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Investment Decisions and the Quid Pro Quo Myth

*Staughton Lynd**

Under the quid pro quo doctrine, workers relinquish the right to strike in exchange for management's promise to submit contract grievances to arbitration. While workers give up the right to strike over all grievances, management has to arbitrate only those covered by the contract. As a result, management retains the right to make investment decisions unilaterally, including those to close or relocate plants. Mr. Lynd examines the legal remedies available to contest these decisions and finds them ineffective. After tracing the historical development of the quid pro quo doctrine and exposing the asymmetry of that bargain, the author offers two proposals to remedy the inequity inherent in the bargain.

INTRODUCTION

RECENT PLANT CLOSINGS have shown clearly and poignantly the helplessness of workers faced with a management decision to relocate manufacturing facilities. The unilateral nature of these investment decisions has also emphasized the imbalance and inequity of the celebrated quid pro quo doctrine in which workers voluntarily relinquish the right to strike in exchange for management's promise to submit contract grievances to arbitration. Workers lose the right to strike over *all* problems, while management agrees to arbitrate problems covered by the contract but retains the right to make the investment decisions unilaterally.

This article examines the legal remedies currently available to contest these decisions and finds them ineffective. It then traces the historical development of the quid pro quo doctrine, demonstrates the asymmetry of that bargain, and concludes that the bargain as enforced today by the courts is both historically inaccurate and analytically unfair. Finally, the article proposes two methods to resolve the unfairness inherent in the bargain. One is to give workers a veto in investment decisions. The other is to recognize

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expressly that investment decisions are not part of the quid pro quo in the collective bargaining agreement so that, while management is free to shut down the plant, workers are free to strike in response.

I. LAW IN PURSUIT OF THE RUNAWAY PLANT

Between 1960 and 1975, national manufacturing employment rose by 8.3%. While manufacturing jobs increased by 43.3% in the Southeast and 67% in the Southwest, they declined by 9.9% in New England and 13.7% in the Mideast.¹ This massive relocation of industry has hit workers in the older cities particularly hard: Akron lost 24,000 manufacturing jobs in twenty-five years,² New York 647,000 within seven years,³ and Philadelphia nearly one-quarter of its manufacturing jobs in less than five years.⁴

The statistics represent the effects of management decisions concerning the reallocation of investment capital and the relocation of manufacturing plants. Management makes these decisions unilaterally; the work force bears the impact individually and collectively. Legal disputes over plant relocation, contracting out, automation, scheduling, and successorship demonstrate the human consequences of these decisions.⁵

The lawyer representing a union faced with a unilateral investment decision has a limited range of options.⁶ Assume a typical collective bargaining agreement.⁷ One clause recognizes the union as bargaining agent,⁸ another provides for grievance arbi-

1. J. RIFKIN & R. BARBER, *THE NORTH WILL RISE AGAIN: PENSIONS, POLITICS AND POWER IN THE 1980's*, at 30, 33 (1978) (citing NORTHEAST/MIDWEST RESEARCH INSTITUTE, *PROSPECTUS* (1977)).

2. *Id.*

3. *Id.* at 31 (citing NORTHEAST/MIDWEST RESEARCH INSTITUTE, *PROSPECTUS* (1977)).

4. *Id.*

5. For a summary of leading cases in each category, see Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 *STAN. L. REV.* 533, 553 (1978).

6. These options can include issues arising from the *effects* of investment decisions on, for example, the obligation to provide retiree health and life insurance, proration of vacation pay, transfer of rights to a new plant, pension funding, and severance pay. This article focuses, however, on the investment decisions themselves and not on their effects.

7. The clauses which follow are drawn from the contract of a union which the author represented in a plant relocation case. The parties were GF Business Equipment, Inc. and Local 1617, United Steelworkers of America.

8. "The Company recognizes the Union as the exclusive bargaining agent for its employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment."

tration,⁹ a third reserves to management exclusive rights to manage the company,¹⁰ and finally, a fourth states that the union agrees not to strike during the term of the agreement.¹¹ Suppose the company announces that it will move a department to another state or permanently lay off 5,000 workers. What can the lawyer do?

Two principal strategies have been attempted. One is to have the decision set aside for failure to comply with the statutory duty to bargain in good faith under section 8(a)(5) of the National Labor Relations Act (NLRA);¹² the other is to enjoin implementation of the decision until an arbitrator can decide whether it violates the collective bargaining agreement.¹³

A. *The Duty to Bargain in Advance About Investment Decisions*

The NLRA imposes a mutual obligation on the employer and the union to bargain in good faith.¹⁴ The purpose is to require parties to present and support their proposals in an attempt to reach a common ground that can be embodied in a binding bilateral agreement.¹⁵ The Act does not encourage fruitless marathon discussion¹⁶ or require the parties to make counteroffers¹⁷ or compromises¹⁸ or reach agreements.¹⁹ It does, however, require the

9. "Should any dispute or disagreement arise between an employee and the Company as to the meaning and application of the provisions of this agreement, such dispute or disagreement shall be handled" in arbitration.

10. "The Company retains the exclusive rights to manage the business and plant and to direct the working forces. The Company, in the exercise of its rights, shall observe the provisions of this agreement."

11. "The Union agrees that there shall be no strikes, work stoppages, interruption, impeding or concerted slowdown of work during the term of this agreement."

12. 29 U.S.C. § 158(a)(5) (1976). For text of the relevant provisions, see note 14 *infra*.

13. The language of the relevant portions of §§ 301(a)-301(b) of the Taft-Hartley Act are set out at note 49 *infra*.

14. Section 8(a)(5) obligates the employer by providing in part: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. . . ." 29 U.S.C. § 158(a)(5) (1976). Section 8(d) provides:

[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 . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Id. § 158(d)(5). An injunction may issue for refusing to bargain collectively as defined in the Act. NLRA § 10(j), 29 U.S.C. § 160(j) (1976).

15. R. GORMAN, BASIC TEXT ON LABOR LAW 399 (1976).

16. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).

17. *Id.*

18. NLRA § 8(d), 29 U.S.C. § 158(d) (1976) provides: "For the purposes of this [Act],

parties to *attempt* to agree—that is, to bargain in good faith.²⁰

Workers view the duty to bargain in good faith commonsensically. If management agrees to a strike settlement and shortly thereafter announces an intention to leave town or suddenly informs the union of a massive layoff while simultaneously releasing the information to the press, the workers wonder what happened to the employer's obligation to bargain. From the union's point of view, the company should tell its workers in advance about whatever difficulties it is experiencing. Employees should be given an opportunity to suggest alternatives before management announces a decision.²¹

Technically, however, whether the duty to bargain in good faith applies to an investment decision depends on whether the decision is considered a mandatory subject of bargaining.²² In 1960, in *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*,²³ the Supreme Court held that a railroad's decision to close certain stations was a mandatory subject of bargaining. The Chicago & North Western Railway had filed petitions with the public utility commissions of four states in which it operated requesting permission to close some stations and consolidate service at others. Prior to any decision by the commissions, the union learned of the petitions and notified the railroad

to bargain collectively . . . does not compel either party to agree to a proposal or require the making of a concession. . . ."

19. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

20. *See id.*; Klare, *Judicial Deraidicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 293-310 (1978); Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History*, 5 IND. L.J. 720, 732 (1975). The author believes that the "contractualism" discussed in the text was always embedded in the Wagner Act; Klare believes that the concept was grafted onto the Act after passage, much like the quid pro quo concept of the NLRA.

21. The Supreme Court has shown some sympathy for this view, noting that "the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers should be balanced by some protection to the employees from a sudden change in the employment relationship." *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964) (compelling arbitration under a collective bargaining agreement that the Court held had survived the disappearance by merger of the corporate party). "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining contrary to the congressional policy." *NLRB v. Katz*, 369 U.S. 736, 747 (1962) (unilateral changes by employer in matters subject to pending contract negotiations violated § 8(a)(5) duty to bargain collectively).

22. Section 8(d) not only imposes a duty to bargain in good faith but also requires the parties to bargain over mandatory subjects, which include "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1976).

23. 362 U.S. 330 (1960).

that it wanted to negotiate to amend the bargaining agreement with the following requested amendment: "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."²⁴ The railroad contended that it had no obligation to negotiate over the amendment because an amendment request did not constitute a "labor dispute" under the Railway Labor Act.²⁵ The Supreme Court disagreed. It held that the proposed amendment related to "rates of pay, rules, or working conditions" and therefore was subject to the bargaining obligations imposed by the Act.²⁶

Railroad Telegraphers prompted the National Labor Relations Board to reconsider its position on the same issue—mandatory bargaining over unilateral management decisions affecting job rights and job security—under the NLRA. In *Town & Country Manufacturing Co. v. NLRB*,²⁷ the Board held that the employer had violated section 8(a)(3) of the NLRA²⁸ by discharging employees on the basis of antiunion animus and then subcontracting their work. The Board also held that the employer had violated section 8(a)(5)²⁹ by failing to bargain over the subcontract, even if its motives were purely economic.³⁰ Then in *Fibreboard Paper*

24. *Id.* at 332.

25. Railway Labor Act, 45 U.S.C. §§ 151–188 (1976). The Act was intended *inter alia*: to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; [and] to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

Id. § 2(l)(4), (5), 29 U.S.C. § 151(a)(4), (5).

26. 362 U.S. at 339.

27. 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

28. Section 8(a)(3) provides: "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1976).

29. *See* note 14 *supra*.

30. The Board's majority stated that the duty to bargain about a decision to subcontract

in nowise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment. Experience has shown, however, that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations 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.

136 N.L.R.B. at 1027 (footnote omitted).

Products Corp. v. NLRB,³¹ the Board decided on the authority of *Railroad Telegraphers* that the employer had violated its section 8(a)(5) duty to bargain by failing to bargain about a decision to replace plant maintenance workers with workers outside the bargaining unit who could be hired more cheaply. The Board held that the employer was obligated to bargain not only about the effects of the decision to subcontract but also about the decision itself, even though the decision was motivated by a good faith desire to effect economies.³² The Board stressed that its holding merely required the employer to bargain, not to reach agreement.³³

On appeal, the Supreme Court affirmed *Fibreboard* on narrower grounds. The Court emphasized that its decision to require bargaining over subcontracting was not to extend beyond "the type of 'contracting out' involved in this case—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"³⁴ Moreover, the concurrence by Justice Stewart stressed that many management decisions affecting the conditions of employment by abolishing jobs were nonetheless not subject to the duty to bargain. Justice Stewart cautioned that the *Fibreboard* holding should not be read as "imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control."³⁵ Since the majority insisted that it was deciding nothing more than the question of infringement of job rights before it and the concurrence attempted to insulate decisions "at the core of entrepreneurial control," it was difficult to tell how *Fibreboard* affected the scope of mandatory bargaining.³⁶

In the years after *Fibreboard*, the Board found a duty to bar-

31. 138 N.L.R.B. 550 (1962), *affg on rehearing*, 130 N.L.R.B. 1558 (1961), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

32. 138 N.L.R.B. at 554.

33. The Board emphasized that the issue in *Fibreboard* was

not, as stated in the dissent, "whether business management is free to subcontract work in the interest of the more efficient operation of its business." Nor is the Board majority holding, anymore than it did in the *Town & Country* case, that a decision to subcontract is foreclosed to management unless it is a negotiated decision satisfactory to the union.

Id. at 551 (emphasis in original).

34. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964).

35. *Id.* at 223 (Stewart, J., concurring). Justices Douglas and Harlan joined Justice Stewart's concurrence.

36. The interpretation given *Fibreboard* is still controversial. For a discussion of the present controversy, see Rabin, *Limitations on Employer Independent Action*, 27 VAND. L.

gain over decisions that significantly affected employees.³⁷ Then in 1971, after a change in its membership, the Board adopted the doctrine of the *Fibreboard* concurrence³⁸ that management need not bargain over decisions which affect the scope of the enterprise or which involve a significant investment or withdrawal of capital.³⁹ It has continued, however, to find a duty to bargain over decisions to close one facility in an enterprise of two or more facilities.⁴⁰

The circuit courts of appeal have usually refused to enforce the *Fibreboard* Board's understanding of the employer's duty to bargain in advance over investment decisions.⁴¹ They have held instead that an employer has a duty to bargain only over the effects

REV. 133 (1974); R. Swift, *The NLRB and Management Decision Making* (1974) (Labor Relations and Public Series, The Wharton School, Report No. 9).

37. *E.g.*, *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1967). In that case the Board determined that three companies which manufactured, sold, and serviced refrigerated truck bodies comprised a single, integrated, multiplant enterprise. Without notifying the union or bargaining over the decision, one of the companies had decided to close a plant, which was consuming excessive manpower and generating defective work. The Board held that the logic of *Fibreboard* required bargaining since the closing was premised on production inefficiencies, which were mandatory subjects of bargaining. It responded to the argument that a partial closing decision "lies at the core of entrepreneurial control" by stating:

[A]n employer's decision to make a "major" change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.

Id. at 566.

38. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

39. *General Motors Corp., GMC Truck and Coach Div.*, 191 N.L.R.B. 951 (1971), *enforced sub nom.*, *UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972) (sale and lease of enterprise facilities to dealership franchisee lay at core of entrepreneurial control and thus not subject to mandatory bargaining).

40. *See, e.g.*, *Metro Trans. Servs. Co.*, 218 N.L.R.B. 534 (1975). *But see* *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978), *denying enforcement of* 230 N.L.R.B. 1002 (1977). *See also* *International Harvester Co.*, 227 N.L.R.B. 85 (1976), *affirmed on remand*, 236 N.L.R.B. No. 77, 98 L.R.R.M. 1274 (June 5, 1977).

41. *Compare* *ILGWU v. NLRB*, 463 F.2d 907, 916 & n.20, 917, 921-22 (D.C. Cir. 1972) ("company's decision was a mandatory subject of bargaining within the meaning of *Fibreboard*," and Board's decision seeking to restore status quo ante was "well suited to remedying the violations found . . .") *with* *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 194-97 (3d Cir. 1965) (company's decision to relocate plant was economically necessary and not mandatory subject of bargaining; order of Board denied and case remanded to Board to take evidence on effects of closing).

of those decisions.⁴² Thus in general it can be said of Board and court application of *Fibreboard* that the more seriously an investment decision affects the lives of workers, the less likely it is to be held subject to the duty to bargain.

Even if courts were to impose mandatory bargaining over investment decisions, that remedy is a further frustration for workers and their counsel.⁴³ Perhaps the most radical aspect of the Supreme Court decision in *Fibreboard* was that it upheld a Board order declaring management's decision to subcontract null and void and directing the restoration of the status quo ante so that the parties could begin again.⁴⁴ Such orders, however, are the exception, even in cases in which a violation of the duty to bargain is found.⁴⁵ But the real problem is that even where the employer is found to have breached his duty to bargain, and even where the Board's initial finding is enforced by the courts, and even where, by that time, an effective remedy is still possible, even then, all that the employer has to do is go through the motions of bargaining and make the same decision a second time. Thus, the remedy created by the Court in *Fibreboard* is procedural only. Frustrated by the ineffectual remedies under the Act, the union's attorney is likely to seek available remedies under the collective bargaining agreement,⁴⁶ especially that of enjoining the implementation of an investment decision until arbitration.

42. NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965).

43. In one case, the Board observed ruefully that the employer had breached § 8(a)(5) by moving its production of portable electric typewriters from Springfield, Missouri, to Hartford, Connecticut, but that by the time the case reached the Board on appeal, production had been moved again—out of Hartford and overseas. Royal Typewriter Co., 209 N.L.R.B. 1006 (1974), *modified*, 533 F.2d 1030 (8th Cir. 1976). Although the circuit court supported the Board's findings, it maintained its rejection of the *Ozark* decision, 161 N.L.R.B. 561 (1966), in dictum, since there was no available remedy against the company. 533 F.2d at 1038-39.

44. 379 U.S. at 215-17. The order terminated the subcontract and reinstated the employees with backpay in their former jobs or in jobs substantially equivalent.

45. The NLRB will often restrain its full remedy powers — even where it finds a violation of the duty to bargain. Restraint is most commonly applied when the employer's decision is found to have been made for genuine economic reasons, not merely to avoid its obligation to the union. See *Rochet* (Renton News Record), 136 N.L.R.B. 1294 (1962). See also R. GORMAN, *supra* note 15, at 534.

46. Not only may the contract provide more protection than the statute, but also, if an arbitral grievance as well as a § 8(a)(5) charge is filed to protest an investment decision, the Board may defer consideration of the charge until the grievance has run its course. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). The Board has deferred on a § 8(a)(5) charge when management had taken unilateral action not covered by any specific provision of the contract. *Radioear Corp.* 199 N.L.R.B. 1161 (1972).

B. *The "Reverse Boys Markets" Injunction*

Historically the labor movement has opposed the use of injunctions.⁴⁷ *Textile Workers Union v. Lincoln Mills*⁴⁸ represented a departure from this position. There the plaintiff union sought an order to compel arbitration pursuant to section 301 of the Taft-Hartley amendments.⁴⁹ The Supreme Court reversed the court of appeals and upheld the district court's order compelling arbitration.⁵⁰ After the *Lincoln Mills* decision, the organized labor movement favored injunctions compelling employers to arbitrate while still opposing injunctions against strikes. Labor argued that these positions were consistent because the employees remained free to strike and the employer enjoyed his traditional freedom to act prior to arbitration.⁵¹

47. The congressional expression of this opposition was the 1932 enactment of the Norris-LaGuardia Act, which stated in part:

No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Norris-LaGuardia Act of 1932, ch. 90, § 1, 47 Stat. 70 (codified at 29 U.S.C. § 101 (1976)).

48. 353 U.S. 448 (1957). The plaintiff union had a collective bargaining agreement with the employer which contained both a no-strike clause and a grievance arbitration provision. Several grievances over work assignments and workloads were processed but were ultimately denied by the employer. When the union requested arbitration, the employer refused. See notes 85-91 *infra* and accompanying text.

49. Taft-Hartley Act of 1947, § 301, 29 U.S.C. § 185 (1976). The relevant portions of § 301 are as follows:

(a) 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, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . .

50. In his vigorous dissent, Justice Frankfurter characterized the union's resort to an injunction as opportunistic and shortsighted—"intermittent yielding to expediency." 353 U.S. at 463 (Frankfurter, J., dissenting). He also stated: "It is not the first time that unions have conveniently disregarded, when it suited an immediate end, their vehement feelings that secured the restriction upon the federal courts in granting injunctions in labor disputes." *Id.* at 469 n.3. Justice Frankfurter was a principal draftsman of the Norris-LaGuardia Act and co-author of the leading work on the subject, F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930).

51. The AFL-CIO articulated the position as follows:

Under almost all collective agreements the employer is free to act in the first instance—to administer the agreement in accordance with his views as to its meaning. The order to arbitrate does not enjoin him from so doing. It only re-

Then, *Boys Markets, Inc. v. Retail Clerks Local 770*⁵² gave employers the capacity to enjoin a strike,⁵³ and unions reached out for corresponding authority to enjoin unilateral employer action.⁵⁴ Recognizing the importance of the arbitral process, some courts were willing to require the employer to abide by the agreement when "the shoe [was] on the other foot."⁵⁵ These court orders came to be known as "reverse *Boys Markets* injunctions" and generally prohibited employer action before arbitration. Such orders were not unknown prior to *Boys Markets*,⁵⁶ but they have become more common in recent years.⁵⁷ *Lever Brothers Co. v. International Chemical Workers Local 217*⁵⁸ provides the best known example of a reverse *Boys Markets* injunction.

In *Lever Brothers*, the company notified the union that it was

quires that he submit to an agreed-upon form of adjudication, after the fact, as to whether his actions violated the agreement. The comparable order against a union, alleged to have violated the agreement by striking, can only be an order directing it to arbitrate, not an injunctive order preventing it from [striking]. . . .

Brief for the AFL-CIO as Amicus Curiae at 17, *Boys Mkts., Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

52. 398 U.S. 235 (1970).

53. In *Boys Markets*, the Supreme Court held that where a striking union did not honor the employer's attempts at establishing arbitration under the collective bargaining agreement that contained a no-strike clause, the district court had jurisdiction to grant an injunction against the union under the Taft-Hartley Act. The Court, per Justice Brennan, emphasized the narrowness of its holding. It stated that injunctive relief is available "only with the situation in which a collective bargaining contract contains a mandatory grievance or arbitration procedure [I]t [does not] follow . . . that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance." *Id.* at 253-54. The Court set forth five prerequisites for the issuance of an injunction: (1) A collective bargaining agreement must be in effect; (2) the agreement must contain a mandatory arbitration procedure; (3) the dispute must be over a matter which is included in the arbitration provision; (4) the employer must submit to arbitration as a condition to the issuance of an injunction; and (5) the issuance of an injunction must meet the ordinary principles of equity. *Id.* at 254.

54. *See, e.g.*, *District 50 Allied and Technical Workers v. Brockway Pressed Metals, Inc.*, 328 F. Supp. 1258, 1260 (W.D. Pa. 1971).

55. *Id.* at 1260.

56. *See, e.g.*, *Local Div. 1098, Ass'n of St., Elec. R.R. & Motor Coach Employees v. Eastern Greyhound Lines*, 225 F. Supp. 28 (D.D.C. 1963).

57. *E.g.*, *Bakery Drivers Local 802 v. S.B. Thomas, Inc.*, No. 78-1270 (E.D.N.Y. June 12, 1978); *Koster Bakeries v. Teamsters Local 802*, 97 L.R.R.M. 2806 (E.D.N.Y. 1977); *Branch 998, Nat'l Ass'n of Letter Carriers v. United States Postal Serv.*, 88 L.R.R.M. 3524 (M.D. Ga. 1975); *National Ass'n of Letter Carriers v. United States Postal Serv.*, 88 L.R.R.M. 2678 (S.D. Iowa 1975); *Food Employees Local 590 v. National Tea Co.*, 346 F. Supp. 875 (W.D. Pa.), *remanded*, 474 F.2d 1338 (3d Cir. 1972); *Technical Office and Professional Workers Local 757 v. Budd Co.*, 345 F. Supp. 42 (E.D. Pa. 1972); *Local 294, Int'l Union of Elec. Workers v. Three Rivers Indus.*, 78 L.R.R.M. 2090 (D. Mass. 1971); *United Steelworkers Local 1305 v. Blaw-Knox Foundry & Mill Mach., Inc.*, 319 F. Supp. 636 (W.D. Pa. 1970).

58. 554 F.2d 115 (4th Cir. 1976).

permanently closing its plant in Baltimore, Maryland, and transferring the work to its plant in Hammond, Indiana. The union at the Baltimore facilities argued that the company's action constituted "outside contracting" under the collective bargaining agreement since the Hammond plant was represented by a different union.⁵⁹

The union demanded that the company be ordered not to close the Baltimore plant prior to arbitration. The district court granted the union's request for a preliminary injunction and required the union to post bond. The company's appeal to dissolve the injunction was unsuccessful, and although the union's grievance was arbitrable, the arbitrator ruled against the union. Accordingly, the injunction expired, but the company pursued its appeal, seeking both a determination that the preliminary injunction was wrongfully issued and recovery on the bond. The Fourth Circuit held that the district court had not abused its discretion by issuing a preliminary injunction to preserve the status quo pending the outcome of arbitration.⁶⁰ It also upheld the district court's ruling that the company could not recover on the bond without a judicial determination that the injunction had been wrongfully issued.⁶¹

Enlarging the scope of *Lever Brothers*-type injunctions involves both procedural and substantive problems.⁶² Procedurally, a preliminary injunction or temporary restraining order will be granted only if the moving party satisfies traditional equitable standards.⁶³ These requirements have been embodied in section 7 of the Norris-LaGuardia Act⁶⁴ and Federal Rule of Civil Proce-

59. The contracting-out clause of the contract gave the union nothing more than a right to "due consideration by the Company to the rights of regular employees" before the work was sent out. 554 F.2d at 118 n.1.

60. *Id.* at 120.

61. *Id.* The court elaborated on the necessity of issuing a reverse *Boys Markets* injunction in an addendum:

Further, the rule contained in this case is obviously a two-sided coin. An injunction to preserve the *status quo* pending arbitration may be issued either against a company or against a union in an appropriate *Boys Markets* case where it is necessary to prevent conduct by the party enjoined from rendering the arbitration process a hollow formality in those instances where, as here, the arbitral award when rendered could not return the parties substantially to the *status quo ante*.

Id. at 123. For an in-depth discussion of *Lever Brothers*, see Case Comment, *Boys Markets Injunctions Against Employers: Lever Brothers, Inc. v. Chemical Workers Local 217 [sic]*, 91 HARV. L. REV. 715 (1978).

62. Simon, *Injunctive Relief to Maintain the Status Quo Pending Arbitration: A Union Practitioner's View*, N.Y.U. 29TH ANN. CONF. ON LAB. 317, 333 (1976).

63. *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1056-61 (1965).

64. Section 7 provides:

No court of the United States shall have jurisdiction to issue a temporary or

ture 65.⁶⁵ Some courts have required parties to meet a preliminary burden of demonstrating potential success on the merits of their claim before an injunction pending arbitration may issue. Yet, courts disagree on the degree of success a party must show. The requirements have varied from "some likelihood of success"⁶⁶ to a minimal showing that the claim is not "plainly without merit" so that arbitration would not amount to a "futile endeavor."⁶⁷

Even under the lesser standard a union may have difficulty showing irreparable harm. A reduction in jobs which endangers the personal safety of employees remaining on the job is clearly irreparable harm.⁶⁸ The loss of seniority recall rights or pension

permanent injunction in any case involving or growing out of a labor dispute, as defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) . . . and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Norris-LaGuardia Act § 7, 29 U.S.C. § 107 (1976).

65. FED. R. CIV. P. 65 provides in pertinent part:

(a) Preliminary Injunction

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(6) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears . . . that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. . . . On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

66. *Hoh v. Pepsico Inc.*, 491 F.2d 556, 561 (2d Cir. 1974).

67. *Transit Union Div. 1384 v. Greyhound Lines, Inc.*, 529 F.2d 1073, 1077-78 (9th Cir.), *vacated and remanded on other grounds*, 429 U.S. 807 (1976) (expressly declining to distinguish between "likelihood of success" and "plainly without merit"); *accord*, *Lever Bros., Co. v. International Chem. Workers Local 217*, 554 F.2d 115, 120 (1976).

68. *United Steelworkers Local 1305 v. Blaw-Knox Foundry & Mill Mach.*, 319 F.

rights has been considered irreparable.⁶⁹ If, however, the impending loss to the employees is simply loss of work or wages, the authorities are divided on whether a subsequent award in damages can make them whole. Many courts, including the Supreme Court, have found that a management decision which "involves the discharge of employees from positions long held and the dislocation of others from their homes . . ."⁷⁰ causes irreparable harm.⁷¹ Other courts have held to the contrary.⁷²

Even if the union succeeds in showing that immediate implementation of the employer's decision would result in irreparable harm, it must show in addition that the irreparable harm would be greater should an injunction not issue than the irreparable harm to the employer should relief be granted.⁷³ This may be difficult since the employer will usually be able to demonstrate financial and economic damages to its business if an injunction issues. Generally, however, courts have held an employer's potential financial losses insufficient to deny the union's request for injunctive relief⁷⁴ except where an injunction would hinder customer service.⁷⁵

Supp. 636, 641 (W.D. Pa. 1970) ("to the extent that defendant's action in reducing the number of employees working at the open hearth furnaces threatens the health and safety of the employees working on reduced crews, there is no adequate remedy either at law or in arbitration. . . .").

69. *Communication Workers v. Western Elec. Co.*, 430 F. Supp. 969, 978-80 (S.D.N.Y. 1977) (recall rights—the court found no irreparable harm on other grounds); *Food Employees Local 590 v. National Tea Co.*, 346 F. Supp. 875, 882 (W.D. Pa. 1972) (pension rights).

70. *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas Texas R.R.*, 363 U.S. 528, 534 (1960).

71. See *Technical Office and Professional Workers Local 757 v. Budd Co.*, 345 F. Supp. 42, 46 (E.D. Pa. 1972) ("Fourteen employees will be put out of work which would cause a tremendous disruption in their personal lives and the personal lives of their families. This is the type of harm which is irreparable."); *Local Div. 1098, Ass'n of St. Elec. Ry. & Motor Coach Employees v. Eastern Greyhound Lines*, 225 F. Supp. 28, 30 (D.D.C. 1963) ("To make the transfer requires some of them to sell their homes, to move their families, to incur considerable expense and obviously a great deal of inconvenience."). It should be emphasized that the holding in the *Lever Brothers* addendum that a plant shutdown is irreparable harm, 554 F.2d at 122, is consistent with the conclusion in *Transit Union Div. 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237, 1239 (9th Cir. 1977) (*Greyhound II*), that revising the work schedules of employees who are not displaced by a shutdown is *not* irreparable harm.

72. Gallagher, *Injunctions Restraining Employers Pending Arbitration: Equity and Labor Policy*, 82 DICK. L. REV. 487, 495 n.60 (1978) and cases cited therein.

73. *Norris-LaGuardia Act* § 7(c), 29 U.S.C. § 107(c) (1976).

74. *E.g.*, *Communication Workers v. Western Elec. Co.*, 430 F. Supp. 969 (S.D.N.Y. 1977).

75. See, *e.g.*, *Hoh v. Pepsico Inc.*, 491 F.2d 556, 560 (2d Cir. 1974); *UAW Local 120 v. Seagrave Fire Apparatus Div.*, 56 L.R.R.M. 2874, 2876 (E.D. Ohio 1964) (weighing "the

A survey of successful reverse *Boys Markets* injunction cases suggests that injunctions are granted when they impose on the employer only a very short delay prior to arbitration.⁷⁶ Assume that the union can surmount the two other procedural problems—that the court requires the union to show merely that its contractual claim is not frivolous and recognizes that irreparable harm will result. Then, if arbitration is imminent, that will tip the balance of equities in the union's favor. The substantive problems, however, remain.

The substantive limitations of a reverse *Boys Markets* injunction pose greater problems for the union because the order preserves the status quo only pending arbitration. In the long run, it conveys no more authority to restrain plant relocation than the arbitrator can draw from the essence of the contract. The limits of *Lever Brothers* are the limits of *Fibreboard*. Unless the contract contains something considerably more potent than the typical clause prohibiting subcontracting, a *Lever Brothers* injunction merely postpones defeat, which was exactly what happened upon the expiration of the injunction in *Lever Brothers*: the employer successfully relocated its plant.

Moreover, the reverse *Boys Markets* injunction approach presupposes the typical absolute no-strike clause. It seeks to balance the employer's ability to enjoin a work stoppage on the basis of the no-strike clause with a corresponding union capacity to delay investment decisions pending arbitration.⁷⁷ Thus, a successful reverse *Boys Markets* injunction places even more power in the hands of arbitrators and courts but leaves labor without the economic leverage of its most effective weapon—the strike.⁷⁸

consequences of lost jobs and all the miseries attendant to unemployment . . ." against the company's "monetary losses in the continued operation of the Columbus plant, along with possible inability to fill existing contracts and all the attendant losses . . .").

76. *E.g.*, *Food Employees Local 590 v. National Tea Co.*, 364 F. Supp. 875, 884-85 (W.D. Pa. 1972) (contract for sale of stores contained no clause binding successors and assigns of employer; order issued with directive that selection of an arbitration panel be completed within 10 days); *Technical Office & Professional Workers Local 757 v. Budd Co.*, 345 F. Supp. 42, 48 (E.D. Pa. 1972) (employer laid off employees who refused employer's offer to transfer from Pennsylvania to Michigan; court enjoined employer for 15 days to seek an "ultimate resolution" in arbitration); *Local Div. 1098, Ass'n of St., Elec. Ry. & Motor Coach Employees v. Eastern Greyhound Lines*, 225 F. Supp. 28, 31 (D.D.C. 1963) (repair shop to transfer from District of Columbia to Illinois; "[t]he only effect of the injunction so far as the [employer] is concerned would be a few weeks' delay.>").

77. See notes 66-76 *supra* and accompanying text.

78. This new balance of power would be in labor's best interest only if contractual language in collective bargaining agreements curbing management prerogatives were much stronger than it currently is in typical agreements.

In the present state of the law, an attorney is virtually powerless to prevent plant closings or relocations, whether through the grievance procedure, the Board, or the courts. Arbitrators and judges are properly bound to enforce whatever the parties include in their collective bargaining agreement. The courts have refused to enforce the *Fibreboard* doctrine, which would superimpose on the parties the statutory duty to bargain in advance about investment decisions affecting job security.⁷⁹ Labor's efforts to enjoin unilateral investment decisions pending arbitration have had quixotic success: victory merely postpones the employer's plans. Substantive rabbits cannot be magically extracted from procedural hats. Thus, the answer must be to change the collective bargaining agreements themselves.

II. THE QUID PRO QUO MYTH

The recent wave of plant closings and relocations⁸⁰ not only reveals the inadequacy of the legal weapons available to labor, but also lays bare a fundamental unfairness in American labor relations. In the typical collective bargaining agreement, labor relinquishes its most effective weapon against management—its ability to strike. Yet in the typical agreement, management retains the prerogative to disrupt the lives of its employees by relocating or closing its facilities.⁸¹ So long as this power is latent, the inequity is not perceived. As one president of a local steelworkers union recently stated, "In everything we did, we always assumed the mill would be there."⁸² The conglomerate owning the mill had informed the president that he could expect the mill to be closed in eighteen months. Such experiences should prompt workers and their advocates to reevaluate the doctrine that the collective bargaining agreement is a quid pro quo.

The Norris-LaGuardia and National Labor Relations Acts were expressly predicated on the inequality of bargaining power between employer and employee.⁸³ The underlying assumption

79. See notes 31-42 *supra* and accompanying text.

80. See notes 1-4 *supra* and accompanying text.

81. These clauses in a typical collective bargaining agreement are set out in notes 10 and 11 *supra*.

82. Conversation with Ed Mann, President of Local 1462, United Steelworkers of America (Aug. 1978). Mann is leading a struggle to prevent Jones & Laughlin from shutting down the Brier Hill Works in Youngstown.

83. "[U]nder prevailing economic conditions [of corporate ownership] . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of

of American labor law since the 1930's, evidenced in both Acts, has been that the right to bargain collectively equalizes the bargaining power of employee and employer.⁸⁴ This thesis would fall were courts to closely examine the actual extent of liberty that rank-and-file workers have to determine the content of their contracts.⁸⁵ Courts assume nonetheless that labor and management come to the bargaining table as equals. This is the indispensable premise of the doctrine that the collective bargaining contract is the product of an equal exchange: a quid pro quo.

The quid pro quo concept was suggested to the Supreme Court in the union's brief in *Textile Workers Union v. Lincoln Mills*.⁸⁶ There the union sought specific performance of the employer's contractual promise to arbitrate grievances, but had to overcome the common law rule against specific performance of an agreement to arbitrate.⁸⁷ The union surmounted this problem by distinguishing commercial arbitration from labor arbitration. The petitioner noted that commercial arbitration usurped the courts' traditional jurisdiction because it substituted for litigation.⁸⁸ On the other hand, arbitration under collective bargaining agreements substituted for the strike.⁸⁹

employment" Norris-LaGuardia Act, ch. 90, § 2, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 102 (1976)). "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . ." NLRA, ch. 198, § 1, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 (1976)).

84. "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by restoring equality of bargaining power between employers and employees." NLRA, ch. 198, § 1, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 (1976)).

85. See generally W. SERRIN, *THE COMPANY AND THE UNION: THE "CIVILIZED RELATIONSHIP" OF THE GENERAL MOTORS CORPORATION AND THE UNITED AUTOMOBILE WORKERS* (1973).

86. 353 U.S. 448 (1957). See notes 48-50 *supra*.

87. Brief for Petitioner at 25, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

88. *Id.* at 29.

89. *Id.* at 32, 35. "Whatever the formula in the individual labor agreement, the same pattern appears. The agreement to arbitrate grievances is the concomitant of the agreement not to strike; the arbitration process is the substitute for the strike and the picket line in settling questions of application of the agreement." *Id.* at 34. The American Arbitration Association also advocates this distinction. Summarizing the relationship between judicial tribunals and grievance arbitration, a speaker for the Association stated:

It is of first importance that in dealing with arbitration, whether legislatively or judicially, it should be recognized that this is not litigation in the conventional sense. Nor is it a substitute for litigation. It is a procedure specifically designed to meet the need for a substitute for strike. . . .

The union argued that whether arbitration was indeed a quid pro quo for waiver of the right to strike could be determined only by an inquiry into the intention of the parties to a particular contract. As it happened, the *Lincoln Mills* contract embodied a genuine quid pro quo of the kind posited. In contrast to most labor agreements, the contract contained an article dealing with both arbitration and strikes.⁹⁰ The article gave "authority to the employer to discharge employees who engage in work stoppages or slowdowns during the term of the agreement 'as a result of the failure of an employee to exhaust all grievance procedures available under the contract.'" ⁹¹ Moreover, evidently the union agreed not to strike only over matters which the employer agreed to arbitrate: "Union action to prevent and secure the termination of strikes is specified *in cases in which they occur over grievances which are 'arbitrable under the contract'.*" ⁹²

The Supreme Court adopted the union's quid pro quo argument with enthusiasm, yet failed to develop fully the doctrinal underpinnings. The majority's inquiry began with an analysis of the legislative intent of section 301 of the Labor Management Relations Act.⁹³ Concluding the historical survey with the premise that recognition of the labor agreement as a valid and binding contract would confer greater responsibility on the parties to the contract and ultimately promote industrial peace, Justice Douglas surmised that "[p]lainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike."⁹⁴ In that statement Justice Douglas abruptly transferred attention from the

Id. at 36. See also *United Steelworkers v. Warrior & Gulf Navigation, Co.*, 363 U.S. 574, 578 (1960).

It is especially noteworthy, in view of what the Supreme Court was to do with this idea, that the union brief in *Lincoln Mills* stressed that a union might or might not choose to settle the kind of problem involved in the case (unilateral changes in work loads during the term of an agreement) by arbitration. "Two avenues of limitation are possible: 1) the right to strike to protest against changes in work loads (as in the automobile industry) or 2) an agreement to arbitrate under general principles of equity and fairness. *The parties here chose the second route.*" Brief for Petitioner at 38, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (emphasis added).

90. The union's brief does not supply the full contract language, but notes that "[t]he Article begins by stating that the employer and the union agree that the procedures provided in the article are adequate to provide a fair and final determination of all grievances and that therefore they both agree that strikes and work stoppages should be avoided." Brief for the Petitioner at 37, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

91. *Id.*

92. *Id.* (emphasis added).

93. See note 49 *supra* and accompanying text.

94. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

intent of Congress in drafting section 301 to the intent of the parties in the collective bargaining agreement. While Justice Douglas considered Congress' intent at length,⁹⁵ there is absolutely no discussion of the parties' intentions. It is these intentions, and not the legislative history, that the Court should have analyzed to determine whether a quid pro quo existed in fact.

Attempting to explain the Court's rationale, Justice Douglas stated: "[T]he entire tenor of *the history* indicates that the agreement to arbitrate grievance disputes *was considered* as quid pro quo of a no-strike agreement."⁹⁶ "The history" alludes, not to the history of collective bargaining between the union and Lincoln Mills, but to the legislative history of the Taft-Hartley Act. Those who "considered" the agreement to arbitrate grievances a quid pro quo for a no-strike provision were not the workers and corporate executives who made the agreement, but congressmen. Thus, in two sentences the Court abandoned a fundamental inquiry of the law of contracts: the inquiry into what the parties actually intended to achieve by their agreement.⁹⁷

A. *Genesis of the No-Strike, Binding Arbitration Tradeoff*

The arrangement rationalized by the quid pro quo doctrine originated not by contract but by force, as an aspect of governmentally imposed labor peace during World War II.⁹⁸ David Feller, who as attorney for the United Steel Workers of America

95. *Id.* at 448-59.

96. *Id.* at 455 (emphasis added).

97. Justice Black excoriated this approach to collective bargaining agreements in his dissent in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 106 (1962) (Black, J., dissenting). He explained that the Court made up contract terms "out of clear air, so far as I can see," so that its decision "actually vacates and amends the contract that the parties themselves had made and signed. . . ." *Id.* at 107. "I had supposed . . . that the job of courts enforcing contracts was to give legal effect to what the contracting parties actually agree to do, not to what courts think they ought to do." *Id.* at 108. "Section 301 is torn from its roots when it is held to require the sort of compulsory arbitration imposed by this decision." *Id.* at 110.

98. An initial observation should lead one to suspect the historical accuracy of the quid pro quo doctrine as a voluntary tradeoff: working people do not perceive arbitration as helpful and certainly not so helpful as to be worth the right to strike. A steelworker with 25 years in the mill has described the grievance-arbitration system as "Five Steps to Failure." C. SPENCER, *BLUE COLOR: AN INTERNAL EXAMINATION OF THE WORKPLACE* 134 (1977). As he tells the story, grievances are routinely kicked upstairs from *Step One*, where the grievant confronts his or her own foreman, to *Step Two*, where the superintendent who told the foreman what to do in the first place denies the grievance again. *Id.* at 134-36. If the grievance is appealed further, after a year or two it reaches *Step Three*. "In *Step Three*, the grievance becomes more depersonalized. The aggrieved worker and the boss have been eased out of it. It has become a matter between the company's industrial relations officers

did much to promote the quid pro quo idea, provides the clearest account of the genesis of no-strike and arbitration provisions.⁹⁹ Feller notes that the accepted method of resolving labor disputes in the early 1930's was the strike; fewer than ten percent of the contemporaneous labor agreements provided for arbitration.¹⁰⁰ Although early contracts between the Congress of Industrial Organizations and such major corporations as General Motors and United States Steel contained language which resembled today's no-strike and arbitration clauses, in actuality strikes abounded and arbitration occurred rarely and only by mutual agreement.¹⁰¹ Moreover, the organized labor movement itself remained deeply

and the chairman of the union's grievance committee." *Id.* at 137. The author describes *Step Three* as follows:

Industrial relations people come to *Step Three* with *attache* cases filled with past arbitration decisions, grievance settlements that bear the union's signature, copies of local agreements agreed to by the union, and a dossier on the aggrieved worker, all lined up to sustain the company's position. What new weapon does the union representative have to beat down the company's massive defenses? Nothing that wasn't previously demonstrated in *Steps One* and *Two*. The facts in the grievance don't change. History is on the side of the company . . .

Id. at 138. The decision whether to appeal the grievance from *Step Three* to *Step Four* is made not by the grievant, or even by any member of the grievant's local union, but by a staff representative for the international union. The staff representative's decision is final. Usually he decides not to appeal the grievance, "often for strategic reasons unexplained either to the worker or to the local union." *Id.* If the staff man decides to appeal the grievance, *Step Four* proceedings will be initiated 6 to 12 months later. No new information is available at *Step Four*, only the decisionmakers, now the company's industrial relations superintendent, a corporation attorney, and the international union representative are new. All are "one more step removed from the workplace." *Id.* at 139. The only remaining option for the grievant is *Step Five*—arbitration. Many unions are too poor ever to arbitrate a grievance. Even for the richest, arbitration is a costly luxury. Spencer notes that more than 500 grievances were filed each year in his local union; only two percent reached arbitration. *Id.* at 141.

Spencer comes to the following conclusions about arbitration as he has watched it during his working life:

There is a widespread impression that in a plant where arbitration is provided for in the union contract, that, ultimately, all disputes are settled by an arbitrator, to the satisfaction of all concerned parties. . . . A closer look at the workplace shows that arbitration—the final step in the pyramid of grievance procedure—has failed to satisfy the worker or to fulfill the union's promise of a fair and equitable system for settling their disputes with the management.

Id. at 140. If this acid portrait is even remotely reflective of the rank-and-file view of arbitration, it makes no sense to suppose that workers have voluntarily waived their right to strike in exchange for grievance arbitration.

99. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 745-47 (1973).

100. *Id.* at 745.

101. *Id.* at 746 n.364. For example, only two grievances were arbitrated under the collective bargaining agreement between General Motors and the United Automobile Workers from 1937 to 1940. See Harbison, *Steel*, in TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS 508 (1942).

ambivalent over submitting grievances to arbitration.¹⁰²

Grievance arbitration provisions became widely used as a result of the activity of the War Labor Board.¹⁰³ In December 1941, the month of Pearl Harbor, President Roosevelt convened a Labor-Management Conference which agreed upon a resolution to prohibit strikes and lockouts for the duration of the war. The President also established a War Labor Board to resolve grievances.¹⁰⁴

The strike could therefore no longer be tolerated as even an optional terminal point of the grievance procedure. And so, "the Board insisted, as a matter of paramount importance, upon arbitration as the final step of [the] grievance procedure." As a result, the system of grievance arbitration as we now know it was created.¹⁰⁵

This mandatory quid pro quo was not welcomed by workers. On the contrary, it prompted a strike wave statistically comparable to the wave of the 1930's.¹⁰⁶ Union officials used union funds "to enforce the directives of the National War Labor Board which, in the first instance, [the workers did] not believe in."¹⁰⁷ The officials repeatedly imposed various sanctions—"members suspended or expelled, locals put in receivership or charters lifted, company firing and draft board induction of strikers and local of-

102. For example in 1938, the International Longshoremen's and Warehousemen's Union agreed to industry-wide arbitration over any conflict arising from the interpretation of their contract. The American Federation of Labor immediately denounced the union's agreement and "expressed its unalterable opposition to 'compulsory arbitration clauses in agreements'" *Id.* at 746 n.363 (quoting *Arbitration of Labor Disputes*, 3 L.R.R.M. 1071, 1072 (1939)).

103. Feller, *supra* note 57, at 746. ("[T]he real explosion in the number of provisions for grievance arbitration, and in large measure the forms which those provisions took . . . came as a result of the activity of the War Labor Board.")

104. *Id.* at 746-47.

105. *Id.* at 747 (quoting U.S. DEP'T OF LABOR, NATIONAL WAR LABOR BOARD TERMINATION REPORT 113 (1948)).

106. M. Glaberman, *The Struggle Against the No-Strike Pledge in the UAW During World War II* (1975) (unpublished Ph.D. thesis, Institute for Policy Studies (Washington, D.C.)). Glaberman cites the following statistics to demonstrate the similarity between the strike wave of the mid-1940's and that of the 1930's. The statistics are taken from *Work Stoppages Caused by Labor-Management Disputes in 1945*, 62 MONTHLY LAB. REV. 718, 720 (1946).

<u>Year</u>	<u>No. of strikes</u>	<u>No. of workers involved</u>
1937	4,740	1,860,621
1944	4,956	2,115,637
1945	4,750	3,467,000

107. B. COCHRAN, LABOR AND COMMUNISM: THE CONFLICT THAT SHAPED AMERICAN UNIONS 201 (1977).

ficers ratified—so that there existed in a number of CIO unions a state of warfare between large sections of the membership and high union officials.”¹⁰⁸

The conclusion drawn from a review of the historical context from which the quid pro quo doctrine emerged is that the no-strike/arbitration tradeoff is a child of martial, industrial necessity imposed upon a reluctant rank and file. The question is why, if historically the quid pro quo was both imposed and unpopular, it continued in collective bargaining agreements when the war ended. There appear to be two reasons. First, the quid pro quo benefits unions, even if it does not benefit their members individually.¹⁰⁹ A second, more subtle answer is that plant closings were relatively rare in the expanding economy of the post-war years. The collective bargaining agreement appeared to offer an equal exchange: the worker could not strike, but could arbitrate his own discharge. Moreover, during World War II contracts had commonly come to include clauses requiring just cause for discharge.¹¹⁰ The additional mandatory inclusion of a just cause standard probably crystallized the assumption that labor could justly be asked to relinquish its most effective weapon, the strike, since management had been required to place the power of reviewing its own final decision, discharge, in the hands of arbitrators. This assumption fails, however, when management unilaterally makes investment decisions. A plant closing puts a person out of a job as effectively as a firing, and the present state of the law provides no way to arbitrate whether a plant closure or relocation was for a just cause.

B. *The Asymmetry of the Exchange*

The quid pro quo doctrine presumes a mythical waiver which never in fact took place. An even more serious difficulty for the vitality of the doctrine is the nature of the bargain itself. Management, while agreeing to arbitrate *some problems* covered by the contract, reserves the right to decide all other problems unilaterally.¹¹¹ Labor, while obtaining the opportunity to submit *some*

108. *Id.* at 201.

109. A full exploration of this theme would go far beyond the boundaries of this article.

110. “[T]he Board regularly ordered their inclusion in collective agreements in cases that came before it Even when the parties had no agreement for arbitration or no just cause clause, the Board established a policy of referring disputes concerning discipline to arbitration for decision under a just cause standard.” Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 499 n.103 (1976).

111. See note 10 *supra*.

problems to arbitration, relinquishes the right to strike about *all problems whatsoever*. This asymmetry can be represented by the following matrix:

	<u>Problems covered by the contract</u>	<u>Problems not covered by the contract</u>
Management	Gives up freedom of action	Retains freedom of action
Labor	Gives up freedom of action	Gives up freedom of action

The imbalance of the bargain is only too obvious; yet the realities of the situation—so unsettling to the assumptions of court-created national labor policy—have received little acknowledgment from the courts.

Since *Lincoln Mills* the Supreme Court has applied the quid pro quo doctrine to a series of particular collective bargaining agreements. The results have been strained because of the Court's commitment to the assumption that the quid and the quo of a given contract are equal. Hence, both in the rare case in which management's commitment to arbitrate is more sweeping than the union's commitment not to strike¹¹² and in the typical case in which the union has an absolute duty not to strike but management reserves extensive management prerogatives,¹¹³ the Court has tried to make the equation balance despite the obvious intent of the parties. Moreover, the Court has evaluated these contracts with the substantive terms of a paradigmatic contract in mind: "Complete effectuation of the federal policy . . . is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the 'quid pro quo' for the agreement not to strike."¹¹⁴ This formulation conceals an inherent ambiguity in the meaning of "grievances." If a grievance is any dispute between the parties, then the arbitration clause becomes coextensive

112. *E.g.*, *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974).

113. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). These three cases are commonly referred to as the *Steelworkers Trilogy*.

114. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 n.4 (1960).

with the no-strike clause. But if a grievance is a dispute concerning only the terms of the agreement, then the commitment to arbitrate is less extensive than the commitment not to strike.

In *United Steelworkers v. American Manufacturing Co.*,¹¹⁵ the first case in the *Steelworkers Trilogy*,¹¹⁶ the arbitration clause committed the parties to arbitrate all disputes "as to the meaning, interpretation and application of the provisions of the agreement."¹¹⁷ The contract also contained a typical management prerogatives clause, reserving for management "the direction of the working force, plant layout and routine of work, including the right to [hire and fire] and to lay off employees because of lack of work. . . ." ¹¹⁸ The contract unambiguously provided for arbitration only over grievances arising from the terms of the contract. The Court, however, construed the arbitration clause as if it encompassed all disputes of any kind. The agreement, the Court stated,

is to submit all grievances to arbitration, not merely those that a court may deem meritorious. There is no exception in the "no strike" clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other. . . . Arbitration is a stabilizing influence only as it serves as a vehicle for handling every and all disputes that arise under the agreement.¹¹⁹

Thus, the Court's position was that any party who claimed that a grievance was based on the contract had a right to have the claim arbitrated.¹²⁰

The second case, *United Steelworkers v. Warrior & Gulf Navigation Co.*,¹²¹ posed the problem more sharply. The contract there stated that differences "as to the meaning and application of the provisions of this Agreement" and differences over "any local trouble of any kind" should not occasion suspension of work but should be submitted to a grievance process culminating in binding arbitration.¹²² But the contract also stated: "[M]atters which are strictly a function of management shall not be subject to arbitra-

115. 363 U.S. 564 (1960).

116. See note 113 *supra*.

117. 363 U.S. at 565 n.1 (emphasis added).

118. *Id.* n.2.

119. *Id.* at 567.

120. *Id.* at 568-69. The Court concluded that the "processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." See also *id.* at 571 (Brennan & Frankfurter, JJ., concurring).

121. 363 U.S. 575 (1960).

122. *Id.* at 576.

tion."¹²³ Moreover, the evidence established that during the previous nineteen years management had been contracting out the type of work involved in the grievance and that the union had been attempting, unsuccessfully, to change the contract to limit the employer's right to contract out.¹²⁴ Both the district court and the court of appeals held that contracting out fell within the management prerogatives clause and was not subject to arbitration. The Supreme Court reversed. It emphasized the fundamental role that both collective bargaining and arbitration play in promoting industrial peace and resolved the issue before it in favor of arbitrability.¹²⁵

The Court came very close to saying that the dispute had to be arbitrable: "When . . . an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes."¹²⁶ The Court hastened to add that it "[did] not mean . . . that the language, 'strictly a function of management,' has no meaning."¹²⁷ Yet the Court did in effect strip the phrase of all practical interpretations in holding that it "must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion."¹²⁸ Thus, the phrase did not in itself make any problem unarbitrable unless the contract also had an "express provision excluding a particular grievance from arbitration."¹²⁹ Justice Whittaker, dissenting, protested,¹³⁰ and even Justices Brennan and Frankfurter,

123. *Id.* at 588 (Whittaker, J., dissenting).

124. *Id.* (Whittaker, J., dissenting).

125. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83. "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . ." *Id.* at 584-85.

126. *Id.* at 583. The sentence is not a model of clarity. On the verge of a declaration that management must have committed itself to arbitrating everything because the contract forbade all strikes, the Court stopped short with trivial semantics—everything management does is "subject to the agreement" because either the agreement restricts management's freedom of action or else the agreement restricts labor's right to restrict management's freedom of action, and in either case, management is "subject" to the agreement.

127. *Id.* at 583-84.

128. *Id.* at 584.

129. *Id.* at 584-85.

130. *Id.* at 589 (Whittaker, J., dissenting). Justice Whittaker pinpointed the Court's underlying methodology: "I understand the Court . . . to hold . . . that when, as here, the

concurring, asked: "If a court may delve into the merits to the extent of inquiring whether the parties have provided that contracting out was a 'function of management,' why was it error for the lower court here to evaluate the evidence of bargaining history for the same purpose?"¹³¹

The premise that the collective bargaining agreement contains an exchange of equally broad promises—a quid pro quo—also provides the basis for the Court's corollary doctrine of an implied no-strike clause. In *Local 174, Teamsters v. Lucas Flour Co.*,¹³² the contract contained provisions for grievance arbitration and for termination of an employee for unsatisfactory work. The union struck to protest an employee's discharge, and later the arbitrator found the discharge justified. In the interim the employer brought suit for damages to his business attributable to the strike. The Supreme Court considered the argument that the union could not have engaged in an illegal strike "in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called."¹³³ Rejecting the argument, the Court implied an agreement not to strike over anything the union had agreed to arbitrate: "[A] contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."¹³⁴

Following the rationale in *Lucas Flour*, the court implied a no-strike clause in *Gateway Coal Co. v. UMW*.¹³⁵ The collective bargaining agreement contained language similar to that in *Warrior & Gulf*,¹³⁶ the parties agreed to arbitrate disputes about "local trouble of any kind." The Court held that, absent any express language limiting the no-strike commitment, "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."¹³⁷ Thus, when the union in *Gateway Coal* went out on strike over allegedly unsafe working conditions,

contract contains a no-strike clause, everything that management does is subject to arbitration." *Id.* (Whittaker, J., dissenting).

131. *Id.* at 572 (Brennan & Frankfurter, JJ., concurring).

132. 369 U.S. 95, 95, 104-06 (1962).

133. *Id.* at 104-05.

134. *Id.* at 105. The Court's rationale flies in the face of explicit language in the arbitration clause providing "that during such arbitration, there shall be no suspension of work." *Id.* at 96. It is evident from this language that the parties must have bargained over a no-strike clause and adopted the preceding language as a compromise.

135. 414 U.S. at 382.

136. See text accompanying note 70 *supra*.

137. 414 U.S. at 382.

they were held to have violated an implied agreement not to strike over "any local trouble of any kind."

*Buffalo Forge Co. v. United Steelworkers*¹³⁸ is the most recent decision interpreting the quid pro quo doctrine. Its importance is that the five-Justice majority and the four-Justice minority confronted the underlying problem in the doctrine: management's prerogative makes the collective bargaining agreement unequal. Justice White, for the majority, recognized this by redefining the quid pro quo doctrine. Justice Douglas had announced the doctrine in *Lincoln Mills*—"the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike."¹³⁹ Justice Brennan repeated in *Boys Markets* that "a no-strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration."¹⁴⁰ In *Buffalo Forge*, Justice White added nine momentous words: "The quid pro quo for the employer's promise to arbitrate was the union's obligation not to strike *over issues that were subject to the arbitration machinery.*"¹⁴¹ These words define fairness in a collective bargaining agreement. Henceforth, a collective bargaining agreement will be held fair and properly characterized as a quid pro quo if the employer agrees to arbitrate everything over which labor agrees not to strike, or conversely, if labor reserves its right to strike over matters which management refuses to submit to arbitration.

Justice Stevens' dissent in *Buffalo Forge* conceded the inequality in the ordinary labor contract. He stated that "in many collective-bargaining agreements, the employer has agreed to mandatory arbitration only in exchange for a no-strike clause *that extends beyond strikes over arbitrable disputes.*"¹⁴² Nevertheless

138. 428 U.S. 397 (1976).

139. 353 U.S. 448, 455 (1957).

140. 398 U.S. 235, 248 (1970).

141. 428 U.S. 397, 407 (1976) (emphasis added).

142. *Id.* at 418-19 (Stevens, J., dissenting) (emphasis added). For support, Justice Stevens cited an article by David Feller, counsel for the union in the *Steelworkers Trilogy*. See note 99 *supra* and accompanying text.

The arbitration provision in the collective agreement has frequently been described by the Supreme Court as the quid pro quo for the agreement not to strike. Although the characterization is accurate insofar as it reflects the historical development . . . in only a few agreements does it describe an equivalence. . . . The great majority of industrial collective agreements contain . . . a prohibition of strikes to protest any employer conduct, whether or not the conduct is limited by the rules contained in the collective agreement. . . . [T]he no-strike provisions of most collective agreements constitute a *quo* considerably in excess of the *quid* of the agreement to arbitrate.

he argued that such contracts should be enforced because, first, that is what Congress directed in section 301 of the Labor Management Relations Act,¹⁴³ second, presumably the parties freely entered the agreements,¹⁴⁴ and third and most important, only by enforcing the no-strike clause of such contracts could the Court effectuate the "policy of motivating employers to agree to binding arbitration by giving them an effective 'assurance of uninterrupted operation during the term of the agreement.'"¹⁴⁵

Justice White, on the other hand, was concerned that the reciprocal commitments of labor and management be equal and argued that a contract which reduces unequal commitments to writing cannot be fairly described as a *quid pro quo*. While it is important that Justice White implicitly redefined what the *quid pro quo* *should* be, the fact remains that in at least sixty per cent of existing collective bargaining agreements the no-strike clause *is* broader than the arbitration clause.¹⁴⁶ Thus, the *quid pro quo* doctrine can no longer legitimize that disparity between the parties' obligations.

In the aftermath of *Buffalo Forge*, one circuit court has concluded that the implied promises as well as the express promises of the parties to collective bargaining agreements are unequal. In *Transit Union Division 1384 v. Greyhound Lines, Inc. (Greyhound II)*,¹⁴⁷ the Ninth Circuit explained the *quid pro quo* doctrine:

While a promise to submit a dispute to arbitration may justify a finding of an implied duty not to strike . . . such a promise does not imply a duty on the part of the employer to preserve the status quo pending arbitration. The source of this difference is that a strike pending arbitration generally will frustrate and interfere with the arbitral process while the employer's altering the status quo generally will not.¹⁴⁸

The court's acknowledgement shows that the *quid pro quo* doctrine has ceased to perform its original function of rationalizing inequality. It also shows that courts are no longer seeking to

Feller, *supra* note 99, at 757-60.

143. 428 U.S. at 417-18 (Stevens, J., dissenting).

144. *Id.* at 425 (Stevens, J., dissenting).

145. *Id.* at 423-24 (Stevens, J., dissenting).

146. Feller, *supra* note 99, at 759 n.408. Thus, Justice Stevens was correct in introducing his dissent with the following statement: "A contractual undertaking not to strike is the union's *normal quid pro quo* for the employer's undertaking to submit grievances to binding arbitration," 428 U.S. at 413 (Stevens, J., dissenting) (emphasis added).

147. 550 F.2d 1237 (9th Cir. 1977).

148. *Id.* at 1238-39 (citation omitted).

present the collective bargaining agreement as fair and equal;¹⁴⁹ rather, they are using the phrase "quid pro quo" as a synonym for national labor policy. In so doing, the courts impose a no-strike clause on labor whether fair or not.

III. WHAT IS TO BE DONE?

The typical collective bargaining agreement is unequal. It forces labor to give up its right to strike in all cases yet enables management to retain the right to make unilateral investment decisions. The available remedies are merely procedural. Generally, management need only go through the motions of bargaining or maintain the status quo until after arbitration. The remedies postpone labor's defeat; they do not avoid it. The only way to correct the present realities is to change the content of the collective bargaining agreement.

How should the contract be changed? What direction should be recommended for changing the terms of the typical collective bargaining agreement? There are two possibilities.

A. *Expanding the Quid: Management Agrees to Arbitrate Investment Decisions*

The first possibility is to give workers a voice in investment decisions. This may be accomplished in more than one way. An approach currently being explored by the Ecumenical Coalition of the Ohio Mahoning Valley would enable employees to block adverse investment decisions by giving them sufficient voting power in the management of the corporation. The management scheme proposed to the Coalition by the National Center for Economic Alternatives would allow the local community (through a community development corporation), private investors, and employees (through an Employee Stock Ownership Plan) each to select approximately one-third of a corporation's board of directors. Although workers would have less than a majority voice in this proposal, the corporation by-laws could be drafted so that the

149. Another example of the attitude that any change in the existing labor-management imbalance must be wrong, because it represents a departure from the quid pro quo, is the dissenting opinion of Member Penello in *Gould Corp. v. James P. Moran*, 237 N.L.R.B. No. 124, 99 L.R.R.M. 1059 (Aug. 25, 1978). According to Member Penello, preventing the employer from selectively disciplining union officers for their role in wildcat strikes would endanger "the grievance-arbitration, no-strike tradeoff" which is "the very foundation of our collective-bargaining system." *Id.* at 1064 (Penello, Member, dissenting).

votes controlled by employees would be more than enough to protect their job security.

A more conventional, though still uncommon, approach is to negotiate contract language radically restricting management's control over investments. For example,¹⁵⁰ the United Shoe Workers negotiated, and an arbitrator and federal court enforced, a clause that prevented an employer from moving his factory from the county in which it was located.¹⁵¹ Clothing workers in New York City obtained and enforced contract language that gave a "joint board" the authority to prohibit an employer from not only moving his plant from the city but also from manufacturing garments in another factory.¹⁵² An innovative restriction from a 1936 agreement read: "No member of the association shall, during the term of this agreement, move his shop or factory from its present location to any place beyond which the public carrier fare is more than 5 cents."¹⁵³

Obtaining such contract language is, however, a serious practical problem. Plant relocations are generally considered permissive subjects of bargaining.¹⁵⁴ Consequently, a union has no right to insist to impose on contract language restricting the employer's power to shut down or remove plants. A strike called to obtain such language would be unprotected activity.¹⁵⁵ The scope of a no-strike clause, on the other hand, is a mandatory subject of bargaining.¹⁵⁶ Therefore, the only protected way for unions to obtain

150. A study by attorneys Matt Robbins and Leonard Page provided these examples. M. Robbins & L. Page, *Plant Shutdowns* (Feb. 14, 1978) (unpublished paper on file with the *Case Western Reserve Law Review*).

151. *United Shoe Workers v. Brooks Shoe Mfg. Co.*, 183 F. Supp. 568, 569 (E.D. Pa. 1960), *aff'd*, 298 F.2d 277 (3d Cir. 1962) ("It is agreed by the Employer that the shop or factory shall not be removed from the County of Philadelphia during the life of this Agreement.").

152. Jack Meilman, 34 Lab. Arb. 771, 773 (1960) (Gray, Arb.). There the contract provided:

A. During the term of this Agreement the Employer agrees that he shall not, without the consent of the New York Joint Board, remove or cause to be removed his present plant or plants from the city or cities in which such plant or plants are located.

B. During the term of this Agreement the Employer shall not, without the consent of the New York Joint Board, manufacture garments or cause them to be manufactured in a factory other than his present factory or factories.

153. *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 179, 292 N.Y.S. 898, 901 (Sup. Ct. 1936). See also *Centra Leather Goods Corp.*, 25 Lab. Arb. 804 (1956) (Kheel, Arb.).

154. See text accompanying notes 14-43 *supra*.

155. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

156. *Shell Oil Co.*, 77 N.L.R.B. 1306 (1948). See *THE DEVELOPING LABOR LAW* 410 (C. Morris ed. 1971).

contract language preventing unilateral management investment decisions is to insist on contract language permitting workers to strike in response.¹⁵⁷

B. *Restricting the Quo: Labor Reserves the Right to Strike Over Investment Decisions*

A second strategy for changing the content of the typical collective bargaining agreement would be to cut back the scope of labor's no-strike commitment to the extent of management's commitment to arbitrate. The Supreme Court has made it clear that the scope of an agreement to arbitrate or not to strike depends entirely on the parties.¹⁵⁸ If they undertake to submit disputes to arbitration in lieu of self-help, they "are free to make that promise as broad or narrow as they wish. . . ." ¹⁵⁹ The rights of the parties are wholly "a matter of contract."¹⁶⁰ "No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."¹⁶¹ This rhetoric is indispensable to modern American labor law. The Supreme Court cannot represent the collective bargaining agreement as being less than a contract voluntarily entered. Though at present it may be myth, that image offers workers the opportunity to control their unions, assert labor's position in the bargaining process, and take the absolute no-strike clause out of their contracts.

Assume the no-strike clause embodied in the contract reads as follows: "During the term of this Agreement, neither the Union, its officers, agents or members, nor any Employee will authorize, instigate, aid, condone, or engage in a work stoppage or strike. . . ." ¹⁶² My proposal requires only the following addition:

157. Another critical practical issue is whether *local* unions will be permitted to seek innovative language restricting investment decisions, or in the alternative, to revise the no-strike clause to permit them to strike when such decisions occur. International unions are likely to believe that either change is too critical to be left to local unions. As a consequence, local unions end up bargaining for the number of bars of soap in the shower room. In fact, a decision to shut down or relocate a particular plant has localized impact on the workers employed there. Therefore, they must insist on their right to devise preventive contract language.

158. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring).

159. *Id.* (Brennan, J., concurring).

160. 363 U.S. at 582.

161. *Gateway Coal Co. v. UMW*, 414 U.S. 368, 374 (1974).

162. *Agreement between Republic Steel Corp. and United Steelworkers*, art. 16, § 1, at 167 (1974).

“except that the Union and its members remain free to strike over management decisions which this Agreement does not require the Company to submit to arbitration.”

Suppose this additional language is in the collective bargaining agreement. It leaves the workers free to strike over investment decisions; but is that right of any use to workers when management decides to close a plant? The answer is emphatically yes, for two reasons. First, in situations where a national union is prepared to act, a management decision to stop operations in one place can be challenged by strike action at other facilities owned or operated by the company. This tactic would be ineffective only where the plant to be closed down was the company's only facility. Major national unions such as the United Electrical Workers, Rubber Workers, or Steelworkers could change these management decisions rapidly were they prepared to strike the company's other plants.

Second, aggressive strike action can be effective even if limited to the locality where management proposes to discontinue production. Where the plant contains valuable machinery¹⁶³ or an inventory of bulky products partially completed at the time of the decision,¹⁶⁴ management has capital invested in the facility it plans to abandon. By threatening to prevent the removal of the machinery or the products, labor could make the decision to shut down so expensive that management might be deterred from making it.¹⁶⁵

163. See, e.g., *Prestige: Workers Go It Alone*, AGENOR, Aug. 1976, at 3. This pamphlet describes a successful sit-in at an American-owned plant in Belgium. On November 24, 1975, representatives of the absentee management informed the workers that the plant would be shut down on January 31, 1976. On December 9, the employees learned of plans to dismantle the machinery and ship it to Great Britain. The next day they occupied the plant. On January 19, the employees decided to resume production and reincorporate as a new company. On the day production was to resume, police arrived and put seals on the machines. The workers broke the seals and used the machinery. Local authorities declined to take legal action.

164. For a description of an effective sit-in in which management had capital investments in the facility it anticipated abandoning, see Coates, *Some Problems of Factory Occupations*, 8 OUR GENERATION No. 3, pt. 1, at 13-16. Coates comments: “[S]hipbuilding is an unusual industry, in which construction is a long-term affair. Because capital was heavily committed at the moment of liquidation, the liquidator must strive to salvage what he can for the . . . creditors.” *Id.* at 14-15. See generally K. Fleet, *Crisis on the Clyde: The Struggle of the Upper Clyde Shipworkers* (December 1971) (pamphlet published by the Research Institute for Social Change (Toronto)).

165. The General Motors strike in 1937 began when management sought to remove from the Flint plant certain dies which were not produced anywhere else in the country. The key to the effectiveness of that strike was not so much the occupation of the plant as the strikers' capacity in or out of the plant to prevent the resumption of production previ-

C. Conclusion

Faced with the two proposed alternatives, management would be forced to make a choice. It could preserve the quid pro quo equation by including among decisions subject to contractual restriction and arbitration the investment decisions currently made unilaterally. Or, it could keep a free hand over investment decisions and allow labor to challenge those decisions by strike action. By requiring management to make this choice, working people will no longer be forced to confront plant closure with both hands tied behind their backs.

ously carried on only in the Flint facility. Although there is some doubt that the die issue precipitated that strike, S. FINE, SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936-1937, at 144-46 (1969), General Motors' dependence on parts produced in its occupied Flint plants was central to the strike's success. Production plummeted from a predicted 224,000 automobiles in January 1937 to the 60,000 that were actually assembled. Moreover, during the first 10 days of February 1937, production throughout the United States was a mere 151 units. *Id.* at 209, 303.