INTRODUCTION

Plant relocation—the transfer of all or a portion of plant operations to another site—can present two distinct categories of labor relations problems: (1) unfair labor practice problems under the National Labor Relations Act ("runaway shop" problems); and (2) problems of interpreting and applying a collective bargaining agreement.[1] While this note deals mainly with plant removal as an unfair labor practice, unionized employers must consider both problems carefully before embarking upon a relocation of operations. Miscalculations or ignorance of the consequences of certain relocation procedure can result in the imposition of liability sufficient to cause the employer to rue the day he decided to move. Likewise union counsel must be vigorous and watchful in protecting labor's rights—NLRA rights and contract rights—in the plant removal situation.

The occasion for consideration of the plant removal problem is the recent case of *Local 57, Garment Workers v. NLRB (Garwin Corp.)*,[2] involving a corporate manufacturer which moved its plant from New York to Miami, Florida, for the primary purpose, as the Board found, of ridding itself of a vexatious labor union.[3] On appeal,

1. The first category, to which this note is primarily devoted, is within the exclusive jurisdiction of the National Labor Relations Board, hereinafter referred to as the Board. The Board does not, generally speaking, operate in the field of contract interpretation or implementation (the second category); and breach of a labor contract is not, of itself, an unfair labor practice, though an unfair labor practice may also be a breach of contract.

2. 374 F.2d 295 (D.C. Cir. 1967), *cert. denied,* 387 U.S. 942 (1967), *enforcing in part & rev'g in part sub nom.* Garwin Corp., 153 N.L.R.B. 664 (1965).

3. Respondents were found to have closed their New York bathing suit manufacturing concern, Garwin Corp., and subsequently to have reopened it under the new corporate name S'Agaro, Inc., in Florida. The trial examiner concluded, and the Board agreed, that S'Agaro, Inc. was the alter ego of Garwin Corp., on the basis of the following facts: S'Agaro was capitalized with money drawn from Garwin; the two carried on substantially identical operations, even producing some of the same lines; and equipment was moved from the New York plant to Florida. The trial examiner based his findings of discriminatory motivation on direct evidence of anti-union bias and hostility, on

the Court of Appeals for the District of Columbia denied enforcement to that portion of the Board's order which directed the runaway employer to bargain with the aggrieved union on request at the Florida plant, without the usual requirement of a showing of majority support.[4] The remainder of the order, directing back pay and an offer of reinstatement at the new plant, with travel and moving expenses to Florida provided, was enforced.[5] While most of the interest in *Garwin* centers around the court's refusal to enforce the Board's novel remedy, the case is an appropriate vehicle for considering the broader problem of plant removal, with particular emphasis on the runaway shop.

II. When Does Plant Relocation Violate the Act?

An employer may have a number of personal or economic reasons for desiring to transfer to another location, including lower wages, lower taxes, and accessibility of natural and human resources and markets. The Board has long held that an employer commits an unfair labor practice under sections 8(a)(1) and 8(a)(3) of the NLRA[6] when he closes a plant at one locality and moves it to another for the purpose of avoiding his obligations under the Act.[7] Findings of 8(a)(1) and 8(a)(3) violations are usually accompanied

concealment from the union of plans for the move, and on the inadequacy of the economic explanations offered by the company. The Board adopted the examiner's findings: "[W]e agree with the Trial Examiner's conclusions that Respondents violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, by the closing of their New York facility, discharging their employees, and removing said operations to Miami, Florida, for the purpose of depriving said employees of rights guaranteed by section 7 of the Act . . . ." 153 N.L.R.B. at 664.

4. The trial examiner had recommended imposition of the traditional remedy, reinstatement and back pay, while at the same time remarking upon its ineffectiveness, in this situation, in depriving respondents of the fruits of their wrong. The Board modified the recommended order "to require Respondents to recognize and bargain with the union, on request, wherever Respondents ultimately decide to locate." 153 N.L.R.B. at 666.

5. In addition to the unfair labor practice remedy imposed, Garwin could well have been vulnerable to a substantial award of damages had its precipitous removal violated an existing collective bargaining agreement. Additionally, employers like Garwin could find their objectives thwarted by a finding that the labor contract, or at least some employee rights under the contract, continue in effect at the new site. These contract aspects of plant removal will be considered in Part IV of this note.

6. 29 U.S.C. § 158(a)(1), (3) (1964). These sections forbid employer interference, restraint, coercion or discrimination which infringes upon the free exercise of employee rights guaranteed in section 7. Under section 7, "Employees shall have the right to self-organization . . . to bargain collectively . . . and to engage in other concerted activities for the purposes of collective bargaining . . . and shall also have the right to refrain from any and all such activities . . . ." 29 U.S.C. § 157 (1964).

7. The Board found little to distinguish this conduct from the firing of employees for union activities. NLRB v. Winchester Electronics, Inc., 295 F.2d 288 (2d Cir. 1961); Rome Prods. Co., 77 N.L.R.B. 1217 (1948); Jacob H. Klotz, 13 N.L.R.B. 746 (1939).

by the finding of an 8(a)(5) violation,[8] predicated upon the employer's refusal to bargain in good faith about the impact of relocation upon employees in the unit. Thus, not only is anti-union relocation itself unlawful, but the employer's avoidance of bargaining about the effects of the change may also subject him to liability.

It is important to note that plant relocation, in itself, is not an unfair labor practice, even when the move is into a non-union setting and has the consequent effect of ridding the employer of a labor union. Relocation violates the Act only when it is carried out with the intent and for the purpose of avoiding one's obligations under the Act,[9] or, stated differently, because of "union animus." These are statements of a legal conclusion which must be drawn from a compilation of evidence.

Unlike some other unfair labor practices, the issue of guilt does not turn upon the effect of the move upon the employees or the union; rather, the issue is simply why the employer moved—his motive or intent. The question is one of causation, and, as seen in tort law, causation can be a formidable subject. In the typical runaway shop case, the charging union will present evidence tending to show that the employer moved wholly or primarily out of a desire to escape the union or impending unionization.[10] The employer attempts to refute a prima facie case of union causation indirectly, by showing that other reasons, usually economic, existed for the move. These economic reasons for relocating, he contends, were in themselves sufficient cause to move, and were, in fact, the cause of the relocation, independent of labor troubles. Economic woes at the old site, coupled with attractive business prospects elsewhere, are

8. Section 8(a)(5) defines the duty "to bargain collectively" about wages, hours, and conditions of employment. 29 U.S.C. § 158(a)(5) (1964). Because an employer whose move is prompted by union animus is not likely to inform the union of his plans beforehand, much less negotiate about them, the 8(a)(5) charge is common in relocation cases. The still-developing law of duty to bargain about the *decision* to relocate is discussed later in this note.

9. Glushien, *Plant Removal*, 1962 N.Y.U. 15TH ANN. CONF. ON LAB. L. 237, 255-56 1962.

10. Union animus as a basis for the move is difficult to prove in a "clean" situation. But where the parties have a long history of labor trouble, and particularly where the employer has warned employees about moving or closing, or committed other separate unfair labor practices, circumstantial evidence and incriminating statements may be abundant. At present, it appears that very nearly the only way an employer who moves in the midst of a "dirty" situation can win before the Board is to show that a final economic decision to move was made before the onset of labor troubles. In Israel Taub, 145 N.L.R.B. 682 (1963), the Board exonerated an employer who moved his textile operation in the midst of a union's organizing campaign and strike. The Board held that the union activity, and its ruinous demands, merely renforced an earlier economic decision to move, but cautioned that a removal in the context of an economic strike will be scrutinized very carefully. It should be noted that the threat to close or relocate may itself violate the Act, whether carried out or not, but this note is confined to actual relocations as unfair labor practices.

cited. Thus, the employer usually proceeds with the approach that while some union troubles and hostility admittedly existed, they were not "the cause" of the move.

These contentions present the Board with a typical case of "mixed motivation."[11] The pattern is familiar: the company is doing poorly, and, as often as not, union troubles and hostility are factors in the generally unfavorable economic picture. The company moves, usually with little or no notice to the union. Out of these circumstances, the Board has had to determine whether union animus was sufficiently important, in the employer's decision, to violate the Act. The subjective nature of this inquiry into motive has afforded the courts of appeal many opportunities to reconsider inferences drawn by the NLRB and to reverse the Board decision, as is seen in the following cases.

In *Mount Hope Finishing Co. v. NLRB*,[12] the Court of Appeals for the Fourth Circuit declined to enforce a Board order directed against an employer who closed his Massachusetts textile mill shortly before another plant in which he was heavily interested opened in North Carolina. The alleged move occurred immediately after a labor union had begun an intensive organizing campaign at respondent's plant and had petitioned for a representation election. The court pointed to evidence of long-standing economic setbacks and previous sentiment for moving, and concluded that union animus was not the primary motivating factor in the move. Setting the pattern for later decisions, the court found that while the appearance of the union may have expedited the decision to close, as an added business pressure, this fact was not sufficient to support the Board's determination.[13] A similar approach was taken by the Second Circuit in *Rapid Bindery, Inc. v. NLRB*.[14] The court held that where sound economic reasons are shown for the move, the fact that the decision is "accelerated or reinforced by contemporaneous . . . differences with a union" does not demonstrate a violation of the Act.[15] During the period 1954-1961, included by the above decisions, several other circuits followed a similar approach and reversed Board determinations on

11. Glushien, *supra* note 9, at 248.

12. 211 F.2d 365 (4th Cir. 1954).

13. The court in *Mount Hope* also reversed the Board's findings that the North Carolina mill was the alter ego of the Massachusetts corporation, on the grounds that sufficient continuity of ownership was not shown. Thus the Court found in effect that there was no transfer, apparently laying two independent grounds for reversal. The problem of what is a "move"—that is, how much continuity is required to characterize a new plant at a new site as the alter ego of the old business—is not treated here.

14. 293 F.2d 170 (2d Cir. 1961).

15. *Id.* at 174.

the basis of mixed motivation, in which they found that bona fide economic considerations predominated.[16]

This remarkable record of reversals sustained by the Board in the mixed motivation area suggests that one of two things is happening: either the Board and the courts are applying different standards, or they are differing as to the application of the test being applied.[17] The language of the circuit court cases discussed above indicates that union animus[18] can be a factor in the decision to transfer, so long as there are other substantial economic factors which in themselves would be good and sufficient reasons for relocation. In other words, the courts seem to be applying a "but for" test[19]—if removal would not have been carried out but for union activity, then the union was a contributing cause sufficient to violate the Act; otherwise it was not.

The Board, on the other hand, seems to apply a test less strict than

16. The following three cases involve partial closure of operations, allegedly for union animus, rather than plant relocation, but the issues and standards applied aro the same. Jay Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961) (abolition of auto repair department); NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961) (termination of trucking operations); NLRB v. Houston Chronicle Pub. Co., 211 F.2d 848 (5th Cir. 1954) (discontinuance of department and substitution of independent contractors). In the recent case of Thompson Transp. Co., 65 L.R.R.M. 1370 (1967), the closure of a trucking terminal was found not discriminatorily motivated, even though it followed a suceessful union campaign in which several threats of closure were made. Overriding economio considerations wero shown. But the Board imposed an 8(a)(5) charge for failure to bargain about effects of the closure. *See also* NLRB v. R. C. Mahon Co., 269 F.2d 44 (6th Cir. 1959); NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955). *Cf.* Phillips v. Burlingame Indus., Inc., 199 F. Supp. 589 (N.D. Ga. 1961).

17. If the former is correct, that the courts are differing with the Board as to tho applicable test, then de novo court review of the questions of law seems appropriate. But if the two are merely disagreeing as to the application of the same test, under given facts, then the courts would seem to be exceeding the scope of review accorded them by § 10(d) and Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), for the latter involves the reweighing of factual emphasis and competing interests, which should be accorded the weight of Board expertise. *See* Sheinkman, note 18 *infra*, at 91.

18. The Board's own term "union animus" is used in this note. "Animus" is used by the Board in its meaning of ill will or hostility. The term is not used, or should not be used, in its alternative meaning of "animating force or principle." This definition would equate union animus with union causation, and simple union causation is not sufficient to violate the Act. If union animus is used in this second sense, "anti-union animus" would be a more appropriate term. The latter term is sometimes seen in the literature. Union causation, such as moving to a low-wage area because of high wages exacted by a vigorous union, is not proscribed, even though at least one commentator thinks it should be. Sheinkman, *Plant Removal Under the National Labor Relations Acts*, 1963 N.Y.U. 16th Ann. Conf. on Lab. L. 81, 87-88. Apparently union animus refers to employer motives directed at depriving employees of their § 7 rights, though this definition may prove circular and not very helpful.

19. In applying the "but for" principle, the courts reason as follows: under the facts, the decision to reloeate (or close, or subcontract) would have been made shortly even without the presence of union activity; or, even if some union activity were required to give final impetus to the decisions, there was so much economic justification for the decision other than union activity that this activity could hardly be called a substantial cause. Sheinkman, *supra* note 18, at 93.

the "but for" standard; a "substantial contributing cause" test would better characterize its view. This approach is seen in the trial examiner's decision, later adopted by the Board, in *Rapid Bindery*.[20] The examiner, after considering respondent's defense of economic justification, appeared to concede that "some readjustment was necessary," but refused "to appraise the merits of the economic reasons advanced."[21] Evidence that management had been looking for a new site for some time, that the present site was unreasonable and unprofitable for a number of reasons, and that a move was probably inevitable, was not a sufficient defense. The fact that the actual decision to move was made after a union vote, and in the context of threats and warnings about closing the plant, was, in the examiner's opinion, sufficient to demonstrate violation of the Act. Thus, in *Rapid Bindery*, the Board found that unionization was a substantial contributing cause of the move, notwithstanding the inevitability of a move for other reasons.

Before the court of appeals, the application of the "but for" test led to reversal.[22] The court found that factors other than union animus were sufficient, independently, to justify the move and had, in fact, already made a move in the near future inevitable. Thus, under this approach, the respondent was exonerated by showing that absent the union activity, the move would have occurred anyway, and the fact that the decision was "accelerated" by union troubles did not change the result.

A minority view is represented by the Eighth Circuit, which, in *NLRB v. Missouri Transit Co.*,[23] did not subject the Board's determination to such a high standard of scrutiny. "These issues [as to whether the operation was sold for economic or anti-union motives] were, under the evidence, issues of fact for the Trial Examiner and the Board to determine, and not questions of law for this court . . . ."[24] By treating the issue of requisite motive as one of fact, the court severely restricted review of the issue.

Plant removal, subcontracting and plant closure bear an obviously close relationship to each other when analyzed from the standpoint of the interests of the workers affected. In all three cases, a segment of employees faces loss of employment because of a managerial decision to close down some or all operations at a given site. The Board has held for several years that most decisions to subcontract work formerly done within the bargaining unit are mandatory bargaining

20. Rapid Bindery, Inc., 127 N.L.R.B. 212 (1960).
21. *Id* at 219.
22. Rapid Bindery, Inc. v. NLRB, 293 F.2d 170 (2d Cir. 1961).
23. 250 F.2d 261 (8th Cir. 1957).
24. *Id.* at 262-63.

subjects.[25] In *Fibreboard Paper Prods. Corp. v. NLRB*,[26] this view gained qualified acceptance by the Supreme Court.[27] In the recent decision of *Ozark Trailers, Inc.*,[28] the Board applied the *Fibreboard-Town & Country*[29] rationale to the closure of one plant of an integrated enterprise, holding that an employer was required to bargain about the decision to close one of its plants, as well as about the effects of the shutdown. And in the *Garwin* case the duty to bargain was applied to the plant removal situation.[30] In view of the analytical parallels in the three situations—subcontracting, closure and removal—this aspect of the *Garwin* decision should have surprised no one; it

25. The Board and the courts have long recognized the duty to bargain about the effects or impact of closure, subcontracting and relocation upon employees. NLRB v. Rapid Bindery, Inc., *supra* note 22, at 176; Royal Plating & Polishing Co., 160 N.L.R.B. No. 72 (1966). However, there has been little judicial acceptance of the duty to bargain about the decision itself. The Board first established the principle that an employer must bargain about the decision to subcontract in Town & Country Mfg. Co., 136 N.L.R.B. 1022, *enf'd*, 316 F.2d 846 (5th Cir. 1963). The Board guidelines laid out in Westinghouse Electric Corp., 150 N.L.R.B. 1574 (1965), for determining what kind of subcontracting is within the duty, are broad enough to cover most decisions to subcontract unit work. *See also* National Fcod Stores, Inc., 142 N.L.R.B. 341 (1963); Hawaii Meat Co., 139 N.L.R.B. 966 (1962).

26. 379 U.S. 203 (1964).

27. In *Fibreboard* the Court held that the subcontracting of work formerly done within the bargaining unit, where no significant capital investment is involved, is a mandatory subject of collective bargaining. While some of the language in *Fibreboard* is quite broad and subject to an expansive interpretation, the Court apparently refrained from going beyond the facts of the case and approving the Board's *Town and Country* doctrine, that all subcontracting is within the duty to bargain. *See* Town & Country Mfg. Co., *supra* note 25. The three concurring Justices insisted that the Court was not deciding "that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty." 379 U.S. at 218. These Justices would specifically exclude from the *Fibreboard* doctrine "such larger entrepreneurial questions as . . . how capital sball be invested in fixed assets . . . ." 379 U.S. at 225.

28. 161 N.L.R.B. No. 48 (1966), *noted in* 20 Vand. L. Rev. 932 (1967). The appeal is now pending in the Eighth Circuit, which has more than once reversed the Board by finding that a decision to subcontract involving "basie operational changes" was not a mandatory bargaining subject. Adams Dairy, Inc. v. NLRB, 322 F.2d 553 (8th Cir. 1963). It should be noted that Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), has no particular relevance to plant relocation. The affirmation of a right to go entirely out of business for any reason has no particular relevance to the area of plant relocation, where no absolute right to relocate for union animus is recognized.

29. *Supra* note 25.

30. The 8(a)(5) violation in *Garwin* was based upon the employer's failure to consult and bargain with the union about the decision to relocate. 153 N.L.R.B. at 664. The court of appeals did not disturb this finding. Actually, the Board had already imposed the duty to bargain about the decision to relocate operations in decisions rendered some months prior to *Garwin*. *See* Spun-Jee Corp., 152 N.L.R.B. 943 (1965); Standard Handkerchief Co., 151 N.L.R.B. 15 (1965). *See also* Purolator Prods., Inc., 160 N.L.R.B. No. 9 (1966). As pointed out in the text, the Board views the plant removal situation, like plant elosure, as part of the broad "*Fibreboard* bargaining obligation issue." To the Board, the duty of decision bargaining in all of these situations is the same.

merely rounded out the Board's application of the *Fibreboard* philosophy to its logical limits.

While the Board is now uniformly imposing the duty of decision bargaining in these situations, the courts have been more hesitant in enforcing a broad duty to bargain in any of these areas.[31] The extent to which the courts will approve the application of the *Fibreboard-Ozark Trailers* rationale to plant removal, to raise a duty to bargain about the decision to move, is unclear. Plant relocation is probably outside the strict language of *Fibreboard* (certainly outside the concurring opinion),[32] because relocation seems to be a peculiarly "entrepreneurial" decision involving major capital reallocation. But there is enough open-ended language in the *Fibreboard* majority opinion to permit the Board to continue to view plant removal, like subcontracting and plant closure, as within the mandatory bargaining area. Most courts of appeal will probably agree. Thus, one may expect the *Fibreboard* line of cases to provide a continuing basis for the Board to find 8(a)(5) violations for the refusal to bargain about the decision to move.

III. Board Remedies for the Runaway Shop

The NLRA gives the Board broad discretion to fashion appropriate remedies in runaway shop situations,[33] though the courts have imposed certain limitations.[34] The runaway shop remedial order was established quite early, and soon became standard.[35] The employer is ordered, at his option, either to reinstate his operation at the old site, or, alternatively, to permit reinstatement at the new site with reasonable moving expenses for the discriminatees and their families. Employees who cannot immediately be absorbed at the new site are placed on preferential hiring lists. Back pay[36] is awarded to compensate the discriminatees for lost wages. This either-or alternative ap-

31. *Supra* notes 25, 27 & 28.

32. The concurring opinion in *Fibreboard* emphasized that the decision was not to be interpreted as sweeping all subcontracting decisions within the mandatory bargaining sphere. The "larger entrepreneureal questions" involving substantial capital investment and reallocation were still to be considered prerogatives of management. 379 U.S. at 225. *See also* note 27 *supra.*

33. NLRA § 10(c), 29 U.S.C. § 160(c) (1964).

34. *See* note 43 *infra.*

35. *See* note 6 *supra.*

36. The amount of back pay liability will naturally vary greatly with the individual case. Had the Fourth Circuit upheld the Board's determination in Mount Hope Finishing Co., *supra* note 12, it is estimated that total back pay liability would have approached two million dollars. Glushien, *supra* note 9, at 238. In some cases, the Board gave the employee the option of moving his family or of being afforded biweekly trips to visit his family, either, of course, at the employer's expense. Jacob H. Klotz, 13 N.L.R.B. 746 (1939).

proach has become traditional, with some minor variations to fit particular facts.[37]

The Board's order is usually accompanied by a conditional bargaining order requiring the employer to bargain at the new location as soon as the union establishes a majority there. But, with the exception of one narrow class of cases, where the employer has moved only a short distance,[38] the Board has never ordered the runaway employer to bargain unconditionally at the new site upon request of the discriminatee union, without any showing of majority representation. In these cases the unconditional bargaining order is based upon the assumption that had it not been for the employer's unfair labor practices, enough employees would have transferred to the new site to re-establish the union's majority status there. Thus the Board

37. Formerly, back pay liability was always terminated when the discriminatee was either reinstated or placed on a preferential hiring list. Beginning with Bonnie Lass Knitting Mills, Inc., 126 N.L.R.B. 1396 (1960), and Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961), the Board began awarding back pay from the time of the closure until the discriminatee either accepted reinstatement or obtained substantially equivalent employment elsewhere. Glushien, *supra* note 9, at 254. Yet the Board continues to exercise considerable flexibility in applying its back-pay remedy. In cases where the sole violation is an 8(a)(5) (failure to bargain about an economically motivated move), the back pay liability is still terminated when reinstatement is offered. Where an 8(a)(1) discriminatory motive is involved, the liability may be continued until the discriminatee either accepts the reinstatement offer or finds equivalent employment. Other variations are seen in Standard Handkerchief Co., *supra* note 30, and Spun-Jee Corp., *supra* note 30.

38. California Footwear Co., 114 N.L.R.B. 765, *enf'd*, 246 F.2d 886 (9th Cir. 1957), involved an employer who moved twelve miles across the Los Angeles area, and, as the Board found, "utilize[d] the move as an opportunity to get rid of the union . . . ." The employer's refusal to bargain at the new site was held to violate § 8(a)(5). The Board placed the burden upon the employer to present "affirmative evidence that a majority of the . . . employees would not have transferred . . . if respondents had fulfilled their obligations under the Act . . . ." The Board found the case to be one where the "union's loss of majority was directly attributable to respondent's unfair labor practices," and ordered respondent to bargain on request with the union at the new site. See dissenting opinion of Chairman Brown, who considered the approach of Brown Truck and Trailer Mfg. Co., *infra*, applicable here. The Board went the other way in Brown Truck and Trailer Mfg. Co., 106 N.L.R.B. 999 (1953), and declined to order a runaway employer, who had moved a distance of over thirty miles, to bargain at the new site: "We cannot assume, however, that even if such agreement had been reached, Charlotte employees would have transferred to Monroe in numbers sufficient to constitute a majority of the employee complement at the Monroe plant. . . . we do not believe we should attribute to the union statutory bargaining representative status in the absence of affirmative evidence that a majority of employees at the Monroe plant have, in fact, designated the union as their bargaining representative." Though *Brown* can be distinguished as involving only an 8(a)(5) charge, it seemed to suggest that a thirty-mile move was past the outer limits for the application of an order to bargain on request, at least prior to the new direction of the *Garwin* case.

An order to bargain on request at the new site was also imposed, without accompanying discussion, in Rapid Bindery, Inc., *supra* note 20, also a short-distance relocation case. The Board's findings of anti-union motivation were set aside and the bargaining order was denied enforcement in the process, though the appropriateness of the bargaining order was not specifically dealt with. Rapid Bindery, Inc. v. NLRB, 293 F.2d 170 (2d Cir. 1961).

has viewed these short-distance relocations as within that class of cases where the employer's unfair labor practices have eliminated the union's majority status.[39] In such circumstances, the Board has often required the employer to bargain with what was, because of his wrongdoing, a minority union.

This background brings us to the remedy imposed in the *Garwin* case. Here, for the first time, an employer who had moved a great distance was ordered to bargain on request at the new site, without regard to majority status. In making the order, the Board relaxed its normal contract bar rules by providing that unless the union re-established its majority, any collective bargaining agreement arrived at would serve as a bar for only one year.

The Board was very much aware that the remedy imposed interfered with the free choice of employees at the new site, but on balance, the Board felt that the rights of employees "whose very jobs" exist "by virtue of . . . Respondent's unfair labor practices" should not be preferred at the expense of an effective bargaining order.[40]

The Board recognized that the traditional remedies had proven inadequate to deal with runaway companies like Garwin. In the Board's view, the traditional remedy did not serve to deter employers who aspired to escape the union by distant relocation. Because it is highly improbable that enough employees to re-establish the union's majority status will elect to accept reinstatement at some distant site, the company is being permitted to achieve its "primary illegal objective"—escape from the collective bargaining agreement[41] and the establishment of a non-union shop. The employer may determine that permanent relocation in a non-union area may well be worth the temporary expense of traditional Board remedies. The

39. NLRB v. National Plastics Prods. Co., 175 F.2d 755 (4th Cir. 1949); Delight Bakery, Inc., 145 N.L.R.B. 893 (1964); Shirlington Supermarket, Inc., 109 N.L.R.B. 192 (1954).

40. "In the circumstances, the interests of newly hired employees whose very jobs, and hence statutory protection, exists by virtue of: (1) Respondents' unfair labor practices, (2) the Board's unwillingness to order the return of the plant to its original location, and (3) the failure of the discriminatees to displace them by accepting reinstatement, should not be preferred at the expense of a bargaining order which will dissipate and remove the consequences of a deliberate violation of statutory obligations. On balance, therefore, their interests must yield to the statutory objective of fashioning a meaningful remedy for the unfair labor practices found." 153 N.L.R.B. at 666.

41. There is no indication that the Board's order contemplates the re-establishment or continuance of a labor contract at the new site. In fact, the collective bargaining agreement at Garwin Corp. had expired scme time before the removal. Thus, while the *Garwin* remedy orders the employer to bargain in good faith, it cannot assure a labor contract at the new site. And the weak bargaining position of a minority union, transplanted far from home in what may be a hostile enviroument, makes any meaningful contract improbable.

Garwin remedy appears to defeat such objectives by virtually assuring the re-establishment of the union at the new location for at least one year, even if not permanently.

On appeal, the District of Columbia Circuit denied enforcement to the order to bargain on request. The court affimed the Board's findings of violations of section 8(a)(1), (3) and (5) of the Act and enforced other portions of the order which imposed the traditional back pay-reinstatement remedies. Viewing the right to choose a union and have it operate free from coercion as the "cornerstone of the Act," the court held that the order clearly infringed upon the section 7 rights[42] of the employees at the new site by depriving them of the opportunity to bargain collectively through representatives of their own choosing, or to refrain from such activities altogether. While section 7 rights should not be considered absolute, to the exclusion of all others, nevertheless, in the court's view, these rights should not be infringed unless sufficient justification is shown in protecting other equally vital interests. The countervailing interest here is clearly that of deterring this type of employer conduct. The court viewed this object as essentially "punitive" rather than remedial, since it does not compensate the discriminatees or restore the status quo as to them. Rather, the order is intended to punish an employer by depriving him of the fruits of his wrongdoing, and to serve as a deterrent to others. And because the Act has been repeatedly interpreted as being remedial rather than punitive,[43] the court concluded that the order does not properly effectuate the policies of the Act.[44] Thus, the required justification for infringing vital section 7 rights failed altogether, and the court refused to permit a largely punitive order to override these rights.

Judge McGowan dissented from that portion of the opinion which denied enforcement to the Board's bargaining order. He agreed with the majority that two conflicting policies were clearly presented, but he reasoned that the court's proper scope of review should extend

42. *See* note 8 *supra.*

43. It has been held that the purpose for Board remedies is to rectify the harm done injured employees, not to provide punitive measures against errant employers. "[T]he power to command affirmative action is remedial, not punitive." Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940). And deterrence alone is not a proper basis for a remedy. NLRB v. Coats & Clark, Inc., 241 F.2d 556, 561 (5th Cir. 1957). "This authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." Consolidated Edison v. NLRB, 305 U.S. 197, 235 (1938).

44. "The Board's order will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Fibreboard Paper Prods. Co. v. NLRB, 379 U.S. 203, 216 (1964).

no further than determining whether the accommodation reached here was "within the range of the Board's primary authority to effectuate the policies of the Act."[45] He felt that the Board's resolution was within this range, and that the court should thus defer to Board expertise in striking a balance between competing interests, rather than reweighing the competing interests in order to reach a different result. In Judge McGowan's view, the Board should be accorded the broad scope of remedial inventiveness envisioned by section 10(c).[46]

Not usually deterred by one circuit court reversal, the Board may well persist in applying its new bargain-on-request remedy in appropriate cases. But if other circuits follow the precedent set here,[47] what other appropriate remedies are available to the Board to deal with the runaway shop problem in a more effective manner?[48] The only other readily apparent deterrent is the order to relocate at the old site, without the reinstatement-back pay alternative now accorded the employer. This order could be selectively employed where such a relocation is economically feasible, with the burden on the employer to prove undue hardship from such an order. While potentially traumatic for the runaway employer, the "move back" order would meet the remedial standard[49] in that it would restore the employees at the old site to the status quo. Nevertheless, it is submitted that such an order would likely be denied enforcement by most courts of appeal as being too drastic and punitive,[50] in spite of its remedial aspects. Thus the Board may be stymied in its attempt to fashion a more effective

45. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

46. The Board's remedial power is "a broad, discretionary one, subject to limited judicial review. . . ." Fibreboard Paper Prods. Co. v. NLRB, *supra* note 44, at 216. *See also* NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

47. The District of Columbia Circuit is one of the Board's "friendliest" in terms of percentage of reversals; thus reversal here, more than in other circuits, may portend reversal elsewhere. And the Supreme Court's denial of certiorari, *supra* note 2, tends to strengthen the precedent.

48. The *Garwin* remedy, had it been allowed to stand, may not have been as effective in practice as it first appears on paper. Meaningful bargaining presupposes parties of some relative strength, but a minority union, lacking any broad support, may be unable to gain any concessions of consequence from the employer. This state of affairs could irrevocably damage and humiliate the union. *See* note 41 *supra.*

49. Cases cited note 43 *supra.*

50. The Board has never unconditionally ordered a moveback of a wholly relocated plant. Glushien, *supra* note 9, at 254. But an order to restore subcontracted operations was upheld in *Fibreboard,* and has been employed by the Board in other cases. See NLRB v. Kelley & Picerne, Inc., 298 F.2d 895 (1st Cir. 1962); NLRB v. Brown-Dunkin Co., 287 F.2d 17 (10th Cir. 1961). The subcontracted work in *Fibreboard* involved little capital investment or integration into plant operations, and was formerly performed by unit employees, so that its reinstatement did not entail undue hardship. But the exorbitant expense of dismantling and shipping a whole plant, or of resuming operations at a stripped factory, is obvious. And the courts have traditionally been hostile to orders which appear excessive or which upset the basic entrepreneureal direction of a business.

remedy,[51] which will assure sufficient deterrence to overcome the attraction of freedom from the union and an existing collective bargaining contract.

IV. Non-Unfair Labor Practice Aspects of Plant Removal

The thrust of the discussion above has necessarily been confined to only one facet of the plant removal problem—the unfair labor practice aspects under the NLRA. But there is another side to this problem which is as important, for even though a move is carried out for bona fide economic reasons, after good faith bargaining, the labor contract aspect of plant removal remains to be reckoned with. This labor contract aspect can itself be subdivided into two areas: (1) plant relocation as a violation of an existing collective bargaining agreement; and (2) contract and contract rights' survival at the new plant.

If an employer moves his plant without the consent of the union, in violation of a contract clause prohibiting or restricting removal,[52] he is vulnerable to legal action on the contract. The union may proceed against the breaching employer through the arbitration process, if the issue of breach is arbitrable, or through the courts in a section 301 suit.[53] The union may seek damages,[54] an order enjoining the move, an order compelling the employer to move back to the old site,[55] or a combination of damages and such specific relief. The awards granted unions against intentionally breaching employers have on occasion been quite large, combining staggering damages with specific orders to return to the old site, or giving an employer an election as to one or the other.[56] The courts and arbitrators in such

51. The Board's dilemma is caused by the fact that the deterrence required to prevent the runaway shop must be much greater than the immediate economic harm actually done to the discriminatees; and yet the Act, as construed, does not permit punitive measures over and above restoration to the status quo.

52. Most suits are on express no-removal provisions, but occasionally the promise not to move is implied from a subcontracting clause or seniority clause in the labor contract. *See* note 54 *infra.*

53. Labor-Management Relations Act § 301, 29 U.S.C. § 185(a) (1964). *See* Local 127, Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir. 1962).

54. Selb Mfg. Co., 61-3 CCH Lab. Arb. Awards ¶ 7111 (1961) (no explicit no-removal clause; decision based on provision restricting subcontracting). *See also* NLRB v. Winchester Electronics, Inc., 295 F.2d 288 (2d Cir. 1961). Because the measure of damages employed by the courts and the arbitrators roughly parallels that used by the Board, cases from all these sources may be cited as generally representative of damage awards.

55. Address-O-Mat, Inc., 61-1 CCH Lab. Arb. Awards ¶ 3773 (1961); Dubinsky v. Blue Dale Dress Co., 162 Misc. 177, 292 N.Y.S. 898 (Sup. Ct. 1936).

56. In Sidele Fashions, Inc., 61-3 CCH Lab. Arb. Awards ¶ 6202 (1961), the arbitrator awarded sums exceeding $78,000, with a possibility of awards exceeding $355,000 if the employer did not elect to move back to Philadelphia from North Carolina. *See* Glushien, *supra* note 9, at 238.

cases have freely employed the specific relief remedy, which the Board has refrained from applying in unfair labor practice cases.[57]

Another perplexing problem, particularly in light of recent developments, concerns the question of contract survival or continuance: When will an existing labor contract continue in effect at the new site? Or if the whole contract does not survive, what of the contract rights of individual employees transferring with the plant? In *John Wiley and Sons, Inc. v. Livingston*, the Supreme Court held that arbitration rights under a collective bargaining agreement survived the sale and merger of a business into a larger non-union concern.[58] The basic holding was that a change in ownership of a business should not, of itself, be a basis for upsetting the stream of industrial government. By analogy, the *Wiley* rationale may be applied to plant removal, at least where the employees, processes and equipment remain largely unchanged by the move. But, of course, most plant relocations over any appreciable distance entail a substantial turnover in personnel, so the question becomes one of deciding how much change in personnel, and in other aspects of the industrial community,[59] is required to vitiate the collective bargaining agreement. When the matter has been considered, courts and arbitrators have differed widely.[60] As for individual rights of transferees, most courts have recognized in individual employees certain "vested rights" which may survive the termination of the contract itself or at least continue in effect at a relocated site as to employees transferring under the contract. Retirement pension, vacation and severence pay are usually

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57. *See* notes 50 & 55 *supra*.

58. 376 U.S. 543 (1964). The arbitration rights survived notwithstanding an express clause in the sales agreement that the purchaser does not assume the seller's labor contract with the union.

59. In determining whether the contract survives as a bar to other representational activity at the new site, the Board looks to the following factors:

(1) numher of employees transferring to the new plant;
(2) distance of new to old plant;
(3) similarity of functions, processes and goods produced;
(4) amount of machinery and fixtures actually transferred;
(5) identity of supervisory and managerial personnel.

60. In Lion Match Co., 40 BNA LAB. ARB. REP. 1 (1963), Arbitrator Schieber, analogizing from the Board's contract bar rules, expressed the opinion that an existing labor contract should follow a plant if thirty per cent of the employees are transferred to the new site. *Compare* General Elec. Co., 85 N.L.R.B. 150 (1949), *with* General Extrusion Co., 121 N.L.R.B. 1165 (1958) ("[A] mere relocation of operations, accompanied by a transfer of a *considerable portion* of the employees to another plant, without an accompanying change in the character of the jobs and the functions of the employees to another plant in the contraet unit, does not remove the contract as a bar" (emphasis added)). *See* Yale Rubber Mfg. Co., 24 L.R.R.M. 1372 (1949) (labor contract still in effect where 70 of new plant's 150 employees are transferees); United Packers, Inc., 38 BNA LAB. ARB. REP. 619 (1962) (no basis for contract survival in move from Chicago to Louisiana).

cited as being within this category. At least one court has included seniority rights in the classification of vested rights.[61]

These remarks do no more than raise some questions in this non-unfair labor practice area of plant removal; the subject is too broad for extensive treatment here. But counsel for an employer or a labor union, when confronted with a real or threatened plant removal situation, must analyze his legal position from both of these standpoints—that of the NLRA and that of the labor contract.

V. Conclusion

It is not an oversimplification to say that plant relocation of whatever kind—unfair labor practice or otherwise—is induced, ultimately, by the profit motive. Employers move because it is in their apparent economic interest to do so.[62] Proceding from this premise, to what extent does the overall public interest coincide with the interest of the moving employer? Or, to pose the key question, to what extent, if any, should public policy favor the mobility of capital and capital plant, as represented by businesses' moving from one place to another?[63] If it is assumed that the mobility of capital in response to

61. Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 530 (1962). Glidden Co. moved after the expiration of the contract term, and refused to recognize the seniority rights of those who wanted to transfer to the new plant. The court held that seniority rights embodied in contract provisions which guaranteed rehire rights for a specified period were "vested," and continued for at least that period into the future. The case attracted wide attention, but a later comment by a member of the court cast doubt upon the validity as precedent of its continued liability holding. Zdanok v. Gideon Co., 327 F.2d 944 (2d Cir. 1964). *See* 110 U. Pa. L. Rev. 458 (1962). Most other courts have refused to follow the *Glidden* holding. Glushien, *supra* note 9, at 246.

62. Admittedly, some management conduct, including, presumably, plant removal, is motivated by sheer malevolence toward unionism and the philosophy of the Wagner Act. But when this factor is present, it is usually sublimated to economic self-interest. However, it is not suggested here that present treatment of those motivated by such non-economic factors be changed.

63. A classic example of industrial migration is the southward movement of the New England textile industry. Lower wage scales and non-wage costs, aided by such factors as tax forgiveness and nearness to raw material sources, created an economic differential irresistible to the industry. While Northeasterners were losing jobs, Southerners were acquiring them in equal or (because of lower labor costs) greater numbers. True, the new jobs were at substandard wages by Northeastern standards, but the positions were quite sought-after in economically depressed, rural Southern communities. *See* H. Perloff, E. Dunn & E. Lampard, Regions, Resources, and Economic Growth (1960), especially 416-24. Putting regional and individual self-interest aside, the net long-term result of this transfer of capital appears positive: a more favorable regional economic balance and cost-price ratio, which implies greater efficiency of capital and lower consumer prices. *See* H. Perloff, How a Region Grows 121 (1963). To prevent, delay or hinder this mobility of business to seek out the geographieal area where capital can operate most efficiently is economically unsound. It might be argued that the short-term nature of labor contracts (*e.g.*, three-year contract bar limitation) refutes the idea that no-removal provisions can seriously affect mobility of business capital over any extended period of time. There is some

changing economic patterns is desirable to the extent of generating a general public policy in its favor, then the creation of rights and duties which unduly restrict movement of capital should be discouraged and denied recognition. Of course, both types of plant relocation —moves motivated by union animus and moves for bona fide economic reasons—have been considered above. The Board seeks to prevent the former; the latter are permissible, subject to any contractual restrictions (no-removal provisions) negotiated by the parties.

Regarding the unfair labor practice cases, one sees how economic motivation can merge into union animus in the twilight zone of mixed motivation.[64] Isolating a primary or independently sufficient motive, in the context of economic distress and labor troubles, is necessarily subjective, thus contributing to the Board's high reversal rate in this area.[65] Viewing these evidentiary difficulties against the background of economic policy adverted to earlier, might not the cure at times be worse than the disease? It is submitted that the Board should be wary of overly penalizing employers who move to more "desirable" areas, unless union animus and personal vendetta (as opposed to economic factors aggravated by the union) are the predominant motives, or unless the employer has overtly exploited the move to chill unionism.

In regard to the second class of cases, where the motives are clearly economic and not anti-union, a further proposition is submitted: Might not no-removal provisions in labor contracts—at least those absolutely prohibiting removal during the term—be denied enforcement as contrary to public policy? Standard contract law contains numerous instances where courts refuse to enforce otherwise valid contract provisions on grounds of public policy, even economic public policy,[66] but no cases were found in which a provision of a labor contract has been denied enforcement on such grounds. It is somewhat anomalous that in a field which is more cluttered with statutory restrictions than ordinary contract law, contracting parties are given such free reign in this regard. A compromise view would be to deny specific enforcement to bans on relocation. Thus, workers would still be protected from the impact of relocation by compensatory damage awards, and yet businesses would not be so irrevocably tied to one place regardless of economic pressures. And, at the very least, arbitrators should be wary of implying promises not to relocate from

merit in the point, but in many situations it is unrealistic to talk about dropping a provision, in which one party has a real interest, from a labor contract. Once inserted, they can only be eliminated by hard bargaining or a strike—and why should the parties be required to do battle over a provision which shouldn't be accorded enforcement anyway because it doesn't comport with public policy?

64. *See* note 19 *supra* and accompanying text.

65. *See* note 16 *supra* and accompanying text.

66. A. CORBIN, CONTRACTS §§ 1374, 1375 (1952).