Subjects Included Within Management's Duty to Bargain Collectively

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COMMENTS

SUBJECTS INCLUDED WITHIN MANAGEMENT'S DUTY TO BARGAIN COLLECTIVELY

With the passage of the National Labor Relations Act of 1935, Congress, in order to eliminate certain causes of substantial obstructions to the free flow of commerce, adopted the practice of collective bargaining as the policy of the United States for the prevention and adjustment of labor disputes.1 The theory of the act as stated by the Supreme Court is "that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act itself does not attempt to compel."2

The collective bargaining process essentially provides a forum in which the actions of management are subject to challenge by the union acting for the employees whose services are necessary if the business is to function successfully. The National Labor Relations Act (NLRA) promotes the use of this forum by subjecting both the employer and the representative of his employees to certain remedial actions if they refuse to bargain collectively. This Comment is concerned, however, only with the collective bargaining obligation imposed upon management.

Section 8 (a) (5) of the act enunciates the employer's duty to bargain in negative terms:

"It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees."3

Congress' efforts to define collective bargaining resulted in section 8(d) of the Taft-Hartley Act which states:

"[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." (Emphasis added.)

The purpose of this Comment is to discover which employer activities, motivated without union animus, are included within the statutory obligation to bargain collectively.

**EMPLOYER'S DILEMMA**

The NLRA provides that collective bargaining is concerned with wages, hours, and other terms and conditions of employment. In interpreting this language, the Supreme Court in *NLRB v. Wooster Division of Borg-Warner Corp.* recognized three categories of bargaining subjects — illegal, mandatory, and

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4. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958). When Congress originally adopted collective bargaining as a national policy for prevention and settlement of labor disputes, it failed to enumerate expressly what actions and subjects fell within the obligation to bargain. The task of defining the term was left to the National Labor Relations Board and the reviewing courts, who gradually arrived at a meaningful definition of the conduct required by the parties to meet their statutory obligation to bargain. Regarding management this definition was subjective based upon the entire course of its conduct, with the essential ingredient that although the employer is not compelled to agree to the union's proposals, he must approach the bargaining table in good faith. In 1947 Congress undertook to define collective bargaining. The original bill passed by the House of Representatives restricted the area of compulsory negotiation to certain enumerated subjects. H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947). However, the Senate amended the bill to omit the specific lists. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., § 34 (1947). Thus Congress couched the definition in the broad terms of section 8(d).

5. It must be remembered that the obligation to bargain collectively is not the only duty imposed upon management by the NLRA. The employer is also prohibited from restraining or coercing his employees in regard to their rights under § 8(a)(1) of the act, 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(1) (1958); from dominating or interfering with the union, § 8(a)(2) of the act, 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(2) (1958); and from discriminating against any labor organization to encourage or discourage membership, § 8(a)(3) of the act, 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(3) (1958). This Comment, however, is limited to a discussion of management activity which does not violate any of these provisions. This is necessary because employer conduct in refusing to bargain collectively which would not normally violate § 8(a)(5) will generally constitute an 8(a)(5) unfair labor practice if such conduct is based upon union animus. In such situations the Board usually finds the employer has violated one of the §§ 8(a)(1) through 8(a)(3), plus § 8(a)(5).

voluntary. The legal consequences of this classification are such that it is of utmost importance that an employer determine the category of each bargaining subject.

There has been relatively little trouble concerning the illegal category. These subjects have been referred to as the "Elliot Ness or vestal virgin type subjects, untouchable and beyond reach" because neither party may collectively bargain concerning them without committing an unfair labor practice. Subjects may fall within this category because either they cannot be included within the collective bargaining agreement or they must be included within the collective bargaining agreement. Examples of the former are closed shop agreements, agreements to pay for work not performed, or clauses limiting the union's exclusive bargaining authority. But a union recognition clause is a nonbargainable subject because an employer must, upon request, include it within the contract.

The Supreme Court declared that all subjects which fall within the language of section 8(d), "wages, hours, and other terms and conditions of employment," are considered mandatory subjects of collective bargaining. Upon request of either party, the employer and the representative of his employees must collectively bargain concerning all such subjects, and refusal to do so generally constitutes a violation of section 8(a)(5) of the

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8. Section 8(a)(3) implies bans preferential hiring and closed shops. American Newspaper Publishers Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951), enforcing in part and remanding in part, 86 N.L.R.B. 951 (1949), held the union committed an unfair labor practice when it insisted upon a closed shop provision within the collective bargaining agreement. However, a hiring hall is not illegal if not discriminatory. Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961).
9. Agreements to pay for work not performed violate § 8(b)(6) of the act. However, this § 8(b)(6) has been given a restricted interpretation by the Court and so long as work is actually being performed it is not in violation of the act to bargain on this subject. American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100 (1953), affirming in part, 193 F.2d 782 (7th Cir. 1951). Arguably, however, any agreement violating the NLRA may not be bargained. NLRB v. News Syndicate Co., 365 U.S. 695 (1961).
11. NLRB v. Sherwin-Williams Co., 130 F.2d 255 (3d Cir. 1942), enforcing, 37 N.L.R.B. 260 (1941); Simplicity Pattern Co., 102 N.L.R.B. 1283 (1953). Recognition of a union is not a bargainable issue; thus an employer who refuses to recognize a local union while suggesting he might enter into a contract with the union's international or another local thereof shall be deemed to have violated section 8(a)(5).
However, neither party is obliged to yield its position; thus an employer or a union may, in good faith, insist upon its proposal concerning a mandatory subject to the point of an impasse in negotiations.

The voluntary or permissive category contains every subject that is neither illegal nor mandatory. Either party may raise a permissive subject and request the other to bargain and the other may then negotiate on that subject if it so desires, but refusal to bargain does not constitute a violation of the act. The Supreme Court has stated, however, that since neither party is required to bargain such a subject, insistence upon such a subject to the point of impasse in negotiations will constitute an unfair labor practice.14

The employer's dilemma is that he must not insist, even in good faith, upon a voluntary subject to the point of impasse in negotiations or as a condition precedent to agreement on other subjects; on the other hand, the employer must not refuse, even in good faith, to bargain concerning a mandatory subject. Obviously, a well-advised employer will attempt to ascertain whether a certain subject is mandatory or voluntary. Unfortunately, there is no sharp line of demarcation between the mandatory and voluntary categories. This problem has been complicated by the recent expansion of the mandatory category to include areas long thought to be completely within the realm of management discretion and, therefore, voluntary subjects. As a result of this expansion, the employer who relies on past decisions may discover that the subject has been shifted from one category to another.15 Furthermore, management is not safe in relying upon the fact that the particular subject has never before been raised during the collective bargaining process. Even though the Board is undoubtedly influenced to some extent by employer-employee customs and bargaining history, the fact that the subject is "new" to collective bargaining does not prevent the Board from ruling that it falls within the mandatory obligation to bargain.16

13. There are certain situations when an employer's refusal to bargain concerning a mandatory subject will not violate the act, the most common occurring when the union has expressly or impliedly waived its right to bargain. See text accompanying notes 55, 57 infra.
15. General Cable Corp., 139 N.L.R.B. 1123 (1962), modifying to three years the contract ban rule which formerly was two years. Town & Country Mfg. Co., 136 N.L.R.B. 1022 (1962), unlike previous Board decisions, required the employer to bargain his decision to subcontract work performed by his employees rather than the effects of the decision.
Although there still remain some subjects which are considered voluntary or permissive, the mandatory classification has been extended to include almost every conceivable activity, exceptional as well as routine, which even minutely affects wages, hours, and other terms and conditions of employment. Further-

17. The following subjects or activities have been held to be voluntary: Selection of negotiators as to either size or membership of team, American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100 (1953); insistence upon a contract clause outlining legal liability, Radiator Specialty Co. v. NLRB, 336 F.2d 495 (4th Cir. 1964); employer's proposal that the signature of each affected employee be required before a grievance could be processed, Industrial Union of Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963); indemnity bonds, Arlington Asphalt Co., 136 N.L.R.B. 742 (1962), enforced, 318 F.2d 550 (4th Cir. 1963); industry promotion fund where union has not voluntarily agreed to such, Raleigh Water Heater Mfg. Co., 136 N.L.R.B. 769 (1962), enforced, 317 F.2d 269 (6th Cir. 1965); unsolved grievances, Knight Morley Corp., 116 N.L.R.B. 140 (1956), enforced, 251 F.2d 753 (6th Cir. 1957); company-owned housing where the rates are normal and the employees are not pressured to live therein, Bemis Brothers Bag Co., 96 N.L.R.B. 726 (1951), enf. denied, 206 F.2d 33 (5th Cir. 1953); union desire that the employer establish a security fund for the payment of wages, Excelsior Dry Wall Co., 145 N.L.R.B. 663 (1963); employer's demand to extend the liability for violation of a no-strike clause to the full resources of the Local's parent international, North Carolina Furniture, Inc., 121 N.L.R.B. 41 (1958); employer's demand that the union withdraw certain unfair labor practice charges, Lion Oil Co. v. NLRB, 245 F.2d 576 (8th Cir. 1957); strike vote clause providing the employers must vote whether to accept or reject the employer's final offer before the union can call a strike, Cranston Print Works Co., 115 N.L.R.B. 537 (1956); certain internal union matters such as the composition of the employees' shop committee, Iron Casting, Inc., 114 N.L.R.B. 739 (1955); possible informal dismissal of unfair labor practice charges, Jefferson Standard Broadcasting Co., 94 N.L.R.B. 1507 (1951).

18. The following subjects have been held to be mandatory: management rights clauses are mandatory subjects in that an employer may insist to an impasse upon their inclusion unless the insistence was otherwise in bad faith, NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); holidays and vacations, Singer Mfg. Co. v. NLRB, 313 U.S. 595 (1941); hiring halls are a mandatory subject if non-discriminatory, NLRB v. Houston Chapter, Ass'd General Contractors, 349 F.2d 449 (5th Cir. 1965); bulletin boards, Proof Co., 115 N.L.R.B. 309 (1956), enforced, 242 F.2d 560 (7th Cir. 1957); compulsory retirement, McMullans v. Kansas, Okla. & Gulf R.R., 129 F. Supp. 157, aff'd, 229 F.2d 50 (10th Cir. 1956); stock purchase plan, Richfield Oil Corp., 110 N.L.R.B. 356 (1954), enforced, 211 F.2d 717 (D.C. Cir. 1955); relief, Fry Roofing Co. v. NLRB, 220 F.2d 432 (9th Cir. 1955); no-strike clauses, Allis-Chalmers Mfg. Co. v. NLRB, 213 F.2d 374 (7th Cir. 1954); rates of pay, piece rates, and other incentive pay, NLRB v. East Texas Steel Castings Co., 211 F.2d 813 (5th Cir. 1954); profit sharing, NLRB v. Black-Clawson Co., 210 F.2d 528 (6th Cir. 1954); union security and checkoff, NLRB v. Reed & Prince Mfg. Co., 205 F.2d 181 (1st Cir. 1953); housing, mandatory where it is company owned and the rates are low, NLRB v. Lehigh Portland Cement Co., 205 F.2d 821 (4th Cir. 1953); changes required by the Fair Labor Standards Act, NLRB v. Harris, 200 F.2d 650 (5th Cir. 1953); Christmas and Easter bonus, Automobile Workers Local 405 v. Niles-Bement-Pond Co., 199 F.2d 713 (2d Cir. 1952); group health and accident insurance, Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949); imposition of compulsory retirement age, Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948); individual merit raises, NLRB v. Allison & Co., 165 F.2d 766 (6th Cir. 1948); methods of payments, General Motors Corp. v. NLRB, 150 F.2d 201 (3d Cir. 1945); hours of work, South Carolina Granite Co. v. NLRB, enf. sub nom., NLRB v. Blair Quarries, Inc., 152 F.2d 25 (4th Cir. 1945); overtime, NLRB v. Moench Tanning Co., 121 F.2d 951 (2d Cir. 1941); seniority rights,
more, continuation of the current trend would expand even further the mandatory classification to include many more subjects now thought to be within the province of employer discretion.

**RECENT DEVELOPMENTS**

The most sweeping innovations and precedent-shattering re-interpretations of labor law occurring recently have concerned management's statutory obligation to bargain collectively. Unfortunately, these decisions by the Board and the reviewing courts have become so inextricably interwoven that it is difficult for management to chart a legal course through the maze.

The recent developments lend themselves most readily to a discussion based upon various classifications of subjects, such as subcontracting, automation, relocation, and termination of the business enterprise. Each classification is discussed chronologically within itself. Furthermore, certain principles, applicable to all classifications, are discussed in the initial classification although the facts of the cases might place them in later groupings.

Discussion of the recent developments begins with subcontracting since the rationale of the initial subcontracting decisions provided the impetus to propel the collective bargaining process into many other areas previously considered management prerogatives.

**MANAGEMENT SUBCONTRACTING DECISIONS**

Subcontracting is an excellent example of the Board's incorporation of what was once a voluntary bargaining subject

into the category of mandatory subjects. When Fibreboard Paper Prod. Corp. first appeared, the Board held that if a decision to subcontract work presently being performed by one's employees was occasioned solely by economic considerations, the employer was only obligated to bargain concerning the effects of the change upon the terms and conditions of employment. The employer was obligated to bargain his decision to subcontract his operations only if such decision was prompted by anti-union motives.

Just one year later, however, the Board, in Town & Country Mfg. Co., asserted that the employer's unilateral action in subcontracting work, even if based upon purely economic considerations, constituted an unlawful refusal to bargain because the employer is under a statutory obligation to bargain concerning his decision to subcontract. On the basis of this decision, the Board, on rehearing, reversed its original holding in Fibreboard and ordered the employer to bargain his decision to subcontract maintenance work even though the decision had been motivated by economic considerations alone. The Board in the Town & Country and Fibreboard decisions enun-

20. Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964), affirming sub nom., East Bay Union Machinists v. NLRB, 322 F.2d 411 (D.C. Cir. 1963), enforcing, 138 N.L.R.B. 550 (1962), reversing, 130 N.L.R.B. 1558 (1961). The employer, motivated solely by economic considerations, determined that $250,000 could be saved annually by contracting out work presently being performed by its maintenance employees. At the time, however, the employer was bound by a collective bargaining agreement with the union. 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 employer informed the union of its decision to subcontract the maintenance work. The employer assumed that it was not obligated to bargain 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 expiration of the existing contract.
22. As discussed in note 5 supra, the Board will generally find the employer has refused to bargain collectively whenever his activities are based upon anti-union motives; however, the significance of the 8(a)(5) violation is minimized due to the fact that the employer was found guilty of other unfair labor practices. The Board has found an 8(a)(5) refusal to bargain when the employer relocated his plant without bargaining the decision, Rapid Bindery, Inc., 127 N.L.R.B. 212 (1960), or modified his operations without bargaining the decision, Rives Co., 125 N.L.R.B. 772 (1959), when his purpose was to discourage union membership or to avoid his collective bargaining duty with the representative of his employees.
associated a theory which would resound in all subsequent decisions in this area and which would later force an employer to bargain many other subjects thought to be solely within management discretion. The Board declared that "candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operation may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. But it commands no less."25

The Board's decision in Fibreboard that an employer must bargain his decision to subcontract seemed extremely broad, as it contained no language of limitation; thus, it could have been interpreted as obligating an employer to negotiate every decision to subcontract work which had any effect upon his employees. However, subsequent Board decisions limited the scope of Fibreboard. Even prior to the Supreme Court decision in Fibreboard, the Board held, in Motorsearch Co.,26 that the employer had not violated the act by failing to bargain with the union over the decision to subcontract because the union knew of the subcontracting and had made no attempt to bargain about it during eighteen consecutive bargaining sessions. Further, in Shell Oil Co.,27 the Board held that the employer did not violate the act by failing to bargain with the union before subcontracting employees' work because the subcontracting clause in the collective bargaining agreement by implication permitted the employer to subcontract occasional maintenance work without prior notice and consultation with the union.

The Court of Appeals for the District of Columbia affirmed the Board's decision in Fibreboard28 without limitation, stating "it is not necessary that it be likely or probable that the union yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints."29 However, other appellate courts were reluctant to

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29. Id. at 414.
adopt the Board's position.\(^{30}\) Specifically, in *NLRB v. Adams Dairy*,\(^{31}\) the Court of Appeals for the Eighth Circuit apparently repudiated the Board's final decision in *Fibreboard* by announcing that the decision on the part of the employer to terminate a phase of his business and to subcontract the distribution of all products through independent contractors was not a required subject of collective bargaining. The Supreme Court granted certiorari in *Fibreboard* to establish uniformity and eliminate the conflicts and confusion existing among the various circuits.\(^{32}\)

The majority of the Supreme Court in *Fibreboard* affirmed the appellate court's decision, holding that "contracting out" is within the literal meaning of the phrase "terms and other conditions of employment" and was, therefore, a statutory or mandatory subject of collective bargaining.\(^{33}\) The Court followed the doctrine enunciated by the Board decisions in *Town & Country* and *Fibreboard* that the possible mitigation, through collective bargaining, of the adverse effects of any activity affecting employees is sufficient justification for subjecting that activity to the collective bargaining process.\(^{34}\) Significantly, however, the Supreme Court explicitly stated that its decision was limited to the facts of the case— the replacement of the employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment.\(^{35}\)

It seems that the Court's cautious pronouncement that the decision was limited to the facts of the case evidences a desire to refrain from labeling subcontracting *per se* a mandatory subject of collective bargaining; on the other hand, it is obvious that under certain circumstances subcontracting will fall within the mandatory category.\(^{36}\) Unfortunately, the Supreme Court,

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\(^{30}\) In *Hawaii Meat Co. v. NLRB*, 321 F.2d 397 (9th Cir. 1963), the court held the employer had not committed an unfair labor practice by refusing to bargain concerning his decision to subcontract since the decision was made while the union was engaged in a strike. The court stressed that the employer's general right to replace economic strikers eliminated the necessity to bargain.

\(^{31}\) 322 F.2d 553 (8th Cir. 1963).

\(^{32}\) 375 U.S. 963 (1964).


\(^{34}\) Id. at 214 (1964).

\(^{35}\) The court declared that "our decision need not and does not encompass the other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." *Id.* at 215 (1964). This desire to limit the holding was reemphasized by the concurring Justices who apparently feared the majority opinion might be misunderstood.

\(^{36}\) The *Fibreboard* doctrine definitely obliges management to negotiate deci-
in exercising care to place its holding within the narrowest possible confines, suggested no concrete guidelines for ascertaining when management would be obligated to bargain concerning its subcontracting decisions. The majority only asserted that under the facts of *Fibreboard* "to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." 37 In his concurring opinion, Justice Stewart, alarmed at the implied breadth of the majority opinion, attempted to provide some guidelines as to which subjects should fall within the phrase "terms and other conditions of employment." 38 Yet he was only able to distinguish between managerial decisions "which lie at the core of entrepreneurial control . . . which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly on employment security," 39 and those decisions which are "in themselves primarily about conditions of employment." 40 Presumably, therefore, the Supreme Court left the Board and the reviewing courts free to determine the guidelines applicable to the doctrine announced in *Fibreboard*.

*Westinghouse Electric Corp.* 41 was the first Board decision to interpret the Supreme Court’s decision in *Fibreboard*. Although agreeing that generally the contracting-out of work being performed or capable of being performed by employees within a bargaining unit is a subject of mandatory bargaining, the Board stated that *Fibreboard* was not intended to establish a rigid rule to be mechanically applied regardless of the relevant facts. On the basis of the cumulative facts in *Westinghouse*, the Board held that the employer did not have to give notice to, or consult, the union with respect to subcontracting the work in question. 42 The Board reasoned that the *Fibreboard* doctrine

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38. *Id.* at 223.
39. *Id.*
42. The facts of *Westinghouse* reveal that the recurring subcontracts were motivated solely by economic considerations, that they comported 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
was meant to apply only if subcontracting departed from previously established operating procedure, effected 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. It is submitted that as far as the Board is concerned, *Westinghouse* established that the *Fibreboard* doctrine was not to be limited solely to its facts; rather, *Fibreboard* precipitated a doctrine of broad application requiring management to bargain collectively its proposed decisions to subcontract unless the facts of the particular case grant dispensation.

Subsequent Board decisions have relied upon *Westinghouse* and have upheld its general principles. Special emphasis has been placed on the 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. In *General Tube Co.* the Board held that, though the evidence was insufficient to show a previously established practice of subcontracting, the employer did not violate the act by refusing to bargain with respect to its decision to subcontract because the decision did not result in any significant detriment to the employees within the bargaining unit or change their employment conditions.

In summary, it appears that although the Board intends to grant the *Fibreboard* doctrine broad application, it nevertheless evidences a desire to create some limited exceptions. A careful reading of the Board decisions reveals some clearly ascertainable guidelines concerning management's obligation to negotiate its subcontracting decisions.

Unfortunately for the formulation of guidelines, but fortunately from the viewpoint of management, the various appellate courts seem to be enforcing a more restrained application of *Fibreboard*. At this writing there have been three important

opportunity to bargain about changes in the existing subcontracting practices at general negotiating meetings.


44. *General Tube Co. & Int'l Union, AFL-CIO*, 151 N.L.R.B. No. 89 (1965)
decisions by two courts of appeals determining the proper application of *Fibreboard*, all overruling the Board.45

Prior to the Supreme Court's decision in *Fibreboard*, the Court of Appeals for the Eight Circuit in *NLRB v. Adams Dairy*46 had announced that a management decision to terminate a phase of its business and subcontract the distribution of all products through independent contractors was not a required subject of collective bargaining. Subsequent to and in light of the final decision in *Fibreboard*, the Eighth Circuit reconsidered its original holding. It concluded that its original decision was correct,47 finding that *Adams* was distinguishable from *Fibreboard* and thus withdrawn from the ambit of the *Fibreboard* doctrine which was restricted to its facts according to the majority opinion.

The distinguishing feature was that in *Adams Dairy*, unlike *Fibreboard*, there was a change in the basic operational procedure. In *Fibreboard* the subcontracted maintenance work was still performed in the plant and no capital investment was contemplated. The employer simply replaced the existing employees with those of an independent contractor who performed the same work under similar conditions of employment. On the other hand, in *Adams Dairy*, the employer completely altered his distribution system when he decided to sell his products to independent contractors. The trucks formerly used to deliver the goods were sold to the independent contractors who became solely responsible for selling the product. Further, the work performed by the independent contractors in *Adams*, contrary

45. Two of these appellate court decisions involved a management decision to partially terminate its business operations without subcontracting the terminated work. Although these decisions rightfully fall within the classification *Partial and Total Termination of the Business Operations* (*infra*), it is submitted that the deducible principles should be equally applicable to the area of subcontracting.

46. 322 F.2d 553 (8th Cir. 1963) (see text accompanying note 31 *supra*), vacated by the Supreme Court, 379 U.S. 644 (1965).

47. 350 F.2d 108 (8th Cir. 1965). The employer and the union entered into three contracts over a period of time. In each negotiation the employer rejected the union's proposal concerning the 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 Adams 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 his decision to subcontract the work and that all positions of the driver-salesmen were terminated.
to the situation in *Fibreboard*, was not primarily performed for the benefit of the employer. The court stated that in *Adams* there was more than the mere substitution of one set of employees for another; there was a change in the capital structure which resulted in a partial liquidation and recoupment of capital investment. To require management to bargain concerning its decision to close out the distribution aspect of its business operation would have significantly abridged its freedom to manage its own affairs.48

This desire of the Eighth Circuit to limit the scope of the *Fibreboard* doctrine was again evidenced in *NLRB v. Burns Int’l Detective Agency*.49 Seizing upon the language in *Fibreboard* that it was limited to its facts, the court held that partial discontinuance of the business operations without prior bargaining was not a violation of section 8(a)(5) because, unlike *Fibreboard*, the employer was not continuing the same work at the same plant under similar conditions of employment.50 No form of contracting-out or subcontracting was involved; the employer

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48. 350 F.2d 108, 111 (8th Cir. 1965). It should be noted that the court of appeals relied upon the language of the majority in *Fibreboard* 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.” 379 U.S. 203, 213 (1964).

In addition, the appellate court asserted that even if the decision to subcontract the distribution of the dairy products was subject to the mandatory bargaining obligation, it was arguable that such bargaining occurred. In *Fibreboard* the employer’s decision to subcontract arose during negotiations for a new labor-management contract and thus there was little excuse for not negotiating the disputed issue during the bargaining sessions. However, in *Adams Dairy*, management’s decision to subcontract arose when the labor-management contract still had two years before expiration. The facts implied that negotiation on the disputed issue had occurred before the current contract was perfected. That being the case, the court stated that the employer should not be required to reopen negotiations during the contract period.

49. 148 N.L.R.B. 1267, enf. part., den. part., 346 F.2d 897 (8th Cir. 1965). The employer had contracts for guard service with Creighton University and several other business concerns in Omaha, Nebraska. Within a year prior to the certification of the International Guards Union of America as the bargaining representative for all of Burns’ Omaha employees, every business concern in Omaha except Creighton University cancelled its contract for guard service. Less than a month after certification, the employer notified the union that he was terminating the contract with Creighton University, leaving no guard service in Omaha, and consequently, no need to bargain with the union. The union alleged that the mere refusal to consult with them concerning termination of the Creighton University contract, irrespective of the economic situation, constituted a violation of section 8(a)(5). The Board agreed and again demonstrated its desire for a broad application of the *Fibreboard* doctrine.

50. Again the appellate court is relying upon language utilized by both the majority and concurring Justices in *Fibreboard* that the decision was limited to its facts, that is, 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.” 379 U.S. 203, 213, 218 (1965).
had, for valid economic reasons, completely discontinued its operations at one of its plants, and no one else was performing for the employer, whether by subcontract or otherwise, the services formerly rendered by its employees.

In *Royal Plating & Polishing Co.* the Court of Appeals for the Third Circuit displayed a similar desire to limit the *Fibreboard* doctrine. The Board had ruled that the employer's economically determined decision to partially terminate his business operations was subject to the collective bargaining obligation. However, the appellate court simply distinguished *Royal Plating* on its facts from *Fibreboard* and found that the *Fibreboard* doctrine did not apply. Unlike *Fibreboard*, the employer's economic decision in *Royal Plating* involved the commitment of investment capital and was, therefore, a managerial decision which lay at the core of entrepreneurial control.

51. 148 N.L.R.B. 545, 57 L.R.R.M. 1006 (1964), reconsidered, 152 N.L.R.B. No. 76, 59 L.R.R.M. 1141 (1965), enforcement denied, 350 F.2d 191 (3d Cir. 1965). The employer's business activities were located in two plants within the same city which constituted a single bargaining unit. During negotiation for a new labor-management contract, the employer notified the union that he was losing money and therefore would close the plant rather than increase wages. Nevertheless, a new contract was consummated. During these contract negotiations, the employer had also been negotiating with the Newark Housing Authority concerning the sale of one of the plants to the Authority. The employer's negotiations with the Housing Authority were not purely voluntary; the Authority could force a sale through the use of its condemnation powers and in fact made an offer to the employer which informed him that if he wished more money he would have to go to court. Subsequent to the new contract between management and the union, the employer agreed to sell the plant to the Authority. The union was never notified of the decision. The employer began laying off all of the employees and subsequently completely closed the plant in question.

The Board applied the *Fibreboard* doctrine to a partial closing of the business operation even though there was no subcontracting of work presently being performed by the employees within the bargaining unit. The Board stated that the fact that the decision to partially terminate was purely economically motivated was unimportant, in fact, under the *Fibreboard* doctrine, it makes a decision to shut down even more amenable to the procedures of collective bargaining. This decision is an excellent example of the extent to which the Board desires to apply *Fibreboard*.

The court of appeals, however, held that an employer who was faced with either moving or consolidating his business operations for economic reasons has no duty under § 8(a)(5) to bargain with the union respecting his decision to close one of his plants. Possibly the appellate court was influenced by the fact that management's negotiations with the Housing Authority were not purely voluntary; under these circumstances there was no room for union negotiations. Nevertheless, the court held that management was under an obligation to notify the union of its intentions after the decision was perfected so the union could be granted an opportunity to bargain concerning the rights of the employees whose employment status would be altered. Thus the effects of the decision must still be negotiated.

52. The Third Circuit utilized the language of the concurring Justices in
It appears that these two courts of appeals intend to enforce a more restricted application of the *Fibreboard* doctrine than that of the Board, by distinguishing the decisions on the facts or by deciding that the employer's activity was a managerial decision which lay at the core of entrepreneurial control or that bargaining such a decision would significantly abridge the employer's freedom to manage his own business affairs.

On the basis of these recent decisions by the Board and the reviewing courts the rapidly changing area of law concerning subcontracting may be summarized, at present, as follows: Management must collectively bargain all decisions to subcontract which are prompted by union animus. Furthermore, management must collectively bargain all purely economic decisions to subcontract unless:

(a) there is an implied waiver of management's obligation to bargain in light of previously established procedure involving subcontracting which the union did not protest.

*Fibreboard* who were fearful that the majority opinion radiated implications of disturbing breadth: "Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions which lie at the core of entrepreneurial control." 379 U.S. 203, 223 (1964).


55. This exception was enunciated in *Motorsearch* Co., 138 N.L.R.B. 1490 (1962), in which the Board held that management had not violated the act by failing to bargain with the union concerning its decision to subcontract because the union knew of the subcontracting and made no attempt to bargain about it during eighteen consecutive bargaining sessions. It was later re-emphasized in *NLRB v. Adams Dairy, Inc.*, 322 F.2d 553 (8th Cir. 1963); *White Consol. Indus., Inc.*, 154 N.L.R.B. No. 127, 60 L.R.R.M. 1147 (1965); *American Oil (Neodesha, Kans.)*, 152 N.L.R.B. No. 7, 59 L.R.R.M. 1007 (1965); *Central Soya Co.*, 151 N.L.R.B. No. 161, 58 L.R.R.M. 1667 (1965); *Allied Chemical Corp.*, 151 N.L.R.B. No. 76, 58 L.R.R.M. 1480 (1965); *American Oil Co. (Whiting, Ind.)*, 151 N.L.R.B. No. 45, 58 L.R.R.M. 1412 (1965); *Fafnir Bearing Co.*, 151 N.L.R.B. No. 40, 58 L.R.R.M. 1397 (1965); *Superior Coach Corp.*, 151 N.L.R.B. No. 24, 58 L.R.R.M. 1369 (1965); *Westinghouse Elec. Corp.*, 150 N.L.R.B. No. 136, 58 L.R.R.M. 1257 (1965); *Kenneecott Copper Corp.*, 148 N.L.R.B. No. 160, 57 L.R.R.M. 1217 (1964).

In *Transmarine Navigation Corp.*, 152 N.L.R.B. No. 107, 59 L.R.R.M. 1232 (1965), management attempted to rely on *Motorsearch* alleging that the union was charged with knowledge of the closing of the terminal because a company vice president informed a union member of the fact and therefore the union waived its right to bargain concerning the closing. The Board held, however, that when a union is advised of an employer's final decision with respect to a matter that should be bargained, it is not incumbent on the union to make a useless request to negotiate something which has effectively already been accomplished.
(b) the subcontract does not constitute a significant detriment to the employees within the bargaining unit;\(^{56}\)

(c) there is an express or implied waiver of the employer's

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this case dealt with termination of the employer's business operations, its principle is equally applicable to any phase of the *Fibreboard* doctrine.

56. This exception was clearly announced in the *Westinghouse* decision (see text accompanying footnotes 41-42 supra); it has also been applied in *American Oil (Neodesha, Kans.)*; *Central Soya*; *American Oil (Whiting, Ind.)*; *Kennecott Copper*; *Superior Coach*; *Fafnir Bearing*; and *Allied Chemical* (see note 55 supra). These later decisions placed special emphasis on the fact that the subcontracting did not constitute a significant detriment to the employees within the bargaining unit (exception b) and the employer was following an established practice of unilateral subcontracting which the union had neither protested nor attempted to limit (exception a). However, the *General Tube* decision asserted that exception b alone is sufficient to protect management from an unfair labor practice charge. Query: What would the Board hold when an employer's unilateral decision to subcontract was in accord with previously established practice but 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 exception a or b alone is sufficient to protect the employer. Indeed, in *White Consol. Indus.*, 154 N.L.R.B. No. 127, 60 L.R.R.M. 1147 (1965), the employer decided to discontinue its Chicago operations and move to Pennsylvania, obviously a decision which would constitute a significant detriment to the employees within the bargaining unit. The Board, citing *Fibreboard* and *Motorsearch*, held there was no violation of §(a)(5) because the union was notified after the decision was reached and they made no objections to the employer's plans or requested bargaining with respect to the decision; the union waited six months before it even filed §(a)(5) charges. Although this case dealt with closure of operations, the extracted principle should be equally applicable to subcontracting. Thus it appears that acquiescence in management's decision by the union is sufficient to protect management from §(a)(5) violations even though the decision constitutes a significant detriment to the employees within the bargaining unit.

*Westinghouse Electric Corp. (Bettis Atomic Power Lab.)*, 153 N.L.R.B. No. 33, 59 L.R.R.M. 1355 (1965), involved a determination of what constitutes a "significant detriment." There was no subcontracting clause in the collective bargaining agreement; consequently the employer unilaterally awarded fifteen subcontractors dealings with matters such as painting and cleaning. The union alleged violation of §(a)(5) because the employer failed to bargain his decision and the employees within the bargaining unit had performed similar work in the past. The Board found that the employer had not violated the act, reiterating that *Fibreboard* was not intended to lay down a hard and fast doctrine as to unilateral subcontracting and even where a subject of mandatory bargaining is involved, there may be circumstances which the Board would accept as justifying unilateral action. The employer's obligation to bargain does not normally arise unless the subcontract effects some change in the terms and conditions of employment of the employees involved. The Board asserted that "significant detriment to the employees in the appropriate unit" is *not* to be found by speculative reasoning; the Board refused to adopt the General Counsel's contention that if the work had not been subcontracted, then the employees laid-off two years before the subcontracting occurred could have been recalled. Member McCulloch dissented, asserting that because of the unilateral subcontracting, the laid-off employees suffered a significant detriment in that they were deprived of a "reasonably anticipated" right to be recalled to perform the subcontracted work. McCulloch relied on the *Westinghouse (Mansfield)* decision in which the Board reasoned that the *Fibreboard* doctrine applied if the subcontracting resulted in a significant impairment of reasonably anticipated work opportunities for those in the bargaining unit.
obligation to bargain through the terms of the collective bargaining agreement,\(^ {57} \)

(d) the employer, in order to meet his obligations, is forced to contract out the work normally performed by his employees because they are engaged in an economic strike,\(^ {58} \)

\(^{57}\) See General Motors Corp., 149 N.L.R.B. No. 40, 57 L.R.R.M. 1277 (1964), in which the Board determined that management had not violated the act by transferring employees from one unit to another without prior bargaining because the decision was essentially a change of method without resulting in layoff or discharge and was a management prerogative recognized by the union in its national collective bargaining agreement. In Shell Oil Co., 149 N.L.R.B. No. 22, 57 L.R.R.M. 1271 (1964), the Board held that management did not violate the act by failing to bargain with the union before subcontracting its employees' work because the subcontracting clause in the collective bargaining agreement implied consent that the employer could subcontract occasional maintenance work without prior notice to, or consultation with, the union. See Druwhit Metals Prodt. Co., 153 N.L.R.B. No. 35, 59 L.R.R.M. 1359 (1965); Shell Chemical Co., 149 N.L.R.B. No. 23, 57 L.R.R.M. 1275 (1964).

In relation to both exceptions a and c, in the absence of a specific waiver of bargaining rights on a particular subject, the Board will not readily infer an implied waiver of the right to bargain on a mandatory subject. The implied waiver must be clear and unmistakable. NLRB v. Item Co., 220 F.2d 936 (5th Cir. 1955), cert. denied, 350 U.S. 836 (1955); Beacon Piece Dyeing & Finishing Co., 121 N.L.R.B. 953 (1958); Tidewater Associated Oil Co., 85 N.L.R.B. 1066 (1949). Normally the union does not waive its right to bargain upon a subject simply by entering into a collective bargaining agreement which is silent on the subject. NLRB v. Allison & Co., 105 F.2d 766 (6th Cir. 1949). Thus, a management rights clause does not amount to a waiver of the obligation to bargain on a subject not expressly covered by the collective bargaining agreement. If a union willingly waives its rights to bargain on a certain subject, the employer will not be required to negotiate on the subject during the period of the waiver. Shell Oil Co., 149 N.L.R.B. 283 (1964).

\(^ {58}\) See Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963), in which, prior to the Supreme Court's decision in \( \textit{Fibreboard} \), the court of appeals held that the employer had not committed an unfair labor practice by refusing to bargain concerning his decision to subcontract since the decision was perfected while the union was engaged in a strike. Subsequent to the Supreme Court's decision in \( \textit{Fibreboard} \), the exception has been upheld in NLRB v. Abbott Publishing Co., 331 F.2d 209 (7th Cir. 1964). See also Shell Oil Co., 149 N.L.R.B. 283, 57 L.R.R.M. 1271 (1964), in which the Board held that management was not obligated to bargain over subcontracts made in the course of a strike as these temporary subcontracts necessitated by the strike did not transcend the reasonable measures an employer may take in order to maintain operations in such circumstances; Shell Chemical Co., 149 N.L.R.B. No. 23, 57 L.R.R.M. 1275 (1964). In Empire Terminal Warehouse Co., 151 N.L.R.B. No. 125 (1965), the Board held that management did not violate the act by failing to notify and consult with the union prior to 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 dispute the employer continued to bargain in good faith with the union concerning contract terms in general and the subcontracting issue in particular; the employer did not attempt to undermine 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 union jobs or otherwise alter or impair the bargaining unit; the subcontracting did
(e) under the facts of the case, application of the collective bargaining obligation to management's decision to subcontract would constitute an unfair burden upon management which would significantly abridge its freedom to manage the business,\footnote{59}

(f) the decision to subcontract was a managerial decision which lay at the core of entrepreneurial control,\footnote{60} or

(g) the facts of the case are so distinguishable from Fibreboard as to remove it from the ambit of that doctrine.\footnote{61}

Even though management's decision to subcontract may fall within one of the exceptions to the Fibreboard doctrine and thereby exempt it from the collective bargaining obligation, it nevertheless appears that management must negotiate, upon not exceed what was necessary to protect the employer's customers whose deliveries were in jeopardy.


Admittedly any distinction between exceptions e, f, and g is indeed tenuous and elusive. However, it is suggested that perhaps a distinction may be drawn.

It is submitted that management decisions concerning certain activities should be exempt from the collective bargaining obligation simply on the basis that they are managerial decisions lying at the core of entrepreneurial control (exception f), rather than because the facts of the case happen to be distinguishable from Fibreboard. Examples of such activities are decisions concerning the volume and kind of advertising expenditures, product design, method of financing, sales procedure, and investment of capital. The fact that application of the collective bargaining obligation to management's decision concerning certain activities would significantly abridge its freedom to manage the business (exception e) should exclude all of the management activities excluded by exception f; however, it should also exclude certain employer activities not normally covered by exception f which arise due to the circumstances. Examples of such decisions are those perfected during an economic strike, during periods of emergency, during periods when a great number of employees or union personnel are absent, or—most important of all—when the employer's very existence as an entrepreneur depends upon a prompt and timely decision concerning the subcontracting of work.

Lastly, exception g should only be applied to situations which could not be excluded from the collective bargaining obligation under exception e or f but the facts of the case demand that the employer be free to make a decision unfettered by the collective bargaining obligation.
request, with its employees concerning the effects of such decision. 62

It is believed that these exceptions are too general and enigmatic to provide management with a highly reliable guide. Unless management is certain its decision to subcontract lies outside the duty to bargain — for instance, because the facts of its case are a replica of a case already decided — it acts at its peril 63 in subcontracting work without first negotiating its decision with the collective bargaining representative of the employees involved.

MANAGEMENT DECISIONS CONCERNING
PARTIAL OR TOTAL TERMINATION OF BUSINESS OPERATIONS

Even prior to the Supreme Court's decision in Textile Workers v. Darlington Mfg. Co., 64 it was settled that if an employer partially terminated his business operations due to union animus it constituted a violation of the National Labor Relations Act. 65 Specifically, if the employer simply threatened to terminate pari-

62. The exceptions to the Fibreboard doctrine merely alleviate management's obligation to bargain rather than totally extinguishing it. In NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965) (see notes 51, 52 supra), the appellate court held that although management had no duty to bargain collectively its decision to close one of its plants, it was obligated to notify the union of its decision and grant the union an opportunity to bargain concerning the effects of the decision. See also Young Motor Truck Service, 156 N.L.R.B. No. 56, 61 L.R.R.M. 1099 (1966) (see note 95 infra). These cases involve a managerial decision to terminate the business operations rather than to subcontract; however, the principles extracted should apply to any case under the Fibreboard doctrine.

63. Management should take extreme care not only when the facts surrounding its proposed decision to subcontract fall within the interstices of the exceptions to the Fibreboard doctrine, but also if it appears possible litigation will arise in a circuit other than those which have enunciated the exceptions.

If management subcontractors without previously engaging the representative of its employees in collective bargaining concerning the proposed decision, and later is found to have violated section 8(a)(5) of the act, the remedial actions available to the Board are harsh indeed. Fibreboard asserted that the nature of the violation might justify directing the employer to resume its subcontracted operation and reinstate the terminated employees to employment making them whole for loss of pay. Furthermore, the employer is usually directed to indicate in writing its adherence to the Board's decision, thereby resulting in a public confession, and is ordered to cease and desist from unilaterally bargaining unit work. Spun-Jee Corp., 152 N.L.R.B. No. 96, 59 L.R.R.M. 1206 (1965). Should the employer fail to comply with the orders levied by the Board or the reviewing courts, the courts may issue a writ of attachment confining him in custody for acts of contempt. NLRB v. Savoy Laundry, 354 F.2d 78 (2d Cir. 1965).

64. 139 N.L.R.B. 241 (1962), enforcement denied, 325 F.2d 682 (4th Cir. 1963), reversed and remanded, 380 U.S. 263 (1965).

65. This classification of subjects is concerned with managerial decisions to terminate partially or totally operations at one situs without relocating elsewhere.
tially the business in order to restrain or coerce his employees in the exercise of their rights under the act, it was a violation of section 8(a)(1). Furthermore, management could not eliminate a portion of the business enterprise due to union animus because this would constitute discrimination with regard to hire or tenure and thus be a violation of section 8(a)(3). Management could not effect a shutdown of the plant and subsequently reopen it for the purpose of hiring only those employees who were formerly anti-union; nor could management discharge its employees for anti-union reasons and allow the work to continue under new personnel. In all of the above decisions major emphasis was placed upon the motives of the employer. If the employer's motives were discriminatory or retaliatory or if they discouraged union membership or were designed to avoid bargaining with the union, then the employer would be guilty not only of violating 8(a)(1), (2), or (3), but also of violating section 8(a)(5). There were no decisions, however, that determined whether management could completely terminate its business enterprise due to union animus.

The Board and the reviewing courts were not in complete accord on whether management could unilaterally, partially or totally terminate its business enterprise for purely economic considerations. The Board, through extensions of the Fibreboard doctrine, had consistently held that such action by management constituted a violation of the statutory bargaining obligation.

66. NLRB v. West Coast Casket Co., 205 F.2d 902 (9th Cir. 1953); Stokely Foods v. NLRB, 183 F.2d 736 (5th Cir. 1952). Presumably management was also prohibited from threatening to terminate totally the business operations.

67. NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962).

68. Stokely Foods v. NLRB, 183 F.2d 736 (5th Cir. 1952). See Norma Mining Corp., 206 F.2d 38 (4th Cir. 1953) in which it was held that management could not effect a shutdown of the plant whereby the employees, by renouncing the union, could cause the plant to reopen.


70. The Board would weigh the relative strength of the economic and anti-union motivations in order to determine which was the primary cause of the decision to terminate operations. It should be noted that the presence of a union can always be considered by the employer as a purely economic factor in motivating his operational change; thus an employer may consider the probability of higher wages due to unionization as a factor when considering a change in operations. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Lassing, 126 N.L.R.B. 1041, enforcement denied, 284 F.2d 781 (6th Cir. 1960).

71. In Weingarten Food Center, 140 N.L.R.B. 256 (1962), the alleged 8(a)(5) violation was not properly presented to the trial examiner, therefore the complaint was dismissed; however, a majority of the Board stated that the Town & Country doctrine should apply and thereby obligate the employer to bargain collectively before reaching a decision to sell his store. Then in Star Baby Co., 140 N.L.R.B. 678 (1963), the Board, by applying the doctrine announced in
New York Mirror epitomizes the rationale utilized by the Board: "Town & Country and Fibreboard involved, to be sure, management decisions to contract out a phase of an operation. But the principles of these earlier cases have been equally applied to management decisions to take other steps to alter or to discontinue permanently either a portion or all of an operation when the decisions have the effect of eliminating unit work. Thus our decisions in Town & Country and Fibreboard did not turn on the means whereby, or the extent to which, the employer terminated operations, but rather on the fact that a management decision 'eliminating unit jobs ... is a matter within the statutory phase (sic) other terms and conditions of employment.' The elimination of unit work is no less within that statutory phrase when it is to result from a management decision affecting an entire operation. And this is so even though the likelihood is slim that prior consultation with the union will alter the employer's contemplated decision. For the Act 'at least demands that the issue be submitted to the mediatory influence of collective bargaining.'" On the other hand, the various appellate courts had been almost as consistent in refusing to find an unfair labor practice in those instances where management unilaterally closed its plant partially or totally for purely economic reasons.

Such was the complexion of the law when Darlington arose. Darlington Manufacturing Company was a South Carolina Corporation operating one textile mill. A majority of its stock was

Town & Country, found that by unilaterally terminating his business operations without consulting the union, the employer violated section 8(a)(5) of the Act. Subsequent to the Supreme Court's decision in Fibreboard but prior to Darlington, the Board, in Royal Plating and Polishing Co., 148 N.L.R.B. 545 (1965), extended the Fibreboard-Town & Country doctrine to include an employer's purely economic decision to close his plant. See Transmarine Navigation Corp., 152 N.L.R.B. No. 107, 59 L.R.R.M. 1232 (1965); Apex Linen Service of Columbus, Inc., 151 N.L.R.B. No. 54, 58 L.R.R.M. 1398 (1965); Lori-Ann, Inc., 137 N.L.R.B. 1099 (1962).

74. See NLRB v. New England Web, Inc., 303 F.2d 690 (1st Cir. 1962) in which the appellate court stated that a businessman retains the untrammeled prerogative to close his enterprise when in the exercise of a legitimate and justified business judgment he concludes that such step is economically desirable or economically necessary. NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960). In NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954), it was stated in dictum that an employer has an absolute right to terminate its business for any reason whatsoever. Union Drawn Steel Co. v. NLRB, 109 F.2d 587 (3d Cir. 1940).
75. For further information concerning the law in this area prior to the Supreme Court's decision in Darlington, see Rothman, The Right To Go Out of
owned by Deering Milliken & Co., a New York "selling house." Deering Milliken in turn was controlled by Roger Milliken and other members of his family. When the Textile Workers Union initiated an organizational campaign at the South Carolina mill, the company resisted in several ways, including threats to close the plant if the union won the representation election. When the union won the election, the Board of Directors, true to its vow, voted to liquidate the corporation. The plant ceased operations and all plant machinery and equipment were sold piece-meal.

The Board found that the plant had been closed due to the union animus of Deering Milliken and this constituted a violation of section 8(a) (5). Alternatively, the Board determined that the Darlington plant was merely a single part of the integrated Deering Milliken enterprise, and that Deering Milliken had violated the act by closing a portion of its business for discriminatory purposes. Significantly, the Board also found an 8(a) (5) violation because Deering Milliken had refused to bargain collectively its decision to completely terminate its operations. The Court of Appeals for the Fourth Circuit set aside the Board's order, holding that even accepting arguendo the Board's determination that the Deering Milliken enterprise had the status of a single employer, an employer has an absolute right to close a portion or all of his business regardless of union animus.

The Supreme Court refused to support the contention of the Board that since the plant had been closed due to anti-union considerations, the employer was guilty of an 8(a) (3) violation. The Supreme Court held that an employer has an "absolute right" to terminate his entire business for any reason he wishes, including union animus. It was felt that the closing of an entire business, even though discriminatory, ends the employer-employee relationship; on the other hand, a discriminatory partial closing may have repercussions on the remnants of


76. These threats were determined by the Board to have violated section 8(a) (1) of the act and such decision was not challenged by the employer before the reviewing courts.
77. 139 N.L.R.B. 241 (1962).
78. 325 F.2d 682 (4th Cir. 1963).
the business, thereby affording the employer leverage for discouraging the free exercise of employee rights granted by the act. Therefore, the Court asserted that a partial closing constitutes an unfair labor practice under section 8(a)(3) if done to "chill unionism" in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that the closing would have that effect. A partial closing becomes a lever to discourage collective employee activities in the future and, as such, yields an unfair benefit for the employer. But a complete termination of the business enterprise yields no such benefit for the employer.\textsuperscript{80}

The Court asserted that in order to ascertain whether the termination was merely a partial closing of a larger single enterprise rather than a total cessation, it is not necessary that there exist an organizational integration of plants or corporations. All that is required is that the party exercising control over the plant being closed for anti-union reasons have an interest in another business, whether or not engaged in the same line of commercial activity as the closing plant, of sufficient substantiality to give promise of reaping a benefit from discouragement of unionism in that business.

The Darlington decision becomes perplexing when one attempts to address the "absolute right" concept to the enigma of what subjects lie within the ambit of the mandatory bargaining category. The Supreme Court dealt solely with employer 8(a)(1) and 8(a)(3) violations and certainly the "absolute right" concept grants management the right to totally terminate its op-

\textsuperscript{80} The case was remanded to the Board to determine the status of the Milliken enterprise, and should it be deemed a partial closing, the purpose and reasonable effects of the closing upon the employees in the other plants comprising the Milliken group. As yet there appears to have been no decision on these issues.

Although the Court, in accord with prior law (see text accompanying note 66 \textsuperscript{supra}), denied that its decision would justify management threatening to close its plant, it acknowledged that management could announce it reached a decision to close the plant should the employees vote for the union. It has been suggested that this gives management another legal weapon to employ in labor-management economic warfare. The employer can make a "definite decision" and announce it to the employees. If the employees take the threat seriously and vote against the union, the definiteness of the managerial decision can never be tested. If the employees gamble that management is bluffing and vote for the union, the employer will simply continue operations. Although the Board will probably find that his "decision" was a "threat" and thus an unfair labor practice, its cease and desist order will be painless. Management will be ordered not to threaten again, but certainly not to fulfill its "decision." See Summers, Labor Law In The Supreme Court, 75 \textit{Yale L.J.} 59, 65 (1965).
erations without fear of violating these sections of the act. Unfortunately, the Supreme Court did not even mention section 8(a)(5) in its opinion. The Board held that the employer violated section 8(a)(5) by refusing to negotiate concerning its decision, but this was unnoticed by the Supreme Court. It appears that Darlington, in spite of the "absolute right" concept, leaves three questions unanswered: (a) Does the "absolute right" exempt management from bargaining its decision, based upon union animus, to totally terminate its operations? (b) Must an employer bargain his decision to terminate his operations, either partially or totally, for purely economic reasons? (c) Assuming arguendo that management, whether motivated by union animus or not, has an absolute right to terminate its business operations partially or completely, is management free from its obligation to bargain concerning the effects of its decision?

Subsequent decisions by the Board have announced that Darlington granted to management nothing more than an "absolute right" to terminate its entire business operation. Darlington has no application to a managerial decision to terminate partially the enterprise; instead, the Fibreboard doctrine is pertinent since bargaining such a decision may possibly mitigate its adverse effects upon the employees. In Royal Plating & Polishing Co., the Board stated that nothing in the Darlington decision

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81. It is submitted, however, that the Board's holding may be relegated to a position of negligible importance owing to the fact that the Board did not rely upon the principles of Town & Country. The employer was found guilty of an 8(a)(3) violation, and, as usual, when the managerial acts are so complete as to discourage and ultimately thwart the union from pursuing its right to bargain, the Board will find the employer guilty not only of the appropriate 8(a)(1) through (3) violation, but also guilty of violating section 8(a)(5) — failure to bargain collectively in good faith. See notes 5, 22 supra.

82. It has already been determined that a unilateral anti-union managerial decision to terminate partially unit work constitutes a violation of either 8(a)(1), (2), or (3) (see notes 65-69 supra); furthermore, existence of the union animus is sufficient grounds for the Board to determine there was an 8(a)(5) violation (see notes 5, 22 supra).

As concerns a unilateral anti-union managerial decision to terminate totally the operations, Darlington stated there could be no 8(a)(1), (2), or (3) violation. Thus the query: does it constitute a violation of section 8(a)(5)?

83. It should be remembered that the Board and reviewing courts have continually acknowledged a dichotomy as concerns the collective bargaining obligation: (1) the actual decision, and (2) the effects of that decision. It appears that management has a greater obligation to negotiate concerning the effects of the decision than it has to negotiate concerning the actual decision. See note 21 supra and note 91 infra.

84. 352 N.L.R.B. No. 76, 59 L.R.R.M. 1141 (1965), reconsidering, 148 N.L.R.B. 545, 57 L.R.R.M. 1006 (1964). The facts of this case are stated in note 51 supra. In its initial decision the Board stated that the Fibreboard doctrine required the employer to bargain collectively before deciding to close his operations.
forbade requiring management to bargain its decision to terminate partially its business operations, whether the decision was prompted by economic considerations or union animus. The Board reasoned that since a decision to terminate partially was subject to the scrutiny of section 8(a)(3), it could also be held subject to the scrutiny of section 8(a)(5). The “absolute right” is applicable only where management decides to terminate completely. The Board expressly refused to state whether management must collectively bargain a decision to terminate its enterprise totally, but implied that such a decision may be perfected unilaterally. Management decisions to totally terminate the operations do not fall within the scrutiny of section 8(a)(3) and therefore should not fall within the scrutiny of section 8(a)(5). In Carmichael Floor Covering Co. the Board again disallowed application of the Darlington “absolute right” concept, but for a different reason. It also reiterated and reinforced its extension of the Fibreboard doctrine to this area of managerial decisions. The employer alleged that his action was legal in light of Darlington since he had abandoned only one phase of his business operations and there was no evidence of any anti-union considerations. The Board firmly stated that this reliance upon Darlington was misplaced. Darlington concerned the issue of discriminatory motivation and its application, if any, to a partial or total closing of a plant. The issue in the Carmichael case, however, related solely to the employer’s statutory duty to bargain; the alleged violation concerned the consequences of failure to fulfill such duty regardless of the existence of any discrimina-
tory motivation. Thus, the controlling principles are to be found in the *Fibreboard* doctrine.

Similarly, courts of appeals from two circuits have agreed that the *Darlington* decision was concerned solely with the issue of discriminatory motivation and its application, if any, to a partial or total closing of the business enterprise.\(^{87}\) Thus, the mere absence of anti-union motivation surrounding a managerial decision has been sufficient to remove the case from the *Darlington* "absolute right." Once it is determined that the case is dis-

\(^{87}\) NLRB v. Adams Dairy, 350 F.2d 108 (8th Cir. 1965), *on remand from Supreme Court*, 379 U.S. 644, *vacating*, 322 F.2d 553 (1963). This case has been partially discussed under *Management Subcontracting Decisions* (see text accompanying notes 46-48 *supra*). The initial Board decision was rendered prior to the Supreme Court decision in *Fibreboard*; when the case reached the Eighth Circuit for the final hearing, the appellate court thought it advisable to discuss not only *Fibreboard*, but also *Darlington*, which had been rendered in the interval by the Supreme Court. The appellate court distinguished the partial closing of employer Adams from that of the employer in *Darlington*, asserting that the Supreme Court in *Darlington* required that the employer's decision be motivated by a desire to chill unionism in any of his remaining plants and that the employer must have reasonably foreseen that the closing would have such effect. In *Adams Dairy* there was no desire to chill unionism, therefore *Darlington* does not apply.

NLRB v. Burns Int'l Detective Agency, 346 F.2d 897 (8th Cir. 1965) (discussed in text accompanying notes 49, 50 *supra*). The Board rendered its decision in this case subsequent to the Supreme Court's decision in *Fibreboard* but prior to the Supreme Court's decision in *Darlington*; thus there was no language in the Board decision concerning the *Darlington* "absolute right" concept. On appeal, however, the Court of Appeals again delved into both areas. It overruled the Board as to the latter's interpretation of *Fibreboard* (see notes 49, 50 *supra*). As to the application of *Darlington*, the appellate court noted the Trial Examiner had determined that the employer's business operations in Omaha were entirely terminated and that such decision was motivated solely by economic considerations. The court stated that although the Trial Examiner's findings were made in connection with an alleged 8(a)(3) violation, they would be equally applicable to an alleged 8(a)(5) violation. This finding of a lack of anti-union motivation in closing the Omaha division precluded a finding of an 8(a)(5) unfair labor practice under the auspices of the *Darlington* decision. The employer's failure to bargain concerning the *effects* of the decision was not properly presented in the complaint.

NLRB v. Royal Plating and Polishing Co., 350 F.2d 191 (3d Cir. 1965) (see text accompanying notes 51, 52 *supra*). The appellate court discarded the *Darlington* theory summarily, reasoning that since there was no union animus, *Darlington* does not apply. In a footnote, the appellate court stated that had there been discriminatory motives in the partial closing, management's actions would have been prohibited and it would have committed an 8(a)(5) unfair labor practice for not bargaining its decision with the union. Interestingly enough, management subsequently decided to close its other plant, thereby completely terminating its business operations. This unilateral decision by management was not contested by the union, perhaps because the union felt that management's "absolute right" to terminate its business totally includes the right to do so without bargaining its decision. Once it was determined that *Darlington* had no application, the court proceeded to distinguish the case on its facts from *Fibreboard*, thereby rendering the *Fibreboard* doctrine inapplicable as concerns the employer's actual decision; the employer was still required to bargain concerning the *effects* of his decision,
tistinguishable from Darlington, the courts of appeals, have applied the Fibreboard doctrine to determine whether the employer violated his 8(a)(5) bargaining obligation.

On the basis of these decisions by the Board and the courts, it appears that management has the benefit of the "absolute right" concept only when motivated by anti-union considerations it decides to totally terminate its operations; the "absolute right" concept has been deemed inapplicable to managerial decisions to partially terminate the operations and as concerns managerial decisions not tainted by union animus. In ascertaining whether the closing was partial rather than total, the applicable test is undoubtedly that announced in Darlington: Does the party exercising control over the plant which is being closed for anti-union purposes stand to reap a benefit from the discouragement of unionism in either the business, if it should be reopened or continued elsewhere, or in any other business in which he has an interest?

It is yet uncertain what benefits to management are encompassed within the "absolute right" concept. It definitely grants management the right to unilaterally terminate the business — whether the decision is motivated by economic considerations, capriciousness, or radical union animus — without fear of violating sections 8(a)(1) through (3) of the act. And although no decision has yet met the issue whether the "absolute right" releases management from its statutory collective bargaining obligation, it is submitted that the concept is sufficiently broad to encompass unilateral managerial decisions. There have been indications however, that notwithstanding management's "absolute right" to terminate the operations totally, management must negotiate with the union, upon request, concerning the effects of such a decision. Thus it appears that Darlington's "absolute

88. See note 84 supra.
89. See note 87 supra.
90. It is logical to state, as did the Board in NLRB v. Royal Plating and Polishing Co. (see text accompanying note 85 supra), that since anti-union managerial decisions to terminate the operations totally do not fall within the scope of sections 8(a)(1) through (3), they should not fall within the scope of section 8(a)(5) — at least to the extent that management is not required to negotiate concerning its actual decision.
91. It is well settled that whenever management is obligated to bargain collectively concerning its decision on a certain matter, this bargaining must include negotiation of the effects this decision will have upon its employees within the respective bargaining unit. It now appears the Board and the reviewing courts will require management to negotiate with the union concerning the effects of its decisions upon the employees even though the Act may not require negotia-
right" concept will not completely negate the application of the Fibreboard doctrine—that collective bargaining may possibly mitigate the adverse effects of a managerial decision upon the employees—to a management decision to totally terminate the enterprise.

Managerial decisions to terminate the operations partially and purely economic or capricious managerial decisions to terminate the enterprise totally appear to be excluded from the benefits of the "absolute right" concept. As concerns the former, it has been seen that a decision to terminate partially which is based upon union animus constitutes a violation of the act. Furthermore, a purely economic decision to terminate partially is subject to the Fibreboard doctrine and failure to bargain collectively concerning the decision constitutes violation of section 8(a)(5). It should be noted that extension of the Fibreboard doctrine into this area of managerial decisions has not been without exceptions. In New York Mirror, the Board


92. See text accompanying notes 65-69 supra.


94. 151 N.L.R.B. No. 110, 58 L.R.R.M. 1463 (1965). Although the Board acknowledged that the statutory right of a union to bargain concerning changes in terms and conditions of employment may be waived, it stated that such a waiver is not to be lightly inferred, rather it must be clear and unmistakable. In the instant case, the mere existence of severance and termination pay provisions in juxtaposition with the zipper clause in the collective bargaining agreement was insufficient to indicate a waiver.

The Board acknowledged that in determining the parties' contractual intent, one is not restricted to the contract provisions themselves, but may properly evaluate them against the elucidating background of their bargaining history (citing Kennecott Copper, see notes 55, 56 supra). Thus, for example, if it were to appear that in full exploration of the subject during prior negotiations the union had consciously yielded their interest to be notified about the permanent suspension of the Mirror's operations in return for the severance and termination provisions, a finding of a clear and unmistakable waiver might well be justified (citing Shell Oil Company, see note 57 supra).

The Board nevertheless found that management had not violated the Act by unilaterally deciding to sell and close down this printing operation. The Board was mindful of the Supreme Court's oft-quoted statement in NLRB v. Katz, 369 U.S. 736 (1962), to the effect that—even though unilateral action by an employer without prior discussion with the union is contrary to congressional policy, this does not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying such unilateral action. The Board was satisfied that circumstances existed here. The employer was motivated solely by pressing economic necessity; there was no evidence of any union animus; sale and cessation of business have permanently abolished all unit work and union is here not seeking reinstatement of the employees; the
recognized that the statutory right of a union to bargain concerning changes in terms and conditions of employment and, more specifically, a managerial decision partially to terminate its business enterprise, may be waived. In *Young Motor Truck Service*, the employer, motivated solely by economic considerations and without union animus, unilaterally sold his oil-trucking operation and relocated his minor sand-trucking operation pending efforts to sell it. The Board held that the employer did not violate the act by failing to negotiate such decisions because the union apparently acquiesced in the closing and waived its rights to negotiate on the decision itself. However, it was held that the employer must bargain with the union, upon request, concerning the effects of the decision upon the employees. It is submitted that the Board, in the process of extending the *Fibreboard* doctrine to include managerial decisions concerning partial termination of operations, will recognize each exception to the doctrine that it has previously recognized in the area of subcontracting. Some exceptions, however, were enunciated by appellate courts and have not yet been endorsed by the Board or the Supreme Court. The judicious employer should refrain from perfecting a unilateral decision to terminate his business partially unless the facts of the case fall precisely within one of the exceptions recognized by the Board or there is an opportunity for review of the employer's actions in a Circuit which recognizes relevant exceptions. Even if the facts of the case

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union and the employer have had a long and effective bargaining relationship which has resulted in contractual settlement of the employees' severance pay and termination rights in the event of abolition of unit jobs, and the employer met and bargained with the union concerning the effects of the shutdown.

95. 156 N.L.R.B. No. 56, 61 L.R.R.M. 1099 (1966). The employer owned two trucking operations. He was insolvent and unless the Interstate Commerce Commission approved his application to sell, immediate bankruptcy would result. The employer had no anti-union motivations. He notified his employees that his entire business was for sale; however, the union did not request bargaining concerning the proposed discontinuance. With ICC approval the employer then sold the oil-truck operation and unilaterally relocated his minor sand-truck operation pending efforts to sell it also.

See also Cumberland Shoe Corp., 156 N.L.R.B. No. 103, 61 L.R.R.M. 1194 (1966), in which the employer found it economically necessary to terminate one of his two plants. The Board held there was no violation by closing the plant and discharging the employees because there was no union animus and the employer gave the union adequate notice and opportunity to discuss relevant matters pertaining to the shutdown.

96. The Board has recognized exceptions a through d. See text accompanying notes 55-58 supra.

97. Exceptions f through g. See text accompanying notes 59-61 supra.

98. The Board has at its disposal several rather harsh remedies should the employer fail to fulfill his collective bargaining obligations (see note 63 supra). Fortunately, in this area of *Management Decisions Concerning Partial or Total
fit within a recognized exception, thereby allowing management to perfect such a unilateral decision, management is apparently obligated to negotiate the effects of the decision.99

A managerial decision to completely terminate the enterprise, based purely upon economic or capricious considerations, is excluded from the benefits of the "absolute right" doctrine. Furthermore, it appears that the Board intends to subject such a decision to the Fibreboard doctrine.100 If the assumption that management need not bargain concerning an anti-union decision to terminate the operations totally is correct,101 then there exists the anomalous and inequitable situation that an employer may freely decide to terminate his entire enterprise in order to discourage organized labor, but may not decide to go out of business solely for economic reasons without first consulting the union, unless the case falls within an exception to the Fibreboard doctrine. It is submitted that management should have the unfettered right to terminate its operations completely regardless of its motives. In accord with this view, the anomaly may be dissolved by either extending the "absolute right" concept to include economic decisions to terminate totally, and thereby bar application of the Fibreboard doctrine, or by allowing continued

Termination of Business Operations the Board and the reviewing courts have evidenced a propensity to refrain from imposing the extremely harsh remedy of resumption of the operations. In NLRB v. American Manufacturing Co. of Texas, 351 F.2d 74, enforcing in part, mod. in part, 139 N.L.R.B. 815 (1962), the appellate court ordered reinstatement of the employees with back pay; however, it refused to order the employer to reacquire a fleet of trucks and all the related equipment necessary to operate a large transportation department. In Apex Linen Service, Inc., 151 N.L.R.B. No. 34, 58 L.R.R.M. 1398 (1965), the Board held that since the shutdown was economically motivated, the employer was not required to resume the operations or reinstate the employees.

99. See note 91 supra.

100. New York Mirror, discussed in text accompanying note 72, 73, 94 supra, definitely implies that the Fibreboard doctrine applies to a managerial decision to terminate the operations totally for purely economic reasons. New York Mirror was decided by the Board ten days before the Supreme Court enunciated the "absolute right" concept in Darlington. And upon initial observation it might be argued that the "absolute right" concept negates the employer's obligation imposed by Fibreboard. However, since the appellate courts have refused to extend the "absolute right" concept to include purely economically motivated decisions by management, perhaps the Board's implications in New York Mirror still have value. Young Motor Truck Service, 156 N.L.R.B. No. 56, 61 L.R.R.M. 1099 (1966) (see text accompanying note 95 supra), was decided subsequently to Darlington. The employer, in the process of completely terminating his business operations, perfected several unilateral decisions without prior negotiation with the employees. The Board held there was no unfair labor practice because the union had waived its right to bargain collectively, thus implying that management is obligated to negotiate concerning its economic decisions to terminate completely its operations.

101. See text accompanying note 90 supra.
application of the *Fibreboard* doctrine in theory, but adopting
the exception announced by the Court of Appeals for the Third
Circuit that the *Fibreboard* doctrine does not require manage-
ment to bargain concerning a decision which lies at the core
of entrepreneurial control. 102 Regardless of whether manage-
ment must bargain concerning its *decision* to terminate its op-
erations completely, the *Fibreboard* doctrine presumably requires
negotiation of the *effects* of such decision. 103

**MANAGEMENT DECISIONS CONCERNING AUTOMATION AND
RELOCATION OF WORK**

The principles underlying the *Town & Country* and *Fibre-
board* decisions, developed and applied in the areas of subcon-
tracting and termination, seem to be equally applicable to other
types of managerial decisions that affect terms and other con-
ditions of employment. Indeed, shortly after its decision in *Town
& Country*, the Board, in *Renton News Record*, 104 held that the
employer violated section 8(a)(5) by refusing to bargain with
the union concerning his decision to induce automation and the
effects of such change upon his employees. The doctrine sug-
gested in *Town & Country* and later firmly established in *Fibre-
board* was also applied in the *Renton* decision: "the adverse ef-
facts of changes brought about due to improved, and even rad-
cally changed, methods and equipment, could at least be partially
dissipated by timely advance planning by the employer and the
bargaining representative of its employees." 105 As it was stated
in *Fibreboard*: "[A]lthough it is not possible to say whether a
satisfactory solution could be reached, national labor policy is

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102. This language from *Royal Plating & Polishing Company* has been incor-
porated into exception f, see text accompanying note 60 supra.
103. See note 91 supra.
146 N.L.R.B. 457 (1964), aff'd, 343 F.2d 521 (7th Cir. 1965), the appellate
court affirmed the Board's decision that the employer committed an 8(a)(5)
violation in unilaterally changing his bundle delivery system without first af-
fording the representative of his employees an opportunity to bargain collectively
concerning his decision. It is submitted, however, that the importance of this
decision is mitigated because the employer was also found guilty of an 8(a)(3)
violation. It must be remembered that whenever the employer is driven by anti-
union motivations, the Board and the reviewing courts have no difficulty in
finding that he has failed to fulfill 8(a)(5)'s requirement: bargain collectively in
good faith. However, the existence of union animus precludes the Board or re-
viewing court from ever reaching the question whether or not the case falls
within *Fibreboard* and its progeny. See notes 5, 22 supra. Had there been no
union animus in *Northwestern* perhaps the court would have found there was no
8(a)(5) violation because the decision lay at the core of entrepreneurial control.
105. Id. at 1297.
founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective bargaining.\textsuperscript{106}

A managerial decision to relocate business operations necessarily implies a decision to terminate business operations partially or totally at the original situs. A decision to terminate operations without relocating the work elsewhere should be distinguished from a managerial decision to relocate work at a different situs; the former has already been discussed.\textsuperscript{107}

As late as 1961, in \textit{NLRB v. Rapid Bindery, Inc.,}\textsuperscript{108} the Board and the reviewing courts held that an employer, motivated by economic considerations alone, did not have to bargain collectively concerning his unilateral decision to relocate business operations because it was an activity clearly within the realm of managerial discretion and not within the purview of "wages, hours, and other terms and conditions of employment." It was asserted, however, that once the decision was perfected, the employer must give notice to the union so the negotiators could consider the treatment due those employees whose employment was affected. On the other hand, remedial action was forthcoming whenever the Board determined that the decision to relocate the business operations was actually a "runaway shop," a situation where the employer, owing to anti-union motivations, transfers his work to another plant or opens a new plant in another locality to replace his closed plant.\textsuperscript{109}

As might have been expected, the Board, guided by the \textit{Fibreboard} doctrine, has recently expanded management's collective bargaining obligation to include purely economic decisions con-

\textsuperscript{107} See \textit{Management Decisions Concerning Partial or Total Termination of Business Operations}, p. 648 supra.
\textsuperscript{108} 293 F.2d 170 (2d Cir. 1961), enforcing, 127 N.L.R.B. 212 (1960).
\textsuperscript{109} See, e.g., NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962); Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961), enf. sub. nom., Garment Workers v. NLRB, 305 F.2d 825 (3d Cir. 1962); Industrial Fabricating, Inc., 119 N.L.R.B. 162 (1957), enf. sub. nom., NLRB v. Mackneish, 272 F.2d 184 (6th Cir. 1959); Mount Hope Finishing Co., 106 N.L.R.B. 480 (1953), enf. den., 211 F.2d 305 (4th Cir. 1954); NLRB v. Wallick, 198 F.2d 477 (3d Cir. 1952); Gerity Whitaker Co., 33 N.L.R.B. 393 (1941), enf. per curiam, 137 F.2d 198 (6th Cir. 1942); Martel Mills Corp. v. NLRB, 114 F.2d 624 (4th Cir. 1940), denying enforcement, 20 N.L.R.B. 712 (1940); NLRB v. Union Pacific Stages, Inc., 99 F.2d 153 (9th Cir. 1938); Teleom, Inc., 153 N.L.R.B. No. 84 (1965); Allied Chem. Corp. and Oil Chemical and Atomic Workers, 153 NLRB No. 71 (1965); Chemrock Corp., 151 N.L.R.B. No. 111 (1965); Rome Products Co., 77 N.L.R.B. 1217 (1948).
cerning the relocation of its business operations. *Standard Handkerchief Co.* held that the employer violated section 8(a)(5) by proceeding unilaterally and failing to disclose to the union a contemplated plant transfer. The Board further asserted that the employer also erred in failing to negotiate the effects such decision would have upon his employees.

Manifestly, the Board has extended the general *Fibreboard* doctrine to include managerial decisions concerning both automation and relocation of work. Again it appears that this extension will not be without exceptions. In *International Shoe Co.*, the employer was deemed not to have violated section 8(a)(5) of the act even though he not only denied the truth of rumors concerning the proposed transfer of the plant facilities, but also refused to bargain such decision once the truth became known. The Board, using reasoning akin to that in *Shell Oil Co.*, held that, owing to union acquiescence in prior management decisions concerning business changes and to the language of the collective bargaining agreement, the union had granted management the right to act unilaterally in this area. Thus it appears the Board is pursuing a procedure similar to that followed in the area of subcontracting: imposition of certain limitations upon management's general bargaining obligation in order to prevent the collective bargaining obligation from completely destroying management's entrepreneurial control. Presumably this will result in the Board eventually embracing all of the exceptions recognized by it under the *Fibreboard* doctrine as applied to the area of subcontracting. As pointed out above, however, the Board at present has acknowledged only certain exceptions; others have been announced by appellate courts.

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111. 151 N.L.R.B. No. 78 (1965).
112. See note 57 supra.
113. The various changes made by the company in its operations prior to 1962 were with the apparent acquiescence of the union and are indicative of the fact that at least until that time the union regarded such changes as a matter of management prerogative.
114. Until 1962 the collective bargaining agreement contained a management rights clause which had been interpreted by an arbitrator as granting management the right to relocate its work at its discretion. During the 1963 contract negotiations the union insisted upon proposals restricting the employer's right to relocate the work load. However, ultimately the union withdrew its proposals and agreed to the employer's proposals, thus abandoning, apparently in exchange for other terms granted by the employer, its efforts to obtain restrictions on the employer's right to make unilateral changes in the operations.
115. See text accompanying notes 55-58, 63, 96 supra.
116. See text accompanying notes 59-61, 97 supra.
Until the Board or the reviewing courts announce more explicit guidelines in this matter, management is in a precarious position\(^\text{117}\) in perfecting a unilateral decision concerning either automation or relocation of work when the facts of the case do not fall within the acknowledged exceptions. And even though management may not be obligated to bargain collectively concerning the actual decision to automate or relocate, it will be obliged to negotiate concerning the effects of such decision.\(^\text{118}\)

**CONCLUSION\(^\text{119}\)**

The controversy concerning what subjects should be included within the framework of collective bargaining brings into focus the conflicting rights of management to retain unfettered control of its business and the rights of its employees to organize and bargain collectively on issues affecting their livelihood and welfare. The line between mandatory and voluntary subjects of collective bargaining defines matters which management must discuss and therefore describes the reach of union influence through economic pressure. It determines the business decisions that shall be subjected to mutual control and thus resolved by economic contest between management and labor. Since the unions, under pressure of political, economic, and sociological advances, continually strive to bring new subjects within the purview of mandatory collective bargaining, and management, by instinct, vigorously resists erosion of its unilateral control of the enterprise, it is easy to understand why the scope of managerial pre-

\(^{117}\) If the employer unilaterally decides to relocate his operations and is later deemed to have violated section 8(a)(5) of the act, the Board has the power to order the employer to bargain with the union concerning whether the work should be relocated and under what conditions; create preferential hiring lists containing, in order of seniority, names of employees fired when the unilateral decision was perfected; offer unconditional reinstatement to employees named in the hiring list in the new operations; reinstate all employees who notify employer of desire for reinstatement; reimburse each reinstated employee for necessary travel expenses; pay back wages. See Standard Handkerchief Co., 151 N.L.R.B. No. 2, 58 L.R.R.M. 1339 (1965).

Application of the remedies suggested by *Fibreboard* and its progeny to a managerial decision to automate which is in violation of Section 8(a)(5) would perhaps result in a Board order to resume the operations in its original form and reinstate the former employees with back wages. See note 91 supra. See also *NLRB v. Rapid Bindery, Inc.*, discussed in text accompanying note 108 supra; *Standard Handkerchief Co.*, discussed in text accompanying note 10 supra; Renton News Record, discussed in text accompanying note 104 supra.

\(^{118}\) See note 91 supra. See also *NLRB v. Rapid Bindery, Inc.*, discussed in text accompanying note 108 supra; *Standard Handkerchief Co.*, discussed in text accompanying note 10 supra; Renton News Record, discussed in text accompanying note 104 supra.

\(^{119}\) Due to the nature of the law in this area, it should be noted that research ceased March 1, 1966.
rogatives has emerged as one of the bitterest issues in labor relations.

Solution of this problem is not easy. It turns upon basic policy considerations. In fact, it is but a step removed from the initial determination whether there should be collective bargaining at all. Unfortunately, once it created the National Labor Relations Act and thereby established collective bargaining as the national policy for the settlement of labor-management disputes, Congress chose to remain silent as to which subjects fall within the mandatory bargaining category. Thus the Board and the reviewing courts have found themselves in the unenviable position of being responsible for evolving the labor law, and through it, the subordinate national labor policy in this area.

In attempting to ascertain which subjects fall within the ambit of “wages, hours, and other terms and conditions of employment,” the Supreme Court in *Fibreboard* elected to reinforce the policy that industrial conflict may be reduced by subjecting labor-management controversies to the mediatory influence of collective bargaining. Thus it theorized that the adverse effects on employees of the managerial decision to replace employees in the bargaining unit with those of an independent contractor to perform the same work under similar conditions of employment could possibly be mitigated by the collective bargaining process. However, the Court realized that unrestricted extension and application of this policy would produce a situation where labor is effectively installed as a co-partner in the management of the business. This realization was evidenced by a desire to exclude from the mandatory bargaining obligation those managerial decisions which lie at the core of entrepreneurial control. Unfortunately, the Supreme Court enunciated no specific guidelines which would objectively determine whether a subject fell within the mandatory bargaining category. It simply asserted that it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining; industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. Thus the Supreme Court left it to the Board and the reviewing courts to create workable standards. This procedure was pre-
sumably meant to result in viable rules which would function in accord with a changing industrial society.

The National Labor Relations Board has since zealously followed the basic policy consideration of *Fibreboard*: that industrial strife may possibly be mitigated through application of the collective bargaining process. The Board quickly extended the bargaining obligation to include several classes of managerial decisions originally thought to be employer prerogatives—decisions concerning relocation, automation, and termination. In fact, the Board has consistently applied the collective bargaining obligation to any managerial decision affecting employees unless the employees have acted in such a manner as to indicate relinquishment of their right to bargain collectively. The Board has undoubtedly been influenced, consciously or unconsciously, by an awareness of severe economic hardship upon labor resulting from automation, plant relocation, and other recent technological advances. It apparently feels that if the parties will collectively bargain any managerial decision affecting the employees, a satisfactory solution may be discovered. Commendable as this may be, the Board, in attempting to ameliorate all labor-management problems through forced bargaining, is introducing new rigidity into a delicate economic situation. In order to compete in highly dynamic industrial society, management should not be unreasonably hindered by the collective bargaining process. Negotiation of complex business decisions creates a substantial time lag between stimulus and managerial action, thereby imposing severe handicaps upon industrial efficiency and growth.

It is submitted that rather than enforce the collective bargaining obligation upon all managerial decisions affecting employees apart from situations in which the employees have relinquished their right to bargain, the Board and the reviewing courts should adopt a more limited approach to the *Fibreboard* doctrine—preferably an approach like that taken by the Courts of Appeals for the Third and Eighth Circuits. The collective bargaining obligation should include only those managerial decisions which affect the employees and do not significantly involve the employer's right to manage his business or lie at the core of entrepreneurial control.

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