Labor Law - Employer's Obligation to Bargain With Respect to His Decisions Concerning Subcontracting

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Fibreboard Paper Products Corporation, motivated solely by economic reasons, determined that $250,000 could be saved annually by contracting out work presently performed by its maintenance employees. At the time, however, the corporation was bound by a collective bargaining agreement with the United Steelworkers of America, the exclusive bargaining representative for the unit of maintenance workers affected by the decision. As the expiration date of the agreement approached, the employer was uncooperative in scheduling a meeting with the union for the purpose of negotiating a new contract. Finally, four days before the collective bargaining agreement was to expire, the corporation informed the union of its decision to subcontract the maintenance work. Fibreboard assumed that it was not obligated to bargain collectively with respect to its economic decision to subcontract work, and further assumed it would be pointless to negotiate a new contract with employees whose employment would terminate upon the expiration of the existing contract. However, the National Labor Relations Board, on rehearing, decided that even though the employer had been motivated solely by economic considerations, failure to negotiate with the union concerning the decision to subcontract constituted a violation of section 8(a)(5) of the National Labor Relations Act. The Court of Appeals for the District of Columbia ordered enforcement of the decision in its entirety. On certiorari, the Supreme Court of the United States affirmed. Held, irrespective of the employer's motives, the employer violated section 8(a)(5) of the act because his decision to subcontract maintenance work, involving the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment, is subject to the duty to bargain collectively. Fibreboard Paper Prod. Corp. v. NLRB, 85 Sup. Ct. 398 (1964), affirming

1. The contract provided for automatic renewal for another year unless one of the contracting parties gave a sixty-day notice of desire to modify or terminate the contract. Pursuant to the terms of the contract, the union gave timely notice of its desire to modify the terms of the contract and sought to arrange a bargaining session with the company representatives.


3. The Court also affirmed the Board's power to apply the remedy consisting of resumption of the subcontracted operation, and reinstatement of the employees with back pay.
Section 8(a)(5) of the National Labor Relations Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d) defines collective bargaining as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." (Emphasis added.) The Supreme Court has ruled that all subjects which fall within the language of section 8(d) shall be considered "mandatory" or "statutory" subjects of collective bargaining. Upon request of either party, the employer and the representative of his employees must collectively bargain all such subjects; failure to bargain in good faith is a violation of the act. However, neither party is obligated to yield its position; thus an employer or the union may, in good faith, insist upon its proposal concerning a mandatory subject to the point of an "impasse" in negotiations.

Whether subcontracting based purely upon economic considerations is a subject included within the phrase "wages, hours, and other terms and conditions of employment" has long been uncertain. Originally, the Board held that if an operational change was occasioned solely by business considerations, the employer was obligated to bargain only concerning the effects of the change. However, the Fifth Circuit Court of Appeals, enforcing a Board decision in the Town & Country case, ex-
panded the employer's obligation to bargain and forced him to bargain with respect to the decision to subcontract the employees' work. On the basis of the Town & Country decision, the Board reconsidered its original decision in Fibreboard and issued a supplemental decision ordering Fibreboard to bargain collectively over the decision to subcontract its maintenance work. The Board's decision seemed extremely broad, as it contained no language of limitation; thus it could have been interpreted as obligating the employer to bargain every decision to subcontract work which has any effect upon his employees. However, in subsequent decisions the Board in effect limited the scope of its Fibreboard holding. Even prior to the Supreme Court decision in Fibreboard, the Board held, in Motorsearch Co., that the employer had not violated the act by failing to bargain with the union concerning the decision to subcontract, because the union knew of the subcontracting and made no attempt to bargain about it during eighteen consecutive bargaining sessions. Further, in Shell Oil Co. the Board held that the employer did not violate the act by failing to bargain with the union before subcontracting his employees' work because the subcontracting clause in the collective bargaining agreement implied consent that the employer could subcontract occasional

(Emphasis added.) 136 N.L.R.B. at 1026. Additionally, the Board specifically overruled its prior decision in Fibreboard, 130 N.L.R.B. 1558 (1961).
12. 57 L.R.R.M. 1271 (1964). The collective bargaining agreement contained a clause which allowed the employer to subcontract work provided that, in the event he subcontracted work which could have been performed by his own employees, the independent contractor's employees must be paid certain wages prescribed by the collective bargaining agreement. The union proposed removal of the clause in forty-seven bargaining sessions, but the employer remained firm and refused to limit his right to subcontract. The agreement finally expired but the parties continued operating under the terms of the contract, more specifically, under the subcontracting clause. At this time the employer let a group of subcontracts and the Board held as stated in the text. The same holding also applied to subcontracts let after the new collective bargaining agreement was enacted which contained the same subcontracting clause.

However, after termination of the first collective bargaining agreement and before the new agreement was enacted, the union struck. During this strike the employer let another group of subcontracts. The Board held that the employer was not under an obligation to bargain over these subcontracts let and completed in the course of the strike as this temporary subcontracting necessitated by the strike did not transcend the reasonable measures an employer may take in order to maintain operations in such circumstances.

In General Motors Corp., 57 L.R.R.M. 1277 (1964), a similar case, the Board determined the employer had not violated the act by transferring employees from one unit to another because the decision made was essentially a change of method without resulting layoff or discharge and was a management prerogative recognized by the union in its national collective bargaining agreement.
maintenance work without prior notice to, and consultation with, the union.

Although the Court of Appeals for the District of Columbia affirmed the Board's decision in Fibreboard without limitation, other appellate courts were reluctant to adopt the Board's broad position. In Hawaii Meat Co. v. NLRB, the Court of Appeals for the Ninth Circuit held the employer had not committed an unfair labor practice by refusing to bargain concerning the decision to subcontract, since the decision was made while the union was engaged in a strike; and the court stressed that the employer's general right to replace economic strikers eliminated the necessity to bargain. In NLRB v. Adams Dairy, Inc., the

14. 321 F.2d 397 (9th Cir. 1963). Following certification the union and the employer could not reach an agreement through collective bargaining. When it became obvious there was to be a strike, the employer considered subcontracting the company's delivery service. Upon commencement of the strike, the subcontract went into effect and the employer began replacing the economic strikers. It was clear there was no anti-union motive; rather the decision to subcontract was made as a means of keeping the company operating during the strike. The trial examiner and the Board found the employer had violated § 8(a)(5) by subcontracting its delivery operations without first giving the union an opportunity to bargain.

In Empire Terminal Warehouse Co., 58 L.R.R.M. 1589, 151 N.L.R.B. No. 125 (March 31, 1965), the Board held that the employer did not violate the act by failing to notify and consult with the union before subcontracting unit work during a strike because: (a) the subcontracting was prompted by request of the employer's customers, not by the employer's desire to have other persons perform his employees' work; the subcontracting was instituted solely as a temporary measure to continue the business relationship with his customers; (b) throughout the period of the dispute the company continued to bargain in good faith with the union about contract terms in general and the subcontracting issue in particular; the employer did not attempt to undercut the union, rather, he continued to recognize the union as the representative of the strikers and their replacements; and (c) despite the subcontracting, the employer did not eliminate, permanently or otherwise, any unit jobs or otherwise alter or impair the bargaining unit; the subcontracting did not exceed what was necessary to protect the employer's customers whose deliveries were in jeopardy. The decision was based on the Board's earlier decisions in Westinghouse Elec. Corp., 58 L.R.R.M. 1257 (1965) (see note 20 infra), and Shell Oil Co., 57 L.R.R.M. 1271 (1964) (see note 12 supra).

15. 322 F.2d 553 (8th Cir. 1963). The employer and the union had entered into three contracts over a period of time. In each negotiation the employer had rejected the union's proposal concerning inclusion of a clause in the contract prohibiting substitution of independent contractors on company routes. In 1959 the employer initiated a series of meetings to discuss the unfavorable competitive situation created by the lower costs of other dairies. The average earnings for the employer's driver-salesmen were $14,495 per year for a 30-38 hour average work week. When no agreement could be reached, the employer informed the union of its decision to subcontract and that all positions of the driver-salesmen were terminated. The court announced that the decision on the part of the employer to terminate a phase of its business and distribute all of its products through independent contractors was not a required subject of collective bargaining. However, the court asserted that after the decision to subcontract has been made, § 8(a)(5) does require negotiation with reference to the treatment of the employees who were affected by the decision. Id. at 562. The court distin-
Court of Appeals for the Eighth Circuit completely repudiated the Board’s supplemental decision in *Fibreboard* by refusing to expand the employer’s obligation to bargain to include the decision to subcontract. Manifestly, a Supreme Court decision was needed to establish uniformity and to eliminate the conflicts and confusion existing among the various circuits.

The majority of the Supreme Court in *Fibreboard* declared that “contracting out” is well within the literal meaning of the phrase “terms and conditions of employment” and therefore a statutory subject of collective bargaining. The Court supported this declaration with two interrelated propositions. First, the Court reasoned that classifying “contracting-out” of work as a mandatory subject of collective bargaining would effectuate the policies of the National Labor Relations Act by promoting industrial peace. Second, the Court asserted that bargaining on the employer’s decision concerning subcontracting of work was common practice in the United States today and has proved extremely successful. Industrial experience indicated that including subcontracting within the terms of section 8(d) would not be a drastic change in procedure. Thus the Supreme Court settled the question concerning whether the decision or the effects of the decision must be bargained.

More significantly, the Court explicitly stated that its decision is limited to the facts of the case—the replacement of the employees in the existing bargaining suit with those of an independent contractor to do the same work under similar conditions of employment. The Court asserted that “our decision need not and does not encompass other forms of ‘contracting out’ or ‘subcontracting’ which arise daily in our complex economy.” This desire to limit the holding was re-emphasized by the concurring Justices, who apparently feared that the majority opinion might be misunderstood.
Thus it appears the Supreme Court did not wish to make subcontracting per se a mandatory subject of collective bargaining; on the other hand, the Court's statement that the decision was limited to the facts of the case probably does not mean that there are no other situations in which the employer would be obligated to bargain over his decision to subcontract. The Supreme Court, although exercising great care in limiting its decision within the narrowest possible confines, suggested no tests for determining when the employer was obligated to bargain over his decision to subcontract, with the exception of the statement that under the facts of *Fibreboard* "to require the employer to bargain about the matter would not significantly abridge his freedom to manage his business." Presumably, therefore, the Supreme Court left the Board and the lower courts free to determine when the obligation to bargain with respect to subcontracting exists.

*Westinghouse Electric Corp.* was the first pertinent case after the Supreme Court's decision in *Fibreboard*. The trial examiner, relying on the *Fibreboard* decision, concluded that by failing to bargain with the union before subcontracting work which could have been performed by equipment and manpower within the bargaining unit, the employer committed an unfair labor practice under section 8(a)(5). The Board, however, although agreeing that generally the contracting out of work done, or which may be done, by employees in a bargaining unit is a subject of mandatory bargaining, stated that *Fibreboard* was not intended to establish a rigid rule to be mechanically applied regardless of the relevant facts. The facts of the *Westinghouse* case showed that the recurring subcontracts were

19. *Id.* at 404. The facts of the case showed that the company's decision to contract out the maintenance work did not alter the company's basic operation, the maintenance work still had to be performed in the plant, and no capital investment was contemplated.

20. 58 L.R.R.M. 1257 (1965). The union, since 1940, had been the statutory bargaining representative for some 3,000 employees at the employer's plant. From the beginning, subcontracting had been a continuing phase of the employer's operation. Although the union had sought restrictions on the established subcontracting practices at previous contract negotiations, they had been wholly unsuccessful. Subcontracting during this period had consisted of about 7,700 contracts of which approximately 3,000 could have been performed by the employer's maintenance employees. Before subcontracting the employer had considered the economic feasibility of doing the work with his own employees; however, the employer did not notify, consult with, or advise the union each time it awarded a subcontract.

21. The trial examiner's decision supports the contention that the *Fibreboard* doctrine could easily have been broadly construed. See note 18 supra.
motivated solely by economic considerations, that they comport with the traditional methods by which the employer conducted his business operations, that they did not during the period in question vary significantly in kind or degree from previously established practice in the plant, that they had no demonstrable adverse impact on the employees within the bargaining unit, and that the union had the opportunity to bargain about changes in the existing subcontracting practices at general negotiating meetings. On the basis of all these facts cumulatively, the Board found that the employer did not have to give notice to, or consult with, the union with respect to subcontracting the work in question. The Board reasoned that the Fibreboard doctrine was meant to apply only if the subcontracting departed from previously established operating procedure, affected a change in conditions of employment, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit.

Subsequent Board decisions have relied on the Westinghouse decision and upheld its general principles, placing special emphasis on findings that the subcontracting did not constitute a significant detriment to the employees within the bargaining unit and that the employer was following an established practice of unilateral subcontracting, which the union had neither protested nor attempted to limit.22 In the recent General Tube
Co.\textsuperscript{23} case, the Board held that even though the evidence was insufficient to show the existence of a previously established practice of subcontracting, the employer did not violate the act by refusing to bargain with respect to his decision to subcontract, because the subcontract neither resulted in any significant detriment to the employees within the bargaining unit nor changed their employment conditions.

This rapidly changing area of law may be summarized at present as follows: the \textit{Fibreboard} doctrine certainly extended the coverage of section 8(d) to include many of the employer's decisions to subcontract work which affects his employees. In determining which decisions will be subject to the obligation of collective bargaining, one must observe all Board decisions applying the \textit{Fibreboard} principle, most of which have tended to limit the doctrine. It is suggested that "terms and conditions of employment" will include all economic decisions to subcontract work unless:

(a) there is an implied waiver of the employer's obligation to bargain in light of previously established procedures involving subcontracting to which the union did not protest;\textsuperscript{24} or

\begin{itemize}
\item employees had neither protested nor attempted to limit.
\end{itemize}

Both Kennecott Copper Corp., 57 L.R.R.M. 1217 (1964) and American Oil Co., 58 L.R.R.M. 1412 (1965) held the employer had not violated the act by failing to notify the union before subcontracting when: (a) there was no significant detriment to the employees within the bargaining unit; and (b) either long established practice was followed or a broad management prerogative clause reserved the right to the employer to take such action.

23. In General Tube Co. & Int'l Union, AFL-CIO, 151 N.L.R.B. No. 89 (March 19, 1965), the employer was charged with an 8(a)(5) violation because he unilaterally subcontracted work without first bargaining concerning his decision. The employer defended, alleging he had followed his normal industrial practice. However, the evidence showed that at most the employer had subcontracted similar work on only one previous occasion; it failed to show there was a well-established practice of subcontracting prior to the subcontract with which the instant case was concerned. Although the employer's defense of "prior established practice" was not supported, the Board nevertheless found other reasons for holding that the employer's unilateral action in subcontracting was not violative of the act. The Board held there was no probative evidence that the loss of the overtime by the employees within the unit resulted from the subcontract; however, even if it be assumed that some loss of overtime may have resulted from the subcontract, it does not appear that such a loss had a substantial impact upon the unit employees' terms and conditions of employment. As the total overtime lost for each employee was only nine hours, there was no "significant detriment to the employees or change in their conditions of employment." The Board decision cited the prior decisions of Kennecott, 57 L.R.R.M. 1217 (1964); Shell Oil Co., 57 L.R.R.M. 1271 (1964); and General Motors Corp., 57 L.R.R.M. 1277 (1964).

24. This test was enunciated in Motorsearch Co., 51 L.R.R.M. 1240 (1962), and later re-emphasized in Superior Coach Corp., 58 L.R.R.M. 1369 (1965);
(b) the subcontract did not constitute a significant detriment to the employees within the bargaining unit; or
(c) there is an express or implied waiver of the employer's obligation to bargain through the terms of the collective bargaining agreement; or
(d) under the facts of the case, enforcement of the employer's obligation to bargain with respect to his decision to subcontract would constitute an unfair burden upon the employer which would significantly abridge his freedom to manage his business.

These tests are too general to provide the employer an infallible guide to safety. It is submitted that unless the employer is absolutely certain that his decision to subcontract falls outside the duty to bargain—if, for instance, the facts of his case are


25. This test was enunciated in Westinghouse and applied in all of the decisions listed in note 24 supra. It is important to note that in all of those decisions the Board held that the employer had not violated the act in refusing to bargain because both tests labeled (a) and (b) in the text were met. However, General Tube asserted that test (b) by itself is sufficient to protect the employer from an unfair labor practice charge. Query: what would the Board hold when the employer's unilateral decision to subcontract was in accord with previously-established practice but also constituted a significant detriment to the employees within the bargaining unit? It is suggested that General Tube stands for the proposition that fulfillment of either test by itself is sufficient to protect the employer.


27. This test appears extremely general and elusive. That such an exception might be applied to Fibreboard was first indicated in the Board decision in Shell Oil discussed at note 12 supra. Additionally, in Shell Oil the Board stated that temporary subcontracting necessitated by a strike did not transcend the reasonable measures an employer may take in order to maintain operations in such circumstances. The probable existence of such an exception or limitation to the doctrine was re-emphasized in the language of the Supreme Court's decision in Fibreboard, where there was an implication that the employer would not have been required to have bargained his decision concerning the subcontract had the obligation to bargain significantly abridged his freedom to manage his business. The existence of such a limitation appears to have been substantiated by the recent Empire Terminal Warehouse decision, see note 14 supra, in which the Board held that employer could subcontract during an economic strike if in good faith and only as a temporary measure aimed at continuing his business relationship with his customers.

It appears that any time an employer is forced to bargain collectively his freedom to manage his business is limited to some degree; it is therefore submitted the Board probably will require extreme circumstances before this test will be applied. Presumably, the employer will not be required to bargain his decision to subcontract under this test only when his employees are involved in an economic strike and such a decision is necessary to continue the business, or irrespective of whether the employees are on strike, the employer's very existence as an entrepreneur depends upon a timely decision concerning the subcontracting of the work.
an exact replica of a case already decided—he acts at his peril in subcontracting the work without first negotiating his decision with the collective bargaining representative of his employees involved.

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LABOR LAW — SECTION 301 AND REQUIRING EXHAUSTION OF GRIEVANCE PROCEDURES

Maddox, a laid-off employee of Republic Steel Corp., sued in an Alabama state court three years after his discharge to recover severance pay under a collective bargaining contract. The agreement provided for severance pay if any of Republic's mines were closed permanently, thereby resulting in layoff of the mine workers. Although the contract contained a grievance procedure culminating in binding arbitration, Maddox, rather than utilize that mode of redress, sought relief in the courts for defendant employer's breach of the collective bargaining agreement. The trial court entered judgment for the former employee, and the Alabama Supreme Court affirmed. On certiorari the United States Supreme Court reversed, one Justice dissenting. Held, the federal labor policy which requires that individual employees desiring to assert contract grievances attempt to use the contract grievance procedure agreed upon by the employer and the union as the mode of redress applies to severance pay grievances, thereby precluding the aggrieved employee from resorting initially to the state courts for relief. Republic Steel Corp. v. Maddox, 85 Sup. Ct. 614 (1965).

28. If the employer subcontracts without bargaining, and later is found guilty of an 8(a) (5) violation, the Board has available the harsh remedy of compelling resumption of the subcontracted operation, and reinstatement of the employees with back pay. See note 3 supra.

1. 85 Sup. Ct. at 615, n.1: "The section of the contract dealing with severance allowance provided in relevant part: 'When, in the sole judgment of the Company, it decides to close permanently a plant or discontinue permanently a department of a mine or plant, or substantial portion thereof and terminate the employment of individuals, an Employee whose employment is terminated either directly as a result thereof because he was not entitled to other employment with the Company under the provisions of Section 9 of this Agreement—Seniority and Subsection C of this Section 14, shall be entitled to a severance allowance in accordance with and subject to the provisions hereinafter set forth in this Section 14.'"

2. For this grievance procedure set out in the contract, see 85 Sup. Ct. at 620, n.2.