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# Vested Rights in the Runaway Shop

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# NOTES

## *Vested Rights in the Runaway Shop*

When the United States Court of Appeals for the Second Circuit rendered its decision on March 28, 1961 in *Zdanok v. Glidden Company*,<sup>1</sup> the controversial subject of the "runaway shop"<sup>2</sup> was revived.<sup>3</sup>

Three decades ago this problem was of slight importance because few plants sought to relocate.<sup>4</sup> But with the onset of the depression, the intensification of competition, and the great strides forward in unionization, certain industries in which the ratio of labor costs to the total cost of processing was high began to move their plants southward.<sup>5</sup>

In recent years an increasing number of employers have been relocating their plants. They are moving to smaller communities in the Midwest, the South, and along the Pacific Coast. The movement has been mainly from the large industrial centers of New York, Detroit, Pittsburgh, Philadelphia, the Newark-Jersey City area, and upper New York State.<sup>6</sup> The economic repercussion upon these Northern communities is evident.<sup>7</sup>

There is a basic conflict between the employer's need to be free to locate his operations to his economic advantage and labor's need for security of employment.

The primary motivation of the employer in closing his plant and moving to a new location is lower costs. Employers are attracted by the prospects of lower wages, non-union employees, and the absence of restrictive work practices.<sup>8</sup> Other reasons given by businessmen for the

1. 288 F.2d 99 (2d Cir. 1961). A divided court held that seniority rights acquired by employees under terms of a union contract became vested in the employees and survived termination of the contract.

2. This term is used in labor parlance meaning the relocating of a plant as an anti-union tactic.

3. See U.S. News & World Report, Aug. 7, 1961, p. 81.

4. Between 1929 and 1933 less than 36/100 of one percent of all industry in the United States relocated its plants. The removals which did occur were primarily in New England, the Middle Atlantic, and North Central regions. CREAMER, IS INDUSTRY DECENTRALIZING? 55, 60 (1935).

5. For a complete discussion of the problem during this period see, Note, *Legal Problems Raised by the Relocation of Industry: The Runaway Shop*, 36 COLUM. L. REV. 776 (1936). During the war years and the period immediately thereafter, there were relatively few plant relocations.

6. U.S. News & World Report, Dec. 21, 1959, p. 89.

7. The main harms to the community are that more workers are cast into the ranks of the unemployed; the purchasing power of the consumer-worker is substantially diminished; additional burdens are placed upon the local welfare agencies. The repercussions are far greater when a large plant in a relatively small community is relocated.

8. U.S. News & World Report, Aug. 7, 1961, p. 81. Some Southern states have passed right-to-work laws and have given cities, counties, and townships the right to waive taxes up to

removal of a plant are: larger factory sites, lower plant overhead, and lower transportation costs.<sup>9</sup> In addition, municipal authorities in communities with a high incidence of unemployment often will make substantial tax concessions to any company that will open a plant within its city limits.<sup>10</sup> Sometimes they will even arrange for private financing of the relocated plant.

Labor organizations, on the other hand, are motivated by two basic reasons for blocking this migration to non-union communities: first, the union wants to maintain its status as the certified bargaining representative for the particular company's employees; second, it desires to protect the job of the individual union member. Unions maintain that the relocated company leaves to fend for themselves workers who are too old to learn another trade or to secure another job. Such individuals find themselves stranded by the enterprise to which they have "dedicated their best productive years."<sup>11</sup>

This note will consider the evolution of the different theories which unions and employees have resorted to in combating the "runaway shop." There have been (1) actions in the state courts for breach of the collective bargaining agreement; (2) charges of unfair labor practices filed with the National Labor Relations Board; (3) suits in federal courts under section 301(a)<sup>12</sup> of the Taft-Hartley Act for breach of contract; and (4) actions in federal courts based upon employees' "vested rights."

Both unions and individual employees have standing in "runaway shop" situations to institute litigation in state courts or to file unfair labor practice charges with the NLRB. The right to seek relief under section 301(a) belongs exclusively to labor unions while only individual employees have standing to bring an action in the federal courts based upon a "vested rights" concept.

Commencement of such litigation has occurred before, during, and after plant relocation, depending on the nature of each particular case. Remedies obtained have been in the form of damages, injunctive relief against plant movement, and the declaration of a right to a job in the relocated plant.

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a ten-year period for industries that move South. *Cleveland Plain Dealer*, Aug. 18, 1961, p. 37, col. 4.

9. *U.S. News & World Report*, Dec. 21, 1959, p. 90.

10. *Commonweal*, Sept. 29, 1961, p. 4. Such efforts have been undertaken on the part of certain communities in Southern states. See *Saturday Evening Post*, April 9, 1960, p. 10. As an example, the town of Grenada, Mississippi, offered tax concessions to a Detroit firm if the company agreed to staff its new plant with local people. *U.S. News & World Report*, Aug. 7, 1961, p. 81.

11. *Commonweal*, Sept. 22, 1961, p. 4.

12. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958). See note 57 *infra* for the full provisions of section 301(a).

## ACTIONS IN THE STATE COURTS

Prior to the enactment of the National Labor Relations Act<sup>13</sup> unions sought relief in the state courts when an employer removed his plant in violation of the specific terms of a collective agreement. There is a scarcity of decisions, however, in this area. The leading case is *Dubinsky v. Blue Dale Dress Company*,<sup>14</sup> in which a New York court issued an injunction ordering the defendant-company to return its plant from Archbald, Pennsylvania, to New York City, and to rehire its discharged workers.<sup>15</sup> Another New York court held that a union may enjoin an employer from moving his plant to a new location when the object of the removal is to avoid the obligations of a collective agreement.<sup>16</sup> Where state courts have refused to enjoin the removal of a plant, the decisions are generally based on the equities involved in the particular case.<sup>17</sup>

There were no reported state court decisions awarding *damages* for breach of a collective agreement in a "runaway shop" situation until 1935.<sup>18</sup> Then, in *Farulla v. Ralph A. Freundlich, Inc.*,<sup>19</sup> the court in addition to granting a permanent injunction, said that "concededly the plaintiff is entitled to damages."<sup>20</sup> The court thereupon appointed a referee to ascertain the amount of damages. It did not, however, indicate what the measure of damages should be.

Since the passage of the NLRA and subsequent labor legislation, there has been a dearth of state court cases on the subject of the "runaway shop." The reasons for this are, first, that the removal of a plant for the purpose of evading obligations imposed by the NLRA is an unfair labor practice,<sup>21</sup> and second, that state courts are generally without jurisdiction to grant relief with respect to an alleged unfair labor practice

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13. 49 Stat. 449-57 (1935), 29 U.S.C. §§ 151-67 (1958).

14. 162 Misc. 177, 292 N.Y. Supp. 89 (Sup. Ct. 1936).

15. The court expanded on the rule laid down in *Farulla v. Ralph A. Freundlich, Inc.*, 155 Misc. 262, 279 N.Y. Supp. 228 (Sup. Ct. 1935), in which the court had merely threatened to order the defendant-company to return the plant from its new location.

16. *Farulla v. Ralph A. Freundlich, Inc.*, 155 Misc. 262, 279 N.Y. Supp. 228 (Sup. Ct. 1935).

17. In *Goldman v. Cohen*, 222 App. Div. 631, 227 N.Y. Supp. 311 (1928), the union was denied equitable relief enjoining the violation of an agreement when the old company went out of business and a new company was established elsewhere. See also *Berry v. Old South Engraving Co.*, 283 Mass. 441, 186 N.E. 601 (1933). *Contra*, *Goldman v. Rosenszweig*, 10 Law & Labor 207 (N.Y. Ct. 1928).

18. Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572 (1931). The one exception was when the agreement formed part of an individual contract of employment.

19. 155 Misc. 262, 279 N.Y. Supp. 228 (Sup. Ct. 1935).

20. *Id.* at 288, 279 N.Y. Supp. at 256.

21. See pp. 365-66 *infra*.

because an appropriate administrative remedy is afforded by the National Labor Relations Board.<sup>22</sup>

This area of the law was complicated, however, by the creation by the NLRB of certain jurisdictional "yardsticks" which it applied to cases involving activities prohibited or protected by the NLRA.<sup>23</sup> If these standards were not met, the Board would then refuse to hear the unfair labor practice charge. Thus all disputes in which the NLRB *had* authority but *declined* to exercise it, fell into a "no-man's land" in which neither federal nor state law could be applied.

In order to rectify this situation Congress included in the Labor-Management Reporting and Disclosure Act of 1959, section 701,<sup>24</sup> which amended section 14 of the NLRA and provided that cases which do not meet the NLRB's jurisdictional yardsticks can be determined by state courts. This eliminated the former "no-man's land" so that today it may be possible to bring suits for damages or injunctive relief in "runaway shop" situations in the state courts. As yet no such cases have been reported.

#### UNFAIR LABOR PRACTICE UNDER NLRA

Section 7<sup>25</sup> of the National Labor Relations Act gave employees the right to self-organization, to form or join a union, and to bargain collectively through their designated representatives. To assure these rights the act declared that it was an unfair labor practice under section 8(a) (1)<sup>26</sup> for an employer to interfere with, restrain, or coerce an employee in the exercise of the rights guaranteed in section 7, and similarly under section 8(a) (3),<sup>27</sup> for an employer to discriminate in regard to the hiring of employees or tenure of employment or any term or condition of employment, or to encourage or discourage membership in any labor organization. It was also an unfair labor practice under 8(a) (5)<sup>28</sup> for an employer to refuse to bargain in good faith. The act established the National Labor Relations Board, which was empowered to hold hearings and to render decisions after unfair labor practice charges were filed.<sup>29</sup>

22. *Devries v. Baumgartneis Elec. Constr. Co.*, 359 U.S. 498 (1959); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Garner v. Teamsters' Union*, 346 U.S. 485 (1955).

23. These jurisdictional yardsticks are really jurisdictional standards. The NLRB will exercise its jurisdiction when the enterprise involved does business in an amount greater than certain prescribed minimums. For a further discussion see *LABOR RELATIONS AND THE LAW* 112-13 (Woller & Aaron ed., 2d ed. 1960).

24. 73 Stat. 541, 29 U.S.C. § 164(c) (Supp. II 1960). This section is discussed in Aaron, *The Labor-Management Reporting and Disclosure Act*, 73 HARV. L. REV. 1086, 1086-98 (1960).

25. 49 Stat. 452 (1935), 29 U.S.C. § 157 (1958).

26. 49 Stat. 452 (1935), 29 U.S.C. § 158(a) (1) (1958).

27. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a) (3) (Supp. II 1960).

28. 49 Stat. 452 (1935), 29 U.S.C. § 158(a) (5) (1958).

29. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160 (1958).

Thus when confronted with "runaway shop" situations, unions turned to the NLRB, alleging violations of section 8(a)(1) and 8(a)(3). The unions have charged that threats to relocate as well as actual relocation amount to unfair labor practices in violation of the NLRA.

### *Threat to Relocate*

An employer who threatens to move his plant from one town to another if his employees become unionized is in violation of section 8(a)(1). An order to cease and desist from interference with the union's organizational activities has been the usual remedy.<sup>30</sup> Where a company uses other tactics to defeat a union's attempt to organize, such as circulating rumors among local businessmen regarding plant removal so as to create a fear of economic starvation and an atmosphere of anti-unionism, this also has been held to be an unfair labor practice.<sup>31</sup>

It is an unfair labor practice for a company owner to threaten to move his factory elsewhere unless a company-dominated union was selected to replace the incumbent union.<sup>32</sup> The Board has even held that a threat to relocate when uttered by a company supervisor to an individual employee during the course of a discussion concerning the employee's union activities was calculated to intimidate her activities on behalf of a union and was therefore an unfair labor practice.<sup>33</sup> An order directing the employer to cease and desist from future threats and to publicly announce his withdrawal of the threat is usually rendered in these situations.<sup>34</sup>

A statement indicating an intent to relocate, when made by company officials not for the purpose of injuring a union, but motivated by the company's weakened financial condition, is not an unfair labor practice.<sup>35</sup> Thus in *Lengel-Fencil Company* the Board found that since the employer's "threats" to move were motivated exclusively by the company's financial condition the unfair labor practice charge could not be upheld.<sup>36</sup> Support for this finding was found in the company's financial records.

30. *NLRB v. Nina Dye Works, Inc.*, 203 F.2d 849 (3d Cir. 1953); *NLRB v. Mayer*, 196 F.2d 286 (5th Cir. 1952); *Jasper Blackburn Prods. Corp.*, 21 N.L.R.B. 1240 (1940).

31. *Remington-Rand, Inc.*, 4 N.L.R.B. 626 (1937). See also *Lennox Shoe Co.*, 4 N.L.R.B. 372 (1937), where the owner threatened local businessmen and induced them not to extend credit to company employees unless they joined the company indorsed union.

32. *Sanco Piece Dye Works, Inc.*, 38 N.L.R.B. 690 (1942); *Ansin Shoe Mfg. Co.*, 9 N.L.R.B. 929 (1936).

33. *H. Linsk & Co.*, 62 N.L.R.B. 276 (1945). See also *Irving Air Chute Co.*, 52 N.L.R.B. 201 (1943). An employer called an employee away from work to tell him that an official of the company had said that he would move the plant before he would see the union become established.

34. *Irving Air Chute Co.*, 52 N.L.R.B. 201 (1943).

35. *Lengel-Fencil Co.*, 8 N.L.R.B. 988 (1938).

36. *Id.* at 995.

For an eight-year period prior to the filing of the unfair labor practice charge in 1938, the company annually operated at a substantial loss, except in 1934 and 1935.

In *NLRB v. Reynolds Pen Company*,<sup>37</sup> the Court of Appeals for the Seventh Circuit held that a speech to employees containing a veiled threat to move the plant if trouble continued could not sustain the Board's finding of an unfair labor practice. This result was achieved by application of the "substantial evidence" rule. This rule is generally used today as a test for determining whether an NLRB order will be enforced by a court of appeals.<sup>38</sup>

### *Actual Relocation*

In addition to threatening to move elsewhere, some companies have made their threats a reality by relocating their entire plants to other communities. It was found that some employers moved in order to avoid the necessity of dealing with the certified representatives of their employees;<sup>39</sup> others sought to evade the obligations imposed by written agreements.<sup>40</sup>

In *Rome Products Company*<sup>41</sup> the employer moved his plant in great haste from Akron to Kenton, Ohio in order to avoid dealing with a union whose selection as the certified representative of Rome's employees the employer had opposed. The NLRB found this action to be an unfair labor practice under sections 8(a)(3) and 8(a)(5) of the NLRA. There was an 8(a)(3) violation because the plant removal resulted in a discriminatory discharge of the employees. Section 8(a)(5) was violated because the removal was in effect a method of avoiding the requirement to bargain in good faith. Prior to the *Rome* case the Board had rendered a similar decision in *Schieber Millinery Company*.<sup>42</sup> Here the Board found that an employer had moved his millinery plant from St.

37. 162 F.2d 680 (7th Cir. 1947). See also *NLRB v. Lion Shoe Co.*, 97 F.2d 448 (1st Cir. 1938), where evidence was held insufficient to support the Board's finding of an unfair labor practice.

38. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Employers have even caused their factories to be shut down for a period of time in order to increase the effect of a threat to relocate. See *Jac Feinberg Hosiery Mills*, 19 N.L.R.B. 667 (1940); *Omaha Hat Corp.*, 4 N.L.R.B. 878 (1938). A related problem which is beyond the scope of this note arises when management threatens to close its plant. See, e.g., *NLRB v. Armstrong Tire & Rubber Co.*, 228 F.2d 159 (5th Cir. 1955); *NLRB v. West Coast Casket Co.*, 205 F.2d 909 (9th Cir. 1953); *Stokley v. NLRB*, 193 F.2d 736 (5th Cir. 1952).

39. *Rome Prods. Co.*, 77 N.L.R.B. 1217 (1948).

40. *Schieber Millinery Co.*, 26 N.L.R.B. 937 (1940); *Jacob H. Klotz*, 13 N.L.R.B. 746 (1939).

41. 77 N.L.R.B. 1217 (1948). The Board ordered the company to reinstate the discharged employees at the Kenton plant and to pay for the transportation expenses incurred in moving the employees and their households to the new locale.

42. 26 N.L.R.B. 937 (1940).

Louis to DeSota, Missouri, in order to evade certain contractual obligations, that of hiring union employees, and to avoid the duty of bargaining collectively with the union's representatives.

The power of the NLRB to order affirmative action, as well as to render cease and desist orders as remedies for unfair labor practices, is well settled.<sup>43</sup> In framing its remedial orders the Board is limited however by the principle of reasonableness; it may not impose penalties or exact retribution.<sup>44</sup> When a plant relocation is held to be an unfair labor practice, the NLRB will usually issue an alternative order, by which the employer will have the choice of either returning the plant to the point from which it was removed or of reinstating the employees with back wages at the new plant (paying them the reasonable expenses entailed in moving to the new site).<sup>45</sup> Sometimes the company will be ordered to pay the cost of transporting its employee's household effects as well.<sup>46</sup> The Board has never unconditionally ordered an employer found guilty of a "runaway shop" violation to return the plant to its former location. It has always issued an alternative order of the type just described.<sup>47</sup>

Instead of relocating an entire plant, employers have sometimes moved *part* of their operations from one plant to another, in order to avoid dealing with the union representing employees in those jobs. The Board has held that such activities violate sections 8(a)(1) and 8(a)(3).<sup>48</sup> Removal of the *bulk* of a company's business from one city to another has been viewed by the NLRB in the same light as the removal of the entire plant.<sup>49</sup>

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43. Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940).

44. *Id.* at 12.

45. New Madrid Mfg. Co., 104 N.L.R.B. 117 (1953); Schieber Millinery Co., 26 N.L.R.B. 937 (1940). Where the new location is within commuting distance the Board may offer the company the choice of paying for the employees' expenses in moving, or for transportation bi-weekly from the plant to their homes for visits with their families. Jacob H. Klotz, 13 N.L.R.B. 746 (1939).

46. New Madrid Mfg. Co., 104 N.L.R.B. 117 (1953).

47. Often the Board will, in addition, order the employer to bargain collectively with the union, assuming that it represents a majority of the workers at the relocated plant. Mount Hope Finishing Co., 106 N.L.R.B. 480 (1953); Fiss Corp., 43 N.L.R.B. 125 (1942), *enforced*, 136 F.2d 990 (3d Cir. 1943).

48. Winchester Electronics, Inc., 128 N.L.R.B. 1292 (1960); Treadway & Taylor, 109 N.L.R.B. 1045 (1954).

49. See Gerity Whitaker Co., 33 N.L.R.B. 393 (1941), *enforced*, 137 F.2d 198 (6th Cir. 1942), *cert. denied*, 318 U.S. 801 (1943). Employers have also been known to form new companies or to sell their businesses in an attempt to avoid complying with their statutory or contractual obligations. Note, *The Effect of Relocation or Sale of Industry Upon Labor-Management Relations*, 5 WEST. RES. L. REV. 84 (1953). The *alter ego* concept is discussed in NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).

In NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957), a partnership moved its plant eleven miles across the city of Los Angeles and formed a new company in order to avoid bargaining with a union.



*Relocation for Economic Reasons*

All changes in plant location are not unlawful. Where the relocation is based primarily upon sound financial or economic reasons there is no unfair labor practice.<sup>50</sup> Thus in *Mount Hope Finishing Company v. NLRB*,<sup>51</sup> a court of appeals held that there were sufficient economic reasons for moving a textile plant from Massachusetts to North Carolina. Among the considerations which the court relied upon were: the former plant operated at a loss; the employer had contemplated a change long before the local union began to organize its employees; other textile companies had changed localities under similar circumstances.

The law is unsettled in the situation where there are both discriminatory and economic reasons for moving. It was stated as dictum in *NLRB v. Remington Rand, Inc.*,<sup>52</sup> however, that if there are valid economic reasons for moving as well as discriminatory reasons, and the real reason is within the knowledge of the employer alone, a presumption arises that the plant was removed for a discriminatory purpose.

The NLRB has been rather reluctant to accept employers' contentions that plant relocations are necessitated primarily by economic factors. Nevertheless it has held that the movement of a plant because of high rentals and cost of operation, as well as other economic considerations, is not an unfair labor practice.<sup>53</sup> The Board seems to have established a good faith test in these plant removal situations. The employer who is attempting to show that the relocation was lawful must establish facts to prove that the act of removal was made in good faith and without any intent to evade those statutory duties owed to the union or its members.<sup>54</sup> Although the NLRB has never considered the question, it seems likely that the Board would view a plant removal in derogation of an agreement as an unfair labor practice, regardless of the fact that it was based upon

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50. *Mount Hope Finishing Co. v. NLRB*, 211 F.2d 365 (4th Cir. 1954); *Trenton Garment Co.*, 4 N.L.R.B. 1186 (1938). Similarly where a *change or discontinuance* of business operations is dictated by sound financial or economic reasons, the courts have refused to enforce a finding that section 8(a)(3) has been violated. *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); *NLRB v. R. C. Mahon Co.*, 269 F.2d 44 (6th Cir. 1959); *NLRB v. Houston Chronicle Publishing Co.*, 211 F.2d 848 (5th Cir. 1954).

51. 211 F.2d 365 (4th Cir. 1954). The NLRB had petitioned the federal court for enforcement of its orders, as it is empowered to do under section 10(e) of the National Labor Relations Act.

52. 94 F.2d 862 (2d Cir. 1938), *cert. denied*, 304 U.S. 576 (1938).

53. *Brown Truck & Trailer Co., Inc.*, 106 N.L.R.B. 999 (1953); *Trenton Garment Co.*, 4 N.L.R.B. 1186 (1938).

54. See *Kipbea Baking Co.*, 1961 CCH N.L.R.B. ¶ 9939; Administrative Decision of NLRB General Counsel, Case No. K-348 (1956). In *Kipbea* the Board based its decision on the fact that the union and its members had more than adequate notice of the removal of the business. There were also economic and personal financial reasons for changing the locale.

sound economic reasons.<sup>55</sup> There is support for this opinion in the Board's decision in the *Schieber* case.

### SUITS UNDER SECTION 301(a) OF THE TAFT-HARTLEY ACT

Although labor organizations and employees still file unfair labor practice charges with the NLRB in "runaway shop" situations,<sup>56</sup> the unions have more often sought relief under a different theory in recent years. Actions have been brought in the federal district courts for breach of the collective bargaining agreement under section 301(a) of the Taft-Hartley Act.<sup>57</sup> Unions have chosen to exercise this statutory right rather than file an unfair labor practice charge with the NLRB, apparently for the following reasons: damages and injunctive relief are available through 301(a) suits while no such relief can be granted by the NLRB; the defense of economic motivation is not available in breach of contract suits.

As in all breach of contract suits the courts have been required to consider the right of the complaining party to maintain the suit under section 301(a). It is a general rule that the Taft-Hartley Act permits unions alone to sue to enforce union rights. They may not sue on behalf of their members where no union right is involved.<sup>58</sup> Thus neither employees nor union members have the *right* to sue for breach of a collective agreement under section 301(a).<sup>59</sup> Joinder of a union's and

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55. A second question arises, whether a company's failure to submit the subject of plant removal to collective bargaining is a refusal to bargain with respect to rates of pay, hours, and working conditions and therefore in violation of 8(a)(5). The Court of Appeals for the Second Circuit answered this question in *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961). It held that the decision to relocate is not a subject of collective bargaining, but once the decision is made the company is required to give notice to the union and to afford the union an opportunity to bargain as to the treatment due to the affected employees. If no such notice is given, then the company may be found guilty of an unfair labor practice under section 8(a)(5). Apparently, the Board has never considered the problem where a company refuses to negotiate on the subject of employee treatment after notice of plant removal has been given.

56. *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *Kipbea Baking Co.*, 1961 CCH N.L.R.B. ¶ 9939.

57. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958). This section states: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in the Act, 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 regard to the citizenship of the parties."

58. *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955).

59. *Electrical Workers, Local 506 v. General Elec. Co.*, 231 F.2d 259 (D.C. Cir. 1956). See *Local Lodge 2040 v. Serval, Inc.*, 268 F.2d 692, 696 (1959), *cert. denied*, 361 U.S. 884 (1959). Here an action was brought by two unions and a large number of defendant-company's employees for a declaratory judgment. The unions invoked the district court's jurisdiction under section 301(a). The employees asserted jurisdiction based upon diversity of citizenship. The district court, relying on the *Westinghouse* case, dismissed the complaint as to the unions for want of jurisdiction. See note 58 *supra*. It granted summary judgment for the defendant as to the employees' complaint.

individual employees' causes of action where the employees' claims constitute separate non-federal causes of action is not permitted.<sup>60</sup>

There is also a question of whether the federal district courts have original jurisdiction to hear "runaway shop" cases brought under section 301(a). The Connecticut District Court, feeling itself bound by the Supreme Court's decision in *Weber v. Anheuser-Busch, Inc.*,<sup>61</sup> declined jurisdiction in a suit under section 301(a) on the ground that exclusive primary jurisdiction is in the NLRB.<sup>62</sup> This court's conclusion has no legal support since the Supreme Court had merely stated in *Weber* that the NLRB has jurisdiction to the exclusion of a state court when the facts reasonably bring the controversy within that section of the NLRA prohibiting unfair labor practices. It never held that the Board had original jurisdiction in "runaway shop" situations to the exclusion of the federal district courts. Since other federal district courts<sup>63</sup> have taken jurisdiction in suits for runaway shops under section 301(a), it appears that this question is now resolved.<sup>64</sup>

Upon analysis of the decisions rendered there is a strong indication that the question of whether the removal of a plant constitutes a breach of contract depends, as in the state courts, upon the *specific* language of the collective bargaining agreement involved. The leading case is *United Shoe Workers of America v. Brooks Shoe Manufacturing Company*.<sup>65</sup> Here the collective bargaining agreement entered into by the parties contained a provision forbidding the removal of the manufacturing operation from Philadelphia for any reason during the life of the contract. Before the termination date, the company moved its plant from Philadelphia to Hanover, Pennsylvania. The court awarded damages to the plaintiff-union, stating that there was an express violation of the existing agreement by the company.

In *United Automobile Workers v. Crescent Brass & Pin Company*,<sup>66</sup> the defendant had decided upon a plan to move its Detroit plant to Americus, Georgia. Thus a federal court was confronted with a question

60. *United Shoe Workers of America v. Brooks Shoe Co.*, 191 F. Supp. 288 (E.D. Pa. 1960).

61. 348 U.S. 593 (1955).

62. *Auto Workers, Local 586 v. Federal Pac. Elec. Co.*, 28 CCH Lab. Cas. ¶ 69274 (D. Conn. 1955). There is interesting dictum in this decision to the effect that seniority and pension rights are protected by the contract, but are based on continuation of plant operation and employment of the workers. See contrary position, p. 374 *infra*.

63. Jurisdiction has been invoked in *United Shoe Workers of America v. Brooks Shoe Co.*, 187 F. Supp. 509 (E.D. Pa. 1960); *Automobile Workers v. Crescent Brass & Pin Co.*, 41 CCH Lab. Cas. ¶ 16530 (E.D. Mich. 1960); *Carpenters Union v. International Paper Co.*, 40 CCH Lab. Cas. ¶ 66777 (D. Ore. 1960).

64. In *Textile Workers v. Arista Mills Co.*, 193 F.2d 529 (4th Cir. 1951), the court said that there is no reason why union rights may not be enforced under section 301 even though the breach of contract may also constitute an unfair labor practice.

65. 187 F. Supp. 509 (E.D. Pa. 1960).

66. 41 CCH Lab. Cas. ¶ 16530 (E.D. Mich. 1960).

different from that raised in *Brooks Shoe*. In determining whether a mere decision to move constituted a breach of the existing contract, the court looked to the specific language of the contract involved. The agreement contained a clause<sup>67</sup> which anticipated a plant removal. The company was willing to offer its employees the opportunity to transfer to the relocated plant, but it was unwilling to continue the contract in effect in Georgia, in direct violation of a contract provision. The federal district court issued a preliminary injunction stating that the clause in the collective bargaining agreement gave the unions the clear right to have the contract in effect should the company move to Georgia.<sup>68</sup> The court reasoned that the rule announced in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*<sup>69</sup> applied here. This rule permits unions to sue under section 301(a) to enforce rights which are theirs as unions under a collective bargaining agreement.

In the absence of a *specific* contractual provision regarding plant removal, this writer is uncertain as to what decisions the federal courts will reach in future breach of contract suits brought under 301(a). The case law indicates that the courts have not developed as yet any particular standards for deciding such litigation.

It has been held that an employer can not terminate unilaterally a collective bargaining agreement by moving his plant from East Orange to Pennsauken, New Jersey.<sup>70</sup> Here the company argued that "a move on its part brought the contract with the plaintiff-union to an end"<sup>71</sup> since the contract applied only to the activities of the employer in East Orange, New Jersey. This argument was rejected by the court even though there was no provision regarding plant removal in the contract.<sup>72</sup> The contract extended beyond the company's activities at East Orange.

When the contractual language does not specify any provisions regarding plant relocation, a court, in determining the legality of a plant removal, will usually look to the facts in each case and particularly to the employer's motivation for moving. But such a determination may be unnecessary because the union has bargained away its right to object to the plant relocation. For example, in *Carpenters, Local 2524 v. Inter-*

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67. Article XVI, section 11 stated: "In event that plant and/or any of its operations are moved, or the name is changed by any of the owners, this contract shall continue in effect until its termination date and all employees shall be offered an opportunity to transfer also . . ."

68. The contract also contained a union shop provision. The court said that this provision in the agreement would not be in effect should the company move to Georgia because Georgia prohibits the union shop.

69. 348 U.S. 437 (1955).

70. *Metal Polishers, Local 44 v. Viking Equip. Co.*, 278 F.2d 142 (3rd Cir. 1960).

71. *Ibid.*

72. The district court had accepted the company's argument and denied the injunction which the union had sought.

*national Paper Company*<sup>73</sup> the union and the company entered into an agreement *separate* from the collective bargaining agreement. The parties recognized in this separate agreement that: (1) the plant would cease operations at some future unspecified date; (2) the employer regarded the existing collective bargaining agreement as not applicable at the new plant location; and (3) these facts had been known to the union for more than one year. The court granted summary judgment to the employer in this suit for breach of contract.

#### *Remedies Under Section 301(a)*

The Supreme Court concluded in *Textile Workers of America v. Lincoln Mills of Alabama*<sup>74</sup> that in suits brought under section 301(a) the substantive law to be applied is federal law, which the courts must fashion in accordance with the policy of our national labor laws.<sup>75</sup> The Court stated that the lower federal courts must look at the policy of this legislation and fashion a remedy which will effectuate that policy.<sup>76</sup>

In almost every "runaway shop" suit brought under section 301(a) the union has sought damages and injunctive relief. This was the prayer in the *Brooks Shoe*<sup>77</sup> case, but the remedy devised was a rather unusual one. The federal district court first considered the remedies which the NLRB has used in "runaway shop" situations.<sup>78</sup> The court found that it would be an unwarranted hardship to order the company to return to Philadelphia and that to order the company to offer jobs in Hanover with transportation expenses would be impractical. Thereupon the court projected into the future the *status quo* of the parties as they were at the time of the breach. It determined what the probable loss in union dues would be, from the time of the breach, for a period of twenty years. This sum was then awarded to the union as compensatory damages. The court also stated that since section 301(a) neither provided for nor prohibited the imposition of punitive damages, it would award them to the union in the amount of \$50,000. In discussing these punitive damages, the court reasoned that the company had knowingly and willfully violated the national labor policy which had been fashioned by Congress and been applied by the NLRB.<sup>79</sup> Such relief in effect punished the company for

73. 40 CCH Lab. Cas. ¶ 66777 (D. Ore. 1960).

74. 353 U.S. 448 (1957).

75. *Id.* at 456.

76. *Ibid.*

77. *United Shoe Workers v. Brooks Shoe Mfg. Co.*, 187 F. Supp. 509 (E.D. Pa. 1960).

78. See p. 366 *supra*.

79. The district court admitted that the issue of punitive damages had not been raised or ruled on in any case brought under section 301(a). But it said that punitive damages had been awarded under a similar provision (section 303) of the act. The case referred to was *United Mine Workers of America v. Meadow Creek Coal Co.*, 263 F.2d 56 (6th Cir. 1959), *cert. denied*, 359 U.S. 1013 (1959).

its actions, but the discharged employees received no direct benefit from this award. The damages were awarded to the union alone.

In the situation where an employer decides to move his plant and repudiate a collective bargaining agreement in express violation of the contract's provisions, a preliminary injunction has been granted restraining the employer from refusing to keep the contract in effect until its expiration date.<sup>80</sup> It has been reasoned that in such instances the granting of the injunction will cause the employer little harm, while there would be irreparable injury to the plaintiff if it were not issued.

Recent developments in this area may well change the type of remedy fashioned by the courts in "runaway shop" suits brought under section 301(a).

### ACTIONS BASED UPON THE VESTED RIGHTS THEORY

The federal courts have ordered employers to pay damages to unions for breach of collective bargaining agreements when plant removal was specifically prohibited therein. And an employer has been enjoined from unilaterally terminating an agreement after the relocation of his plant, but before the contract's termination date. But the most grievous blow which a court has dealt to an employer in a "runaway shop" situation is the vested rights doctrine which was recently announced in the case of *Zdanok v. Glidden Company*.<sup>81</sup> This appears to be a landmark decision. The question here was whether employees' seniority rights *survived* both the life of the collective bargaining agreement and the change in the physical location of the plant. This question was answered in the negative by the federal district court,<sup>82</sup> but that decision was reversed by the United States Court of Appeals for the Second Circuit.<sup>83</sup>

The Glidden Company, Durkee Fine Foods Division, had operated a plant at Elmhurst, New York for approximately eighteen years. Local 852, of which plaintiffs were members, had been a party to collective bargaining agreements with Glidden since 1949. The last agreement was to expire on November 30, 1957. In May, 1957 the company notified the union that its operations would be discontinued "in several months." It then began to reduce production at its Elmhurst plant and to remove equipment to the new plant in Bethlehem, Pennsylvania. In compliance

80. *Automobile Workers v. Crescent Brass & Pin Co.*, 41 CCH Lab. Cas. ¶ 16530 (E.D. Mich. 1960).

81. 288 F.2d 99 (2d Cir. 1961).

82. *Zdanok v. Glidden Co.*, 185 F. Supp. 441 (S.D.N.Y. 1960).

83. *Zdanok v. Glidden Co.*, 288 F.2d 99 (2d Cir. 1961). The petition for writ of certiorari was denied by the Supreme Court in all respects except on one question: Whether the participation of a United States Court of Claims Judge vitiates the judgment of the United States Court of Appeals? See 30 U.S.L. WEEK 3112 (Oct. 10, 1961).

with the contract terms, Glidden notified the union on September 16 that the contract would not be renewed upon its expiration date.

Upon termination of the agreement the company discharged its employees. It did not offer the plaintiffs continued employment at its new plant with retention of the seniority rights acquired at Elmhurst, but it did offer to receive applications at the Bethlehem plant from former Elmhurst employees. In 1958 certain former employees sued in a New York state court to recover damages for the alleged breach of contract.<sup>84</sup> The company petitioned for removal to the federal district court upon a diversity of citizenship ground. Removal was granted. It should be noted that the district court's power to proceed under section 301(a) was *not* invoked<sup>85</sup> and the plaintiffs' standing to sue was not in issue.<sup>86</sup>

#### *Argument of Parties*

The employees conceded that there was no express provision prohibiting plant removal at the termination of the agreement. But they contended that there was an *implied* condition of the bargain between the union and the company that seniority rights created by the contract would survive the termination date. The employees maintained that the contract provided that in cases of layoffs, the seniority of employees with more than five years service was not to terminate until there was a three-year continual layoff. They argued that the termination of employment was in effect a layoff due to curtailment of production, and claimed that their accrued three-year seniority rights entitled them to resume work when operations commenced at Bethlehem. To meet its obligations, the union requested that the Glidden Company be required to offer the plaintiffs employment at Bethlehem to which seniority status at Elmhurst would attach.<sup>87</sup>

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84. Prior to the suit in the state court, the company had made a motion in the Supreme Court of New York, Queens County, to stay arbitration proceedings sought by the union. The company argued that the disputes were not arbitrable under the arbitration clause of the collective bargaining agreement. The court granted the motion saying, "No provision was made in the collective agreement relating to the continuance or discontinuance of operations at Elmhurst; for the continuance of employment of the employees covered by said agreement for any period of time other than the expiration date thereof, nor requiring the company to offer to each employee continued employment with full seniority in event of discontinuance." Such union disputes are referable to arbitration under a clause which requires arbitration only when the "specific terms" of the collective agreement are involved. *Matter of General Warehousemen's Union*, 10 Misc. 2d 700, 705, 172 N.Y.S.2d 678, 683 (Sup. Ct. 1958).

The question of *res judicata* was raised by the Glidden Company in the district court and in the court of appeals. The appellate court denied the company's contention. *Zdanok v. Glidden Co.*, 288 F.2d 99, 101 (2d Cir. 1961).

85. *Zdanok v. Glidden Co.*, 185 F. Supp. 441, 442 (S.D.N.Y. 1960).

86. The district court relied on *Local Lodge 2040 v. Servel, Inc.*, 268 F.2d 692, 696 (7th Cir. 1959), *cert. denied*, 361 U.S. 884 (1961), in stating that the plaintiffs had standing as beneficiaries of a collective agreement to enforce provisions made for their benefit. The court of appeals was in agreement but relied upon *Parker v. Borock*, 5 N.Y.2d 156, 156 N.E.2d 297 (1959).

87. *Zdanok v. Glidden Co.*, 185 F. Supp. 441, 443-44 (S.D.N.Y. 1960).

The company, on the other hand, argued that no implied understanding concerning survival of seniority rights could be drawn from the terms of the agreement or prior relationship. The implication that such rights were designed to outlive the life of the plant and the agreement were without foundation. They ceased upon cessation of operations and lawful termination of the agreement.<sup>88</sup>

The critical issue before the district court was whether the employees' rights attached beyond the Elmhurst plant. The court of appeals disagreed with the district court's negative answer.<sup>89</sup> In so doing, the court gave a very liberal interpretation to the preamble of the collective bargaining agreement. The preamble stated that the contract was made by the company on behalf of its plant facilities "located at Corona Avenue and 94th St., Elmhurst, New York." By its "rational construction" of the contract the court held that "the statement of location was nothing more than a reference to the existing situation and had none of the vital significance which the defendants would attach to it."<sup>90</sup> The fact that the plant was moved to a city in another state did not seem decisive to this court.<sup>91</sup>

The court's "rational" interpretation of the collective bargaining agreement was made without support from any semblance of authority. One might question how many courts in interpreting collective bargaining agreements would state, "Contracts must, in all fairness, be construed, *ut res magis valeat quam pereat*."<sup>92</sup>

The crux of this decision lies in the court's discussion of employees' rights. The court reiterated the fact that at the time of discharge those employees who had reached the age of sixty-five and who qualified under the contract had been placed on the company's retired list and received retirement pay. Similarly, those employees with fifteen years service, who had reached the age of forty-five at the time of discharge, were told by the company that they had vested rights to retirement benefits and would begin to receive them when they reached sixty-five. The court reasoned that these rights, although they were solely dependent upon the agreement, had been treated as "vested rights" and honored by the company. These rights had been earned by compliance with the contract. By the same token, the court decided that the employees had "'earned' their valuable unemployment insurance, and their rights in it were

88. *Id.* at 444.

89. *Id.* at 447. The district court said that where no relevant limitation of the employer's freedom of action is found in the agreement or from prior conduct, no policy of New York law or national labor laws requires the employer to preserve for its employees seniority status acquired under an expired agreement covering a closed plant.

90. *Zdanok v. Glidden Co.*, 288 F.2d 99, 104 (2d Cir. 1961).

91. *Ibid.*

92. *Ibid.* "That the thing may rather have effect than be destroyed."



'vested' and could not be unilaterally annulled."<sup>93</sup> Since the court adopted this viewpoint, it was logical for it to hold by analogy that the discharged employees were entitled to be employed at the Bethlehem plant with the seniority and re-employment rights they had acquired at the Elmhurst plant.<sup>94</sup>

The refusal by Glidden to recognize that plaintiffs were entitled to be employed at the Bethlehem plant was a breach of contract. Therefore, the court said that plaintiffs could recover the damages which the breach had caused them.<sup>95</sup> The court did not consider whether the plant relocation was based upon sound economic reasons, although it did mention the fact that the Bethlehem plant had more modern and efficient facilities. Apparently the court felt that this factor could not be a valid defense to a breach of contract action.

The rule promulgated in *Glidden* may, at first glance, be contradictory to certain basic concepts of contract law. A closer study of collective bargaining agreements would reveal that (1) parties to an agreement contemplate a subsisting contractual relationship of indefinite duration with regular renegotiations, and that (2) it is expected that the employment relations will continue beyond the contract's termination date. Based upon this reasoning it has been held that certain rights arising under an agreement including rights to vacation pay and severance pay survive the termination of the agreement and are enforceable.<sup>96</sup> The *Glidden* decision becomes more understandable when viewed as a situation analogous to one involving vacation and severance pay rights. Nevertheless, the case represents a bold departure from the rationale of the prior "runaway shop" decisions, and as such, will cause employers increased anxiety.

### CONCLUSION

What the impact of the *Glidden* decision will be upon companies that want to relocate is somewhat uncertain at this time. At least one district court has adopted without reservation the "vested rights" concept promulgated in the *Glidden* case. In *Oddie v. Ross Gear and Tool Company*,<sup>97</sup> plaintiff-employees brought an action on behalf of themselves, and their fellow employees for a declaration of rights, temporary injunctive relief, and damages.<sup>98</sup> At the time of the commencement of litigation

93. *Id.* at 103. (Emphasis added.)

94. *Id.* at 104.

95. Chief Judge Lumbard dissented. *Id.* at 105. He would have affirmed Judge Palmieri's decision in the district court.

96. For a further discussion of this point, see 61 COLUM. L. REV. 1363, 1364 (1961).

97. 195 F. Supp. 826 (E.D. Mich. 1961).

98. Apparently the suit was brought under the Federal Declaratory Judgment Act. 62 Stat. 964 (1948), as amended, 28 U.S.C. § 2201 (1958).

the company was planning to move its plant from Detroit to Lebanon, Tennessee *prior to* the termination of the collective bargaining agreement.<sup>99</sup> The agreement contained provisions regarding seniority, as did the *Glidden* contract (and as does almost every collective bargaining agreement). The court actually expanded on the *Glidden* case, *treating its holding as a general rule* despite the fact that the *Glidden* decision had been based upon a particular agreement.<sup>100</sup> The court reached the following conclusions:

[T]he collective bargaining agreement grants the employees certain benefits and rights that become "vested" in the sense that they cannot be unilaterally denied . . . . [T]hese rights extend beyond the time limitations of the collective bargaining agreement . . . [and] apply to a "plant" regardless of the physical location . . . . [D]efendant has an obligation to rehire on the basis of seniority those employees laid off . . . when that plant's operations are removed . . . .<sup>101</sup>

Whether other federal district courts will adhere to the reasoning of the Second Circuit in *Glidden* is purely a matter of conjecture. One factor is certain, the rank and file union membership considers the inclusion of seniority clauses in collective bargaining agreements to be of primary importance.<sup>102</sup> It is unlikely that any union will ever bargain away its members' basic seniority rights. And since the *Glidden* and *Ross* cases have viewed seniority as a "vested right," these decisions may have a substantial effect upon employers who want to relocate.

Besides being concerned with the "vested rights" concept, the employer who wishes to relocate must also be wary of the fact that lawsuits may still be brought under section 301(a) for damages and injunctive relief, and that unfair labor practice charges may continue to be filed under the NLRA. What then can a company do when it wants to move? Unless the *Glidden* decision is overruled, or the lower federal courts refuse to abide by it, there appears to be only one recourse left for employers. Once a decision to relocate has been reached management will be required to exercise careful advance planning.<sup>103</sup> It will have to

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99. The expiration date of the collective bargaining agreement was October 1, 1961. On May 5 the company announced its decision to move the plant to Lebanon, Tennessee, beginning July 1, 1961. The company said that all seniority rights were to be terminated on September 2, 1961, the date the plant was to be closed. 195 F. Supp. at 827-28.

100. The *Glidden* case concerned a suit for damages filed after relocation of the plant. In the instant case the employees' rights were determined before the plant was moved. The *Glidden* case held that damages were recoverable for the company's failure to recognize its employees' seniority rights, while in the present case the court held that it would take the necessary action should the requests made by the plaintiffs not be dispositive under the Federal Declaratory Judgment Act. *Id.* at 831.

101. 195 F. Supp. 826, 831 (E.D. Mich. 1961).

102. LABOR RELATIONS AND THE LAW 604 (Wollet & Aaron ed., 2 ed. 1960).

103. For a discussion of the steps which a company should take when relocating, see Rodericks, *Advance Planning for Plant Relocation*, 80 MO. L. REV. 376 (1958).