Restrictions on Management Rights - Union Negotiation Waiver

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many cases lead to unnecessarily large verdicts, working an unjustifiable hardship on the defendant.

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RESTRICTIONS ON MANAGEMENT RIGHTS—UNION NEGOTIATION WAIVER

The National Labor Relations Act grants employees the right of self-organization and provides an elaborate machinery for safeguarding that right by guaranteeing "laboratory" conditions for the election of a collective-bargaining representative. If, after an unhampered decision, a majority of employees in the appropriate unit designate a representative, the employer is required to bargain with that representative concerning wages, hours, and other terms and conditions of employment until a contract is concluded and reduced to writing, if one of the parties should request it, or until an impasse is reached. The Act imposes upon employer and union alike the duty to bargain in

1. National Labor Relations Act (Wagner Act), 29 U.S.C. § 157 (1964): "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all of such activities . . . ."

The collective bargaining system as encouraged by Congress, administered by the Board, and enforced by the judiciary, of necessity subordinates the interest of individual employees to collective interests of all employees in the appropriate unit. Vaca v. Sipes, 386 U.S. 171 (1967). The constitutionality of the act was upheld in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

2. The Board in General Shoe Corp. 77 N.L.R.B. 124, 126-27 (1948) wrote: "An election can serve its true purpose only if surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative . . . . In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled."

3. National Labor Relations Act (Wagner Act), 29 U.S.C. § 159(a) (1964): "Sec. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such suit for the purposes of collective bargaining in respect to the rates of pay, wages, hours of employment, or other conditions of employment . . . ."

4. A refusal to sign is a refusal to bargain collectively and is an unfair labor practice: section 8(a) (5). H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).
good faith with the terms of agreement left to the parties. Board policy assures participants that the Board will determine whether there has been collective bargaining but will not decide the terms to be included in the contract. However, this original statement of non-intervention has been undermined by the NLRB and the courts. Decisions have described subject matter of collective agreements as bargainable or non-bargainable, and if

5. The duty to bargain collectively: "Sec. 8(a). It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." National Labor Relations Act (Wagner Act), 29 U.S.C. § 158(a) (1964). See Section 8(b) (3) for union duty to bargain collectively. Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 158(b) (3) (1964).

The obligation to bargain in good faith: "Sec. 8(d). For the purposes of this section, to 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 . . . the execution of a written contract incorporating any agreement reached if requested by either party, but such obligations does not compel either party to agree to a proposal or require the making of concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . ." National Labor Relations Act (Wagner Act), 29 U.S.C. § 158(d) (1964). The purpose of section 8(a) in making an unfair labor practice the refusal of an employer to bargain collectively with employee representatives effectuates management's duty to recognize the union; management’s duty to bargain in good faith is a corollary of its duty to recognize. Similarly, one purpose of section 8(b) is to insure that unions will approach the bargaining table with the same attitude of willingness to reach an agreement that is required of management. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960). See also Westinghouse Electric Corp. v. NLRB, 387 F.2d 542 (4th Cir. 1967). Of significance infra is the Supreme Court's comparison of the NLRA's duty to bargain with that of the Railway Labor Act: "It [the Railway Act] was taken 'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees.' We think this construction also applies to § 9(a) of the National Labor Relations Act. “The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine,'” NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

discussion is not foreclosed, i.e. bargainable, as either compulsory or permissive.⁷

The area with which this Comment deals may be best illustrated by an example of a common industrial situation. An employer has given Christmas “gifts” to his employees for many years, but he notifies the workers that he is unable to do so this year. A union agent registers a complaint and requests the employer to bargain over his decision. Without consulting the union, the employer fails to include the bonus in his employees' year-end paychecks. Rather than follow the grievance procedure which may have been established in the contract, the union files a refusal-to-bargain charge with the Board. Under an "existing benefits" clause in the contract or as part of the actual working conditions of the employees the well-intentioned employer may find that his unilateral action violated the labor statute and will face a Board order requiring him to pay the benefits due. It is the purpose of this Comment to examine why the employer finds himself in this predicament, how he may escape it, and how he may prevent another such dilemma from occurring.

⁷ A subject is "bargainable" if employers and unions either may or must bargain collectively upon it at the request of the other party. "Non-bargainable" subjects are those about which collective bargaining is foreclosed either because they must be included, upon request, or because they may not be included in the contract. See, e.g., Montgomery Ward & Co., 37 N.L.R.B. 100 (1941), recognition is not a bargainable issue once the election results in the union's certification; it must be included. Carroll v. Local 802, AFM, 372 F.2d 155 (2d Cir. 1967), vacated on other grounds, 391 U.S. 99 (1968), price fixing generally is a subject toward which union activity may not be directed without violating antitrust laws. Bargainable topics may be compulsory, see, e.g., Caroline Farms, Div. of Textron, Inc. v. NLRB, 401 F.2d 205 (4th Cir. 1968) (union security is a mandatory subject); Allied Chemical Corp., 151 N.L.R.B. 718 (1965) (the Board has not required employers to bargain concerning all subcontracting decisions).

In determining whether or not a given matter should be deemed a mandatory subject of collective bargaining, the Board and the courts recognize a legal distinction between those subjects which have a material or significant impact upon wages, hours, or other conditions of employment, and those which are related only indirectly or incidentally to those subjects. Westinghouse Electric Corp. v. N.L.R.B., 387 F.2d 542 (4th Cir. 1967). The classification of subjects as terms or conditions of employment is a matter concerning which the Board has special expertise. NLRB v. Local 1082, IHC, 384 F.2d 55 (9th Cir. 1967), cert. den'd, 390 U.S. 920 (1968). As a result of this distinction each party has a right in labor negotiations to present, even repeatedly, demands concerning non-mandatory subjects of bargaining, so long as each does not posit the matter as an ultimatum. Section 8(a)(5) prohibits only a party's insistence to point of impasse upon non-mandatory proposals so that acceptance of the proposal becomes a condition precedent to accepting any collective bargaining agreement. Local 3-89, OCAW v. NLRB, 405 F.2d 1111 (D.C. Cir. 1968).
Management traditionally has felt that the labor contract secured to the union and employees a limited number of defined rights which were deviations from the "once-absolute prerogatives" of the employer. "The powers which management does not surrender by the contract, it [has been] asserted, management necessarily retains and may exercise unilaterally." This view, however, is tenuous in the face of numerous Board and court decisions restricting management's prerogatives and in the light of the fact that problems of mandatory bargaining subjects extend past contract negotiations and actual contract signing. The collective agreement has been likened to a constitution by which basic principles governing employer-employee conduct are stated and by which their conduct should be measured. This contract contains the overt agreements and probably much more. Within its umbrage fall questions arising during negotiations which were not included in the final draft and problems concerning the employment situation about which the parties were silent during negotiations. Just as unilateral action during negotiations prior to an impasse is rejected by the Act.


11. Sections 8(a)(5) and (d) have long been construed to require the employer to refrain from acting unilaterally during negotiations to change conditions of employment. NLRB v. Katz, 369 U.S. 736 (1962). See also Korn Indus., Inc. v. NLRB, 389 F.2d 117 (4th Cir. 1967), employer violates duty to bargain collectively when it institutes changes in subjects of mandatory-bargaining without first consulting the union. In this respect, unilateral changes are so disruptive to the collective bargaining relationship that they violate the Act without any evidence of subjective bad faith. NLRB v. Consolidated Rendering Co., 388 F.2d 699 (2d Cir. 1967). However, once the parties are in a position of deadlock, there is considerable
such action during the term of the agreement is suspect. In both situations unilateral action endangers Section 7 rights because it subverts the elected representative and is an unfair labor practice if it affects items listed in Section 9(a) when not otherwise excused. Yet, obviously the employer is interested in having great leeway to conduct his business, and if he must suffer limitations he would much prefer having them written and readily accessible. Nevertheless, he realizes that to cover specifically every aspect of the working relationship, the agreement would be voluminous and this soon would be inadequate as a result of changes made necessary to maintain a competitive posture.

The original Wagner Act was interpreted to require bargaining over items already agreed upon and incorporated into the contract. That pre-Taft-Hartley view is now no longer possible, since the duty to bargain is not required for any modification of terms “contained in the contract” for a stated period. In *Timken Roller Bearing Co. v. NLRB*, the Sixth Circuit explicitly held that “the duty to bargain . . . may be channeled and directed by contractual agreement” and reasoned that there is no duty to bargain outside of the framework established in the agreement. Two years later this decision favoring manage-

12. See note 3 supra. In *May Department Stores v. NLRB*, 326 U.S. 376 (1945), a case in which the employer refused to bargain in order to obtain judicial review of the appropriateness of the bargaining unit and unilaterally requested permission from the War Labor Board to raise the wages of all its employees. The Supreme Court in affirming the Board’s finding of interference and a refusal to bargain, expressed the general philosophy concerning unilateral action under these circumstances by stating: “Employer action to bring about changes . . . without consultation . . . cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities . . . . Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.” *Id.* at 384-385. *Accord, e.g.*, *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850 (1951), *enfd*, 205 F.2d 131 (1st Cir. 1952), *cert. denied*, 346 U.S. 877 (1953).

13. Management desires limitations in writing for two reasons: (a) it will only be confined to those limitations about which it has negotiated and to which it has applied its economic power; and (b) administration of business is simpler when it is limited by only explicit statements.


15. See note 5 supra.

16. 161 F.2d 949 (6th Cir. 1947).

17. *Id.* at 955.
ment was weakened by a Board decision, *Tidewater Associated Oil Co.* The unanimous Board held that the pertinent Section 8(d) language referred only to "terms and conditions which have been integrated and embodied in writing." This interpretation does not allow the employer, or union, to decline a request to discuss bargainable issues not embodied in the contract.

Once *Tidewater* was decided, one objection remained to the propriety of a union seeking NLRB assistance by filing an 8(a)(5) unfair labor practice charge. That argument was that the Board should withhold the exercise of its jurisdiction in the case of unilateral action because a resolution of the issues requires an interpretation of the contract. Thus, at most, the objectionable conduct is a breach of the collective bargaining agreement which might subject the employer to a suit under section 301 of the Labor Management Relations Act, and interpretation by the Board would interfere with the machinery established by the parties to settle their grievances through arbitration. Such a view was forcefully urged in *Square D. Co. v. NLRB*, in which the employer had signed a union contract which contained a grievance procedure ending with binding arbitration. A dispute arose over the unilateral institution of a group incentive plan and refusal to bargain over it. The company's position was that "since construction of the . . . contract

19. Only a slight change has varied this view—a defense (discussed in depth infra) by the employer when the union files an 8(a)(5) charge. The employer can counter the charge by urging that the union has waived its post-contract bargaining rights to a particular term of employment. As a result of this waiver the employer is entitled to make unilateral changes without notifying or consulting with the employees' representative.
20. Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 185(a) (1964) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties . . . ."
22. 332 F.2d 360 (9th Cir. 1964).
is involved and since the contract provides for arbitration of disputes respecting its construction, the meaning of the contract in regard to the waiver for which the Company contends should have been submitted to arbitration. The Board had dismissed the company's argument which would have preempted the Board's jurisdiction and had ordered the employer to bargain. In denying enforcement the Ninth Circuit wrote: "the existence of an unfair labor practice here is dependent upon the resolution of a preliminary dispute involving only the interpretation of the contract."

Despite this decision, Board policy did not change and this set the stage for three cases in 1967 which have determined subsequent Board and Court action in the jurisdictional conflict. In companion cases, NLRB v. C & C Plywood Corp. and NLRB v. Acme Industrial Co., the Supreme Court settled the question of the Board's power to interpret contracts where a contractual clause is urged as a defense to an unfair labor practice charge. The Court held that the Board had such authority. NLRB v. Huttig Sash & Door Co., decided by the Eighth Circuit, relied on the Supreme Court's decisions and supported the Board's holding that Huttig had violated section 8 (a) (5) of the Act. The company had contended that its wage reduction plan was authorized by the agreement. The union was not obligated to agree to any modification of the existing collective agreement and, having failed to reach an accord, the company was not then at liberty to modify unilaterally the terms and conditions of employment during the life of the contract without complying with the

23. Id. at 361.
24. Id. at 365-366.
27. 377 F.2d 964 (8th Cir. 1967).
28. C & S Indus., Inc., 158 N.L.R.B. 454, 457 (1966): "It is true, of course, that where during timely negotiations for a new agreement an employer has offered to bargain with a union concerning a proposed change in contract conditions and the union has refused to bargain, the employer does not violate his statutory obligation if following the effective period of the expiring contract he unilaterally institutes the change. The situation is different . . . where . . . an employer seeks to modify during the life of an existing contract terms and conditions of employment embodied in the contract . . . . In the latter situation, a bargain having already been struck for the contract period . . . neither party is required under the statute to bargain anew about the matters the contract has settled for its duration, and the employer is no longer free to modify the contract over the objection of the Union." Accord, John W. Bolton & Sons, Inc., 91 N.L.R.B. 989 (1950), involving a similar factual situation; Kinard Trucking Co., Inc., 152 N.L.R.B. 449 (1965).
provisions of section 8(d). The court held that the charge should not be dismissed simply because Huttig's conduct, which was outside "of the plain and unambiguous provisions of the contract," could have been challenged under the available grievance-arbitration procedures. Thus, effect was given to section 10(a) which states: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." Having frequently held that it was not precluded from resolving an unfair labor practice issue simply because as an incident of its inquiry it must construe the scope of a contract which an arbitrator is also authorized to construe, the Board since 1967 could do so with Supreme Court approval.

A most obvious type of limitation is that which the parties have bargained into the written agreement. Here an express provision clearly may prohibit unilateral action. Another express provision of the contract may state specifically that the status quo must be maintained. This "existing benefits" clause recognizes the impossibility of including every facet of the em-

29. 377 F.2d 964, 966 (8th Cir. 1967).
33. This type of clause is a contractual method of assuring continued enforcement of the actual working conditions whether or not they have been reduced to writing. Two examples taken from NLRB v. Nash-Finch Co., 211 F.2d 622, 624-25 (8th Cir. 1954) illustrate (a) a union-biased clause and (b) an employer-biased clause: (a) "The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this agreement." (Emphasis added.)
(b) "Maintenance of Standards. The Employer agrees that wages, hours of work, and general working conditions shall be maintained at not less than the highest minimum standards specified in this agreement and the conditions of the employment shall be improved wherever specific provisions for improvement are made elsewhere in this agreement." (Emphasis added.)
ployment condition in any single contract. The principle of "existing benefits" is that the employer is bound by both express articles of the contract and those which were not expressly included but which are actual terms of employment. An excellent illustration of this principle is found in Nash-Finch Co., where, prior to unionization, the employer was in the habit of giving its employees with whom it had individual contracts, year-end bonuses. The company explained to the employees that if they selected a union to represent them, that benefit would probably end. The union was certified despite this and other campaign maneuvers, and during negotiations it proposed an existing benefits clause. A compromise was worked out during negotiations that emasculated the union-proposed clause. The agreement as signed contained no provision requiring the employer to provide a Christmas bonus, and at year's end the company paid none. The Board held that the company had violated 8(a)(5) and that the union had not waived its right to bargain concerning bonuses just because it had signed the contract. On appeal, the Eighth Circuit denied enforcement on the grounds that the changes in the "maintenance of standards" clause indicated that the employees knew the company would no longer pay Christmas bonuses. The court wrote:

"Where the parties to a contract have deliberately and voluntarily put their engagement in writing in such terms as import a legal obligation without uncertainty as to the obligation or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing."35

This decision reflects a strict approach to interpreting labor contracts. The absence of any existing benefits clause, rather than just a weak one, did not seem persuasive to the Fifth Circuit in General Telephone Co. of Florida v. NLRB.36 The court held, in considering the employer's unilateral discontinuance of Christmas checks, that although the contract actually signed did not contain an existing benefits clause, this did not suggest that the union meant to relinquish any right to bargain about

34. 103 N.L.R.B. 1695 (1953).
35. 211 F.2d 622, 626 (8th Cir. 1954). The Court refers to Ford v. Luria Steel & Trading Corp., 192 F.2d 880, 884 (8th Cir. 1951), and cases cited therein.
36. 337 F.2d 452 (5th Cir. 1964).
bonuses nor could the employer reasonably deduce such an intent. Unlike the Nash-Finch case the court in General Telephone found that in the contract negotiations little or no reference was made to year-end checks and that "the Board properly found on the evidence before it that the Union was not estopped by its contract negotiations." 37

A significant recent Board decision, New Orleans Board of Trade, Ltd., 38 affirms the idea that existing benefits clauses or the lack of them must be construed in the context of what occurred over the bargaining table. Another Christmas-bonus dispute prompted the filing of this 8 (a) (5) charge. There the Board held that the unilateral change was a failure to bargain over the question of discontinuance, and it ordered payment. The decision was lengthened only because of the objections raised by the dissent. In answering the dissent, which was based upon the case of Westinghouse Electric Corp. (Mansfield Plant), 39 the majority noted that the mere absence from the collective bargaining agreement actually signed of an existing benefits clause did not prove that the union meant to forego the right to bargain on subsequent changes. No mention of bonuses was made in negotiations in New Orleans board of Trade, whereas subcontracting had been discussed in Westinghouse.

In the absence of an existing benefits clause the employer may still be bound by terms not embodied in the contract. These limitations are longstanding usages which may or may not have received attention during the bargaining 40 and about which there may or may not have been general agreement but which, for some reason, were not included in the contract. In NLRB v. Niles-Bement-Pond Co., 41 it was held that the Christmas bonuses, though not written into the contract, in view of their regularity over a substantial period of time (12 years), assumed the status of wages. In his dissent to the Board decision, Member Murdock questioned: "Does this [employee expectancy] mean that the first year the employer gives a Christmas bonus there is no

37. Id. at 454.
40. An important consideration of whether the employer will be bound by these long-standing practices is whether they were negotiated at the bargaining table. This discussion, however, will be reserved because it is best urged as a defense by the employer that the union has waived its rights and is now estopped from requesting collective bargaining.
41. 199 F.2d 713 (2d Cir. 1952).
expectancy. . . . Does the first bonus provide the necessary expectancy?" The simplest test in determining the establishment of an expectancy is whether regular payment over a number of years in unvarying amounts not predicated on the company's profit-loss sheet will tend to cause the year-end checks to be considered part of the employee's earnings.

An elementary principle of contract law is that the parties must agree on the terms of the agreement before it is legally binding. In some instances of unwritten long-standing usages in labor relations, silence on the part of the employer will effectively imply his assent. The case of Detroit & Toledo Shoreline R.R. Co. v. United Transportation Union, an opinion by Justice Black, involved the railroad's intention to establish "outlying work assignments" which would require many employees to report for work at Trenton rather than Lang Yard where they had been reporting—the expense of transportation and time to be borne by the employees. The union wanted to prevent the railroad from unilaterally changing this condition of employ-

42. 97 N.L.R.B. 165, 171 (1951).
43. Where the gift varied in amount with each employee and differed in amount from year to year, it was held not an integral part of wages and therefore terminable at management's choice. Renart Sportswear Corp., 6 Lab. Arb. 654 (1947). Accord, NLRB v. Wonder State Mfg. Co., 344 F.2d 210 (5th Cir. 1965), where there was no consistency or regularity in payment, there was no uniformity in or basis for amount, the bonuses were considered not tied to remuneration received by employees. But see NLRB v. Citizens Hotel Co., 325 F.2d 501 (5th Cir. 1964). A Christmas bonus given for several years, although in varying amounts, was integral part of wages and, as such, mandatory subject of bargaining with respect to discontinuance.
44. See, e.g., Beacon Journal Publishing Co. v. NLRB, 401 F.2d 368 (6th Cir. 1968); NLRB v. Zeich Co., 344 F.2d 1011 (5th Cir. 1965) (5 years was sufficient); General Tel. Co. of Florida v. NLRB, 337 F.2d 452 (5th Cir. 1964). See also Century Elec. Motors Co., 180 N.L.R.B. No. 174 (1970), in which the Board held that a successor employer who paid a Christmas bonus one year, his predecessor having paid it for nine years, could not discontinue unilaterally the Christmas bonus in subsequent years.
45. RESTATEMENT OF CONTRACTS § 3 (1932).
46. Note the discussion of this in Jones, The Name of the Game is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration, 46 Texas L. Rev. 865, 869-872 (1968). See Belden's Supermarket, Inc., 179 N.L.R.B. No. 142 (1969), in which the record revealed that for twelve years the employer paid all employees Christmas bonuses equivalent to one week's pay. There was no evidence to suggest that the payment of this Christmas bonus was at any time mentioned in a union contract or during any negotiation sessions.
47. 90 S.Ct. 294 (1969). The Court declared that it did not find compelling the fact that the National Mediation Board had restricted status quo to conditions covered in agreements. The Court stated that the NMB has no adjudicatory authority over major disputes, nor has it a mandate to construe the RLA generally.
ment not covered in their existing collective agreement. However, the railroad refused to maintain the status quo and, instead, proceeded with the new assignments. In supporting its action the railroad asserted that the goal of the status quo provisions of the Railway Labor Act is to assure only that existing collective agreements continue to control the parties' rights and duties during efforts to change those agreements. The railroad argued that the status quo provisions of the RLA\textsuperscript{40} forbid a carrier from changing rates of pay, rules, or working conditions as expressed in an agreement.\textsuperscript{50} Since the labor contract contained nothing to preclude the railroad from altering its reporting stations, it could do so unilaterally without abridging section 6\textsuperscript{51} status quo rights. The Court rejected this contention, stating that section 2 Seventh, which was added to the Act in 1934, does not impose any status quo duties attendant upon major dispute procedures. It simply refers to one category in which those guidelines must be followed. The purpose of section 2 Seventh is to give binding effect to labor-management contracts and to establish the requirement that these agreements be changed only by the statutory procedure. Following a detailed discussion of the RLA the court concluded:

"While the quoted language of Section 5, 6 and 10 is not identical in each case, we believe that the provisions . . . form an integrated, harmonious scheme for preserving the status quo . . . We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement. Thus, the mere fact that the collective agreement before us does not expressly prohibit outlying work assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions."\textsuperscript{52} (Emphasis added.)

\textsuperscript{49} Controlling here is 45 U.S.C. § 152(7) (1964), which provides "No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act."
\textsuperscript{50} 90 S.Ct. 294, 298 (1969).
\textsuperscript{52} 90 S.Ct. 294, 300 (1969).
Were this all that had been written, comparison of this situation with the example of the employer's refusal to give the expected Christmas bonus would present no difficulties. Longstanding practices not included in a contract do circumscribe the legal limits of employer action, as evidenced by the foregoing discussion. Since the employer's consent may be readily implied, the issue of negotiations never arises. Under section 8(a)(5) the employer would have to bargain with the union whose concurrence would be necessary under section 8(d), or the employer would have to follow the procedure outlined in section 8(d).

The dissenting and concurring opinion, authored by Mr. Justice Harlan and joined by Chief Justice Burger, agreed with the majority view that the status-quo provisions of the RLA were not restricted to conditions expressed in agreements. However, he stated that he favored a more subjective approach than that applied by the majority in determining that a section 6 "freeze" is appropriate. He described the method as one in which it is "necessary to consider not only the duration of the practice but all the dealings between the parties, as for example, whether the particular condition has been the subject of prior negotiations." This would seem to fit in the scheme already established by the decisions. Therefore, one may ask whether a dissent was proper. Where then does the majority break new ground? Harlan's dissent, urging a more subjective approach, emphasizes the general principle underlying Mr. Justice Black's opinion for the majority. Harlan would have remanded the case to the district court for a determination of whether or not the preponderance of evidence proved that the employer has agreed to the practice. The majority was not persuaded by this and held that a section 6 freeze applies when there is an affirmative answer to the test of whether the dispute grew out of what had "become in reality a part of the actual working conditions," or the express terms of the agreement. The "actual working conditions" language should advise employers that the Court will no longer feel compelled to examine management's past silence and will infer from it consent to the longstanding practice before enforcing Board orders to bargain. That the practice exists and is suffered to remain will probably be sufficient support for a section

8(a)(5) unfair labor practice charge despite grumblings by employers or assertions that it continues only at their pleasure.\textsuperscript{54} Such a result poses an even greater threat to management prerogatives than existing benefits clauses and longstanding usages incorporated into the contract. These practices, not part of the contract because not agreed on, run counter to the traditional employer approach stated above that “[t]he powers which management does not [actively] surrender . . . management necessarily retains. . . .”\textsuperscript{55} Further implications of this thesis will be discussed below with respect to employers' defenses and methods of avoiding the dilemma.

\textbf{Employer Defenses}

Certainly, the most obvious defense available to the employer in this area is that the practice which the union alleges

\textsuperscript{54} Of course, it is not certain that the rationale of the Shoreline case interpreting the RLA will be carried over to the NLRA, but there appears nothing substantial to prevent it. The Supreme Court has previously cited a RLA case for support in a NLRA case. \textit{E.g.}, Syres v. Oil Workers Int'l Union, 223 F.2d 739 (5th Cir. 1955), \textit{rev'd and remanded per curiam}, 330 U.S. 382 (1943), cited Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) as authority for reversing the lower court's finding of "no jurisdiction" in a racial discrimination case against the unions. \textit{See also} Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944), and J. I. Case Co. v. NLRB, 321 U.S. 332 (1944). There is greater emphasis on the status quo provisions of the RLA than there is in § 8(d) of the NLRA, yet this would not pose any great difficulty for the court analogizing the Shoreline case to similar, non-railroad cases.

Under both Acts collective bargaining requires an employer and the union to negotiate on all topics included within wages, hours, and other conditions of employment. Railway Labor Act, 45 U.S.C. § 152(1) (1958), and National Labor Relations Act, 29 U.S.C. § 158(d) (1964). Negotiating in good faith is also a requisite in collective bargaining. Although there is no express statutory RLA provision requiring good faith bargaining, the courts unfailingly have held that negotiations between railroads and their employees' representatives must be conducted in good faith. Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937). Since the NLRA collective bargaining provision was held to be derived from and comparable to the provision found in the RLA, the requirement of good faith has been expressly included. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34, 43-49 (1937). \textit{See} Weltronic Co. v. NLRB, 73 L.R.R.M. 2014 (1959). The company was engaged in the manufacture, sale and distribution of resistance welding controls with some of this work being performed at the company's Eight Mile Road plant between 1965 and 1967. In 1967 the company moved its plant central wiring and electronic assembly work out of the Eight Mile plant to its new Telegraph Road plant some three miles away. The move was accomplished without written notice to the union with the result that no employees were transferred or laid off. Article I, section 4, contained the management rights clause. The Court held that the company had violated section 8(a)(5) and (1) by transferring unit work from its Eight Mile plant to its Telegraph plant without first notifying the union.

\textsuperscript{55} Cox & Dunlop, \textit{The Duty to Bargain Collectively During the Term of an Existing Agreement}, 63 \textit{Harv. L. Rev.} 1097, 1117 (1950).
has been unilaterally changed is not long-established. This determination would preclude union charges, and the only limitation on the employer would be express contract provisions.

An employer might also urge as a second defense the effect of a management rights clause, if he had been able to have such a clause included in the contract. A purpose of such a clause is to allow the employer to carry out the general operation of his business and to make limited innovations without violating sections 8(a)(5) and 8(d) where such changes would fall within the scope of a mandatory collective bargaining subject. The Board has placed a requirement on this type of contractual reservation of the right to manage; the clause must be a “clear and unmistakable waiver.” In *Union Carbide Corp.* a NLRB decision, the employer is engaged in producing carbon and

56. An example of such may be found in *Allied Chem. Corp.*, 151 N.L.R.B. 718, 724 (1965): “It is recognized that all management functions whether heretofore or hereafter exercised, and regardless of frequency or infrequency of their exercise, shall remain vested exclusively in the company. It is expressly recognized that these functions include, but are not limited to, (1) full and exclusive control of the management and operation of the plant, (2) the direction and the supervision of the working forces, (3) the scheduling of production, (4) the right to determine the extent to which and the means and manner by which the plant and the various departments thereof shall be operated or shut down, (5) the right to introduce new or improved methods or facilities, (6) the reduction or increase of working forces or production, and (7) the right to hire, train, suspend, discipline . . . employees and establish schedule and assign jobs . . . .” Another example may be found in *Ador Corp.*, 150 N.L.R.B. 693, 695 (1968): “The management of the Company’s plant and the direction of its working forces, including the right to establish new jobs, abolish or change existing jobs, or increase or decrease the number of jobs, change materials, processes, products, equipment and operations shall be vested exclusively in the Company; . . . . Subject to the provisions of this agreement, the Company shall have the right to . . . lay off employees because of lack of work or other legitimate reasons.” A management rights clause in a collective agreement whereby an employer reserved exclusive rights to act unilaterally was not illegal, and the employer did not violate the Act’s good faith bargaining requirement by insisting, even to the point of impasse, on the inclusion of such a clause in the contract. See *NLRB v. American Nat’l Ins. Co.*, 343 U.S. 395 (1952); *NLRB v. Lewin-Mathes Co.*, 285 F.2d 329 (7th Cir. 1960).

57. E.g., *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874 (3d Cir. 1968). In the *Allied Chem. Corp.*, 151 N.L.R.B. 718 (1965) case—see note 56 supra for management rights clause—the employer subcontracted some bargaining-unit work without consulting the union. The Board dismissed the complaint on other grounds and agreed that, although certain of the clause provisions could be construed to allow unilateral decisions to sub-contract, the lack of any specific reference to the objectionable activity forestalled such an interpretation. There was simply no clear and unmistakable waiver. See also *Proctor Mfg. Co.*, 151 N.L.R.B. 1166 (1961), and *The Press Inc.*, 121 N.L.R.B. 976 (1958). Compare *Ador Corp.*, 150 N.L.R.B. 1658 (1965) (also noted in note 56 supra), and *International Shoe Co.*, 151 N.L.R.B. 693 (1965), for instances in which the “clear and unmistakable” waiver requirement was met by the management rights clause.

graphite anodes and electrodes at its West Virginia plant. Although the current contract, which runs three years to 1970, makes no mention of subcontracting, it does contain the following management rights clause: “The company’s right to manage its plant and affairs, to hire, discharge, promote, and direct the working forces is unqualified as long as this right is not used in violation of any provisions of this contract.”

It had been the past practice of the employer to subcontract unit work, and the issue had been raised in past contract negotiations. The last time the union requested bargaining on the matter was in 1962; no agreement was reached on a proposal to prohibit subcontracting, and the union dropped the matter. The Board adopted the findings of the trial examiner holding that not every unilateral subcontracting of unit work was violative of an employer’s obligation under section 8(a)(5) and that several of the factors present in the case taken cumulatively persuaded them that the employer did not violate the Act. Given weight were the facts that there was a management rights clause, the contract contained a grievance and arbitration procedure, and the union had been unsuccessful in prohibiting subcontracting through negotiations.

The difficulty which these management rights clauses have in meeting the standard of a clear and unequivocal waiver is seen in Weltronic Co. v. NLRB. The Sixth Circuit in interpreting a management clause similar to the one found in Union Carbide Corp. and similar employer conduct held that the company had the statutory duty to give the union opportunity to bargain about the unilateral action. It wrote:

“We also agree [with the Board] that the bargaining agreement cannot properly be construed as a relinquishment of those rights. While the Board is not empowered to adjudicate the rights of parties covered under a collective bargaining agreement, it does have the right to determine by reference to the agreement whether one of the parties has

59. Id.
60. 73 L.R.R.M. 2014 (1969). See also The Beacon Journal Publishing Co., 194 N.L.R.B. 734 (1967). The zipper clause read: “This contract is complete in itself and sets forth all the terms and conditions of the agreement between the parties hereto.” Id. at 736. The Board refused to “infer a union waiver of its bargaining right as to a particular subject not mentioned in the contract merely because of a broadly worded ‘zipper’ provision limiting the employees’ terms and conditions of employment to those set forth in the contract.” Id. at 738.
agreed to relinquish a statutory safeguard. . . . That is all the Board did here.\footnote{61}

In addition to the "management" clause is another common contractual provision—the "waiver" or "scope of agreement" provision\footnote{62} which constitutes a third defense. This clause specifically waives all rights of the parties to require collective bargaining over any matter whether or not contained in the union contract. It has been noted that the management rights and scope of agreement clauses are quite similar; both literally are a waiver of the duty to bargain. Their difference lies in the circumstances which evoke them.\footnote{63} Such provisions are often referred to in shorthand form as "sewing up" or "zipper" clauses.\footnote{64} Board acceptance of them is unlikely in light of the principle illustrated in Century Electric Motor Co.\footnote{65} In this case, the employer was engaged in the manufacture and sale of electric motors and maintained a plant in Ohio. The plant had been purchased by the employer from the Tait Manufacturing Company in 1967. The successor employer paid a Christmas bonus in that year, according to the formula Tait had used for the previous nine years, notwithstanding the contract which contained no mention of the bonus but did include a "zipper" clause.\footnote{66} A new collective agreement was signed in the next year. This contract made no reference to Christmas bonuses and contained in identical language the "zipper" clause of the pre-

\footnote{61. \textit{Id.} at 2016.}
\footnote{62. In many collective bargaining agreements, the waiver of the duty to bargain is explicitly and elaborately detailed, such as: "The parties acknowledge that during the negotiations which resulted in this agreement each had the unlimited right and opportunity to make demands and proposals with respect to a subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement . . . therefore, the Corporation and the Union for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this agreement." \textit{S. Torff, Collective Bargaining} 61-82 (1963).}
\footnote{63. Note, \textit{41 Ind. L. J.} 455, 456-458, especially n.9 (1966).}
\footnote{64. Waiver provisions usually take the short form of "zipper" or "sewing up" clauses. An example of such may be found in Borden Co., 110 N.L.R.B. 802, 805 (1954): "It is understood and agreed that all matters subject to collective bargaining have been covered in this Agreement and it may not be opened before 1954 for change in its terms . . . ."}
\footnote{65. 180 N.L.R.B. No. 174, 73 L.R.R.M. 1307 (1970).}
\footnote{66. 73 L.R.R.M at 1308.
vious contract. The subject of Christmas bonuses had not been mentioned during the negotiations for either the 1966 contract or the 1968 contract.

The employer, without prior notice of the change, unilaterally discontinued the bonus for 1968. After union protest and demand of bargaining on the subject, the employer met with the union and asserted that he had no obligation to pay the year-end bonus or even to discuss its discontinuance or suspension.

The Board members found that the employer had violated sections 8 (a) (5) and (1) by unilaterally discontinuing the 1968 Christmas bonus and by thereafter refusing to negotiate, since a waiver of right to bargain on a mandatory bargaining subject must be in clear and unmistakable language, and mere silence does not constitute effective waiver.

Nevertheless, it is still true that the parties may by express contract confer on the employer the power of unilateral decision if it comes within the “clear and unmistakable” requirement, in which case the procedures of Section 8(d) would have been satisfied. Such a contractual provision may even involve wages; and the employer’s right to act unilaterally with regard to them would be founded upon the collective agreement. 67

Waiver of the right to bargain may be implied by the conduct of the union during negotiations. In this instance the employer might urge that he has relied on statements by the union and that it would be to his detriment if it were now allowed to change. This waiver may arise in cases where there was discussion of the practice at the bargaining sessions or where absolutely nothing was said about it; but both must meet the “clear and unmistakable” requirement. 68

This standard was used by the Board in supporting its decision in Richland, Inc. 69 After an election, the union was certified and began negotiations on a contract. During one of the bargaining sessions, the union presented to the company a proposed agreement including a clause (Item 36) prohibiting layoffs of employees as the result of the introduction of new equipment without prior notice to and negotiations with the union.

At a later session the union representative withdrew Item 36 in order to get a first contract settlement. This withdrawal was preceded by a union inquiry directed to whether there were any plans of the employer to introduce new automation or remote control equipment. The reply was that no such changes were planned for the foreseeable future.

Despite this concession the negotiations fell through, and the employees struck. The company purchased remote control equipment and in three subsequent negotiation sessions no mention was made of its intent to install such equipment. Following reinstatement, five engineers were laid-off for the reason that the employer was “going remote control and automation.”

A complaint was filed and the employer contended that the union had waived its right to notice and to negotiation. The Board, adopting the findings of the trial examiner, held that the evidence supported a conclusion contrary to the company’s contention:

“A waiver is quite a different matter than the simple withdrawal of a proposal of a clause for negotiation. The Union at no time stated it was waiving its right to such a fundamental right as the right to bargain about the introduction of devices which could destroy the very employment of the members of the bargaining unit.”

The waiver claimed by the employer simply did not meet the standard, and the NLRB indicated that waivers are not to be lightly construed, but on the contrary require the most rigorous of proof. Given the Board distrust of waivers incorporated into the text of the contract, the standard is even more difficult to meet in the case of unwritten waivers.

Nevertheless, such a waiver was recognized by the Board in Murphy Diesel Co. as clear and unequivocal. There the employer had paid annually, by separate check, Christmas
bonuses from 1947 to 1967. The bonus and the amount were not related to individual employee merit or earnings,72 the sole criteria being whether the business earned a profit during the year. Since recognition of the union in 1941 the annual bonus had never been the subject of negotiations or mentioned by the contracts, and the payments were effected without negotiations, request of negotiations, or grievances. During late 1967, the parties began negotiations for a new contract. In December, the employer advised the union that the Christmas bonus would be given for 1967 though there would be none the next year unless there was a profit.

In January, bargaining began on a new contract, and in February the union's attorney examined the employer's books. His examination verified the fact that the employer lost money in 1967 and in January and February of 1968. Although the subject of the 1968 bonus had not been raised directly during the negotiations, a member of the union's team commented that the bonus would probably not be paid. The employer's official replied that "if financial conditions continued as they had been" it would be correct to say that "the bonus would not be paid."73

The unit employees did not receive a Christmas bonus in 1968. The Board, in holding that the employer had not violated section 8(a)(5), wrote:

"In the circumstances of this case, we are satisfied that the Union was aware of the Respondent's intention not to pay a bonus in 1968 if its operations did not return a profit during that year; that the Union had adequate opportunity to apprise itself of the status of profit or lack thereof; and that the Union was afforded every opportunity to bargain about

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72. "The question of whether a Christmas bonus, given over a period of years by an employer to its employees and not negotiated or covered by contract, is embraced within the terms 'wages, hours of employment, or other conditions of employment' under Section 9(a) and Section 8(a)(5) of the Act, is neither novel nor a matter of first impression insofar as the Board and the Courts are concerned . . . ." [I]t was recognized that the payment of a bonus was a subject as to which an employer was bound to bargain collectively upon request . . . . Nor is the basis of or method used in computing the bonus, the determining factor in the conclusion as to whether a Christmas bonus is a bargainable subject . . .

"When a matter, such as the instant unit bonus, is within the coverage of Section 9(a) of the Act, the legal consequence is two-fold, namely, the employer is obligated to bargain with the Union, upon request, about the bonus, and the employer is obligated, as a general proposition, to refrain from acting unilaterally on the bonus . . . ." 179 N.L.R.B. No. 27 at TXD-5, 6.

73. 72 L.R.R.M. 1309, 1311.
elimination of the 1968 bonus during the long negotiations for a contract which concluded in November 1968 . . .

Being persuaded by the past practice of the company's unilateral control that was exercised without any remonstrance or flicker of interest on the part of the union, the Board approved the unwritten waiver. Apparent acquiescence in the employer's unilateral action, lack of a proposal by the union during negotiations that an existing benefits clause be adopted, and opportunity granted the union to explore the bargaining subject and to request bargaining, provided "the most rigorous of proof" of effective waiver.

Conclusion

Despite the difficulty of proof, the employer is certainly not without arguments in defense of his unilateral action, if his economic strength were sufficient at the outset. However, a re-evaluation of these arguments is necessary in view of Shoreline which embraces the area in which either nothing was said during negotiations about the past practice or the practice was discussed but allowed to remain as it was. In neither instance, the court suggests, is it controlling that employer consent was not obtained nor would it seem to matter if the union impliedly waived the right to bargain. That the practice had occurred

74 179 N.L.R.B. No. 27 at D-1, n.1.
75. The validity of the waiver in Murphy was not based on an interpretation of any article in the collective agreement. It represents a union-negotiation waiver and reliance on past practices of the employer. Shell Oil Co., 149 N.L.R.B. 283 (1964), is an example of a case decided, in great part, on the issue of union-negotiation waiver but is distinguished from Murphy in that there was reliance on the interpretation of an available contract article. In Shell, during the course of negotiations, the parties had forty-seven bargaining sessions with the contracting out of work being one of the chief matters discussed. Throughout the discussions, the company consistently maintained that under article XIV ("work within the refinery which could be performed by employees covered by this agreement, the Company will . . . . [require] the contractor to pay not less than the rates of pay provided in this agreement for the same character of work." Id. at 284) it had the right to subcontract without notice to or consultation with the union. The only restriction recognized by the employer was the "prevailing wage" clause in the provision. Union efforts failed to secure either complete prohibition of art. XIV or greater restrictions on it. The new agreement retained art. XIV without material modification and contained no new restrictions on the employer's subcontracting practices.

In the Board's view art. XIV was not merely a limitation on subcontractors' wage rates with no bearing upon the Union's bargaining rights. In the Board's opinion, "its (Art. XIV) terms are reasonably to be construed as embodying an implicit, yet clear, understanding that, at least with respect to the Company's continuous practice of contracting out occasional main-
for a sufficient period of time with the knowledge and approval of the employees even though combined with a union waiver of the right to notice and consultation would still result in binding the employer to maintaining "actual working conditions."

Applying this Shoreline rationale to the clear and unequivocal union negotiation waiver discussed in Murphy, it should be concluded that the employer is unable to change unilaterally the terms of employment in any circumstances where the employees know of and have acquiesced in the practice for a sufficient period without specific collective-agreement permission. Thus negotiations and implied union waiver may be inconsequential and inutile to the employer as a defense. The employer who might have relied on the "clear and unmistakable" waiver should realize that express contractual terms will best negate a past practice.

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