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Michael Frenkel

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## The Runaway Shop

Michael Frenkel\*

ONE OF THE MOST DIFFICULT PROBLEMS in labor law is that of plant removal, better known as the "runaway shop."<sup>1</sup> Here the applicable law is changing and uncertain,<sup>2</sup> yet the advisor must be prepared to answer vital questions.

Certainly, one of the most drastic economic weapons in managements' arsenal in battles with labor unions is the runaway shop.<sup>3</sup> This is the device whereby an employer either prevents unionization, or escapes bargaining with an established union, by ceasing operations at his original location and relocating in another, usually distant community.<sup>4</sup> The purpose of this article is to outline the matters which must be looked at when there is a plant removal problem, and to state the applicable legal doctrines.

### Industrial Migration

Industry in the United States is increasingly on the go. The trend has been strongest in those enterprises where the ratio of labor costs to the total cost of processing is high. In New York, the International Ladies' Garment Workers' Union provided a so called "5 cent fare clause" in their contracts as early as the 1930's. This 5 cent fare clause made it illegal for any employer under contract with the union to move his plant outside the 5 cent fare zone in New York City. This illustration gives some indication of how old this problem is.<sup>5</sup>

It is relatively recently that hard goods manufacturers have begun to take a leaf from the soft goods manufacturers' book.

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<sup>1</sup> 2 CCH Lab. L. Rep. 3795 (1961): "Removal of an existing business operation to another locality or a threat of removal which may interfere with the free exercise of employees' rights. As a manifestation of the economic power of the employer over his employees, the threatened or actual moving of plant locations is a violation of the NLRA, if motivated by a desire to hinder union or employee activity, Sec. 8(a)(1)." This tactic is known in labor parlance as the "runaway shop."

<sup>2</sup> Glushien, *Plant Removals and Related Problems*. 13 Lab. L. J. 914 (1962).

<sup>3</sup> *Recent Decisions*, 41 Colum. L. Rev. 329 (1941).

<sup>4</sup> 2 CCH Lab. L. Rep. 4090 (1961).

<sup>5</sup> *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N. Y. S. 898 (Sup. Ct. N. Y. County, 1936).

Keener competition and the blandishments of new communities seeking industries have created a new problem for trade unionism in the durable goods industries.<sup>6</sup>

Labor unions 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>7</sup>

What then are the problems to be considered? What does the would-be plant mover have to worry about?

The problems can be divided into two principal categories: contract problems, and the NLRA problems.<sup>8</sup>

### Contract Problems

Any problems dealing with contracts depend on whether there is (or has been) a collective agreement, and what it provides. Where we have a non-union plant and there is no agreement, obviously there is nothing to be concerned about in the contract area, whatever the NLRB problems may be. When there is a collective agreement, the contract problems may be serious.

The terms contained in the particular collective agreement are, of course, all important. Once in a while, an agreement may expressly permit plant removal. On the other hand, some collective agreements, especially in the soft goods industries, directly forbid or regulate plant removal (and subcontracting) during the life of the agreement. The needle trades, as has been mentioned, have had such clauses for decades.<sup>9</sup>

Where non-removal provisions are contained in the agreement, the risks involved in a violation can be great. The relief

<sup>6</sup> Gomberg, *Union contracts*, 40 *Taxes* 153-5 (March, 1962).

<sup>7</sup> Schneider, *Vested Rights in the Runaway Shop*, 13 *W. Res. L. Rev.* 360 (1962).

<sup>8</sup> (Wagner Act), 49 Stat. 449 (1935) as amended by 61 Stat., 136 (1947), and 73 Stat. 519, 29 U. S. C. Sec. 151-168 (1959).

<sup>9</sup> *Dubinsky v. Blue Dale Dress Co.*, *supra* note 5.

awarded may include large damages,<sup>10</sup> as well as a direction to return to the original location.<sup>11</sup> Such relief may come from an arbitrator,<sup>12</sup> or from the court,<sup>13</sup> depending on the terms of the agreement.<sup>14</sup>

Without a contractual limitation on management's right to choose its plant sites and to determine the need for layoffs, a plant closing and the transfer of operations from one state to another cannot be considered a breach of contract.<sup>15</sup> Where a contract stated that the agreement would continue in effect if operations were moved, a United States District Court enjoined the company from repudiating the contract upon completion of a proposed transfer of operations from Michigan to Georgia.<sup>16</sup>

In another Federal District Court,<sup>17</sup> in a suit by the union under Section 301,<sup>18</sup> for breach of contract, the court upheld the union's position that the company's removal from Philadelphia to Hanover, Pennsylvania, was a violation of a non-removal provision.<sup>19</sup>

<sup>10</sup> Local 149, Boot and Shoe Workers Union v. Faith Shoe Co., 201 F. Supp. 234 (M. D. Pa., 1962). Award of over \$116,000 for removal from Wilkes-Barre to Oil City, Pa.

<sup>11</sup> Meilman, 34 L. A. R. (L. A.) 771 (1960), Company ordered to move back from Miss., to N. Y. C., and to pay damages of over \$200,000. Address-O-Mat, Inc., 36 L. A. 1074 (1961), Company ordered to move back from Yonkers to N. Y. C., with reinstatement to workers.

<sup>12</sup> Sidele Fashions, Inc., 36 L. A. 1364 (1961), Company given option by an arbitrator of returning from South Carolina to Philadelphia, or increasing his damage payments already awarded by the amount of over \$350,000 including union dues for over 20 years.

<sup>13</sup> 61 Stat. 156 (1947), 29 U. S. C., sec. 185 (a) (1958), sec. 301 (a), provides: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court in the United States having jurisdiction of the parties without respect to the amount in controversy or without respect to citizenship of the parties.

<sup>14</sup> Cf., Gregory, Labor and the Law, Collective Agreements and Arbitration, 443-96 (2d ed. 1958).

<sup>15</sup> Auto Workers v. Federal Pacific Co., (D. C. Conn., 1955), 36 Lab. Rel. Ref. Man. 2357, (LRRM).

<sup>16</sup> Auto Workers v. Crescent Brass & Pin Co., (D. C. E. D. Mich., 1960), 46 LRRM 2975.

<sup>17</sup> Local 127, Shoe Workers v. Brooks Shoe Mfg. Co., 183 F. Supp. 588, 187 F. Supp. 509, (D. C. E. D. Pa., 1960), 46 LRRM 3003.

<sup>18</sup> 61 Stat. 156 (1947), 29 U. S. C. sec. 185 (a) (1958), *supra* note 13.

<sup>19</sup> In this instance, the court did not direct Brooks Shoe Mfg. Co. to return to Philadelphia but awarded compensatory damages which included union dues for 20 years in the future, a total of \$28,011.00, and also punitive damages of \$50,000. On appeal, the Court of Appeals, by an evenly divided 4-4, affirmed the compensatory damages including the 20 years dues projection, but by a 5-3 vote reversed the \$50,000 addition, holding that Sec. 301 does not contemplate the award of punitive damages. 298 F. 2d 277 (CA 3, 1962), 49 LRRM 2346.

In the *Lincoln Mills* case,<sup>20</sup> the Supreme Court directed the judges of the Federal District Courts to utilize their judicial inventiveness, unencumbered by traditional common law doctrines, in favoring a body of federal law to remedy breaches of collective bargaining contracts in suits under Section 301.<sup>21</sup> Pursuant to such a sweeping directive, the courts might make more liberal use of the injunction in preventing runaway shops.<sup>22</sup>

In the past year or two, a number of arbitration awards have granted heavy damages and other relief for violation of a non-removal provision.<sup>23</sup> These cases point up the great danger of moving a plant during the life of an agreement which forbids, or may be construed to forbid, removal. This last phrase "construed to forbid" is used advisedly. Though a contract may not in express terms forbid removal, yet a court or an arbitrator might find from other provisions in the agreement—such as the recognition clause, the seniority clause, the union shop provision or some other clause—that there is an implied prohibition in the agreement against removal. Such a finding could bring with it the dire consequences of back pay and a move-back order. A striking example is *Selb Manufacturing Company v. IAM District No. 9*.<sup>24</sup>

The courts have come a long way from their narrow views of yesteryear, when the Massachusetts court thought so little of a

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<sup>20</sup> *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 77 S. Ct. 912 (1957).

<sup>21</sup> 61 Stat. 156 (1947), 29 U. S. C., sec. 185 (a), (1958), *supra* note 13.

<sup>22</sup> *Milk Drivers AFL v. Gillespie Milk Prods. Corp.*, 203 F. 2d 650 (CA 6, 1953), granted injunction where employer refused to abide by arbitrator's award. *Food Handlers, Local 425 v. Pluss Poultry, Inc.*, 158 F. Supp. 650 (W. D. Ark. 1958), granted injunction to enjoin employer's breach of collective bargaining contract. *UAW, Local 408 v. Crescent Brass & Pin Co.*, *supra* note 16, application for a temporary injunction enjoining employer from removing his plant denied because terms of contract taken as a whole gave employer right to determine where to locate.

<sup>23</sup> For example, *Local 149, Boot and Shoe Workers Union v. Faith Shoe Co.*, *supra* note 10.

<sup>24</sup> 50 LRRM 2671 (CA 8, 1962). In this case, the employer had laid off his St. Louis employees and shipped the machinery and equipment to its subsidiary plants in Arkansas and Colorado. The applicability of the contract clause was by no means evident, for it did not speak of removal but merely forbade the employer to "sub-contract to any other company." Nevertheless, an arbitration panel, finding in favor of the union, directed return of all work to St. Louis, with reinstatement and back pay to all St. Louis employees laid off since the move. The court, recognizing that the "case is one of much importance to the (employer)," and that the coverage of the clause is "debatable," felt constrained nevertheless to enforce the award under the teachings of the famous Steelworkers trilogy. The workers in the Selb case will be entitled to their jobs and almost two years of back pay.

“no relocation clause” in a contract, that an employer was permitted to escape his obligation under it by merely reincorporating.<sup>25</sup> The court reasoned that, since corporations are distinct legal entities, the new corporation was not bound by a contract the union had made with the old corporation, despite the fact that the new entity was merely the alter ego of the old.<sup>26</sup>

Today, employers often still seek to conceal the existence of a runaway shop through reincorporation.<sup>27</sup> When accused of instituting a runaway shop, the corporation’s defense is that there is a distinction between the corporate entities at the old and new locations.<sup>28</sup> If this defense is to fail, the old and new corporations must be recognized as a single entity.<sup>29</sup> This, the NLRB has done with court approval<sup>30</sup> by disregarding the corporate fiction in order to reach the real party in interest.<sup>31</sup> It has disposed of the employer’s argument by holding that different corporate entities cannot be used to frustrate the purpose of the act.<sup>32</sup>

Up to this point, we have discussed the risks which a firm takes if it moves during the contract period. What happens if it

<sup>25</sup> *Berry v. Old South Engraving Co.*, 283 Mass. 441, 186 N. E. 601 (1933).

<sup>26</sup> *Ibid.* The Court, rejecting the union’s request that the corporate veil be pierced, held that the employer’s motive for reincorporating was immaterial.

<sup>27</sup> Under a more realistic view of the situation, employers have not been permitted to escape their obligations to a union by reincorporating. *NLRB v. E. C. Brown Co.*, 184 F. 2d 829 (CA 2, 1950).

<sup>28</sup> *Rome Products Co.*, 77 NLRB 1217 (1948). *Taulane, The National Labor Relations Board’s Pursuit of the Runaway Shop*, 7 *Villa. L. Rev.* 454 (1962).

<sup>29</sup> *Permissibility of Lockouts, Shut-Downs, and Plant Removals*, 50 *Colum. L. Rev.* 1123 (1950).

<sup>30</sup> *E. C. Brown Co.*, 81 NLRB 140 (1949); *NLRB v. Hopwood Retinning Co.*, 98 F. 2d 97 (CA 2, 1938).

<sup>31</sup> *Schieber Millinery Co.*, 26 NLRB 937 (1940).

<sup>32</sup> *Ibid.*; *NLRB v. Lewis & Levitan*, 246 F. 2d 886 (CA 9, 1957), enforcing *California Footwear Co.*, 114 NLRB 765 (1955), employers, through subterfuge, moved factory to alter ego corporation 10 miles away. *NLRB v. Mackneish*, 272 F. 2d 184 (CA 6, 1959), enforcing *Industrial Fabricating, Inc.*, 119 NLRB 162 (1957), employer intended to go out of business but transferred work to disguised subsidiaries at another location. *NLRB v. United States Air Conditioning Corp.*, 302 F. 2d 280 (CA 1, 1962), employer shut factory which soon opened again in different corporate guise; court calls it “a classic example” of “merely a disguised continuance of the old employer.” *Rome Products Corp.*, *supra* note 28, removal to another town in different corporate guise. *Southport Petroleum Co. v. NLRB*, 315 U. S. 100, 62 S. Ct. 452 (1942), facade to avoid reinstatement order is ineffective. Occasionally, however, the employer manages to win out even though the transaction seems to be no more than a colorable device: *NLRB v. New Madrid Co.*, 215 F. 2d 908 (CA 8, 1954).

waits until the contract term has expired? Isn't it completely safe then, at least so far as contract obligations are concerned? Until recently, the answer would appear to have been an unqualified "yes." Now it is more doubtful.<sup>33</sup>

The doubt stems from the famous *Glidden* case,<sup>34</sup> where the company waited until the contract term had ended, and then moved its plant from Elmhurst, New York, to Bethlehem, Pennsylvania. The contract gave workers with specified length of employment seniority-rehire rights for a number of years. Although the contract had terminated, some workers asked the company to honor these rights in the new plant and, when the company refused, they brought suit. The Second Circuit, by a 2-1 vote, held that the workers had acquired vested rights which the company was required to recognize, and that they could recover from the company for its failure to do so, and the Supreme Court denied certiorari on this issue.

The *Glidden* case has spawned a number of similar claims which have not yet reached decision. In one case, *Oddie v. Ross Gear and Tool Co.*,<sup>35</sup> the workers relied on the *Glidden* case and won in the Federal District Court. However, the Court of Appeals, purporting to distinguish the *Glidden* decision, recently reversed and dismissed the complaint, holding that the particular contract language and bargaining history in the case before it indicated that an employer was not required to offer former employees of an abandoned Detroit plant jobs at a relocated plant in Tennessee.<sup>36</sup>

### N. L. R. A. Problems

The enactment of the National Labor Relations Act in 1935<sup>37</sup> was the culmination of a long period of development, during which many employers had used their superior economic strength to prevent employees from organizing for bargaining purposes.<sup>38</sup> The purpose of the Act was to safeguard certain union rights,

<sup>33</sup> Glushien, *op. cit. supra* note 2.

<sup>34</sup> *Zdanok v. Glidden Co.*, 288 F. 2d 99 (CA 2, 1961), cert. den. on this issue and granted only as to an unrelated issue, 368 U. S. 814 (1961), and *affd.* on later issue, 370 U. S. 530, 82 S. Ct. 1459 (1962).

<sup>35</sup> 195 F. Supp. 826 (E. D. Mich., 1961).

<sup>36</sup> (CA 6, 1962), 50 LRRM 2763.

<sup>37</sup> (Wagner Act) 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947), and 73 Stat. 519, 29 U. S. C. sec. 151-168 (1959), *supra* note 8.

<sup>38</sup> Cox & Bok, *Labor Law*, 118 (1962).

and to equalize the bargaining power between labor and management.<sup>39</sup> Various anti-union measures of the employer were designated as unfair labor practices,<sup>40</sup> and the National Labor Relations Board was established, with exclusive primary jurisdiction<sup>41</sup> to handle violations of the Act.<sup>42</sup>

Although the runaway shop is not expressly considered by the NLRA,<sup>43</sup> the NLRB has found this device may fall under three separate unfair labor practices prohibited by Section 8 of the Act.<sup>44</sup> Plant removal intended to frustrate unionization has been held to violate the employees' right to organize guaranteed by Section 7,<sup>45</sup> and therefore constitutes an unfair labor practice under Section 8(a)1,<sup>46</sup> which prohibits employer interference with these rights.

If a company fires one or a few employees for anti-union reasons, this is a plain violation of Section 8(a) (3),<sup>47</sup> prohibiting anti-union discrimination. If a company for anti-union reasons gets rid of all its employees by a plant removal, it is surely no less a violation.<sup>48</sup> Finally, if an employer changes location in order to escape bargaining with a union, he violates his obligation to bargain in good faith under Section 8(a) (5).<sup>49</sup>

The NLRB, moreover, has held that not only actual plant removal may be prohibited by the NLRA, but also the threat of

<sup>39</sup> This is the express policy of the Act, as found in Sec. 1 of the Wagner Act, *supra* note 38.

<sup>40</sup> Sec. 8 (a) of the Act lists five unfair labor practices for which an employer may be liable. 49 Stat. 452 (1935), as amended by 61 Stat. 140 (1947), 29 U. S. C. sec. 158 (a) (1)-(5) (1959).

<sup>41</sup> These practices can only be remedied through the machinery provided by the Act, that is, by the NLRB. *Local 586, UAW v. Federal Pacific Electric Co.*, 28 CCH Lab. Cas. 69, 274 (D. C. Conn. 1955); *Textile Workers Union v. Arista Mills Co.*, 193 F. 2d 529 (CA 4, 1951).

<sup>42</sup> *Ibid.*

<sup>43</sup> *Taulane*, *op. cit. supra* note 28.

<sup>44</sup> *NLRB v. Wallick*, 198 F. 2d 477 (CA 3, 1952); *Rome Products Co.*, *supra* note 28.

<sup>45</sup> 49 Stat. 452 (1935), as amended by Stat. 140 (1947), 29 U. S. C. sec. 157 (1959); see also *Klotz*, 13 NLRB 746 (1939).

<sup>46</sup> *Supra* note 40; see also *New Madrid Mfg. Co.*, 104 NLRB 117 (1953); *S. & K. Knee Pants Co.*, 2 NLRB 940 (1937).

<sup>47</sup> *Supra* note 40.

<sup>48</sup> *Glushien*, *op. cit.*, *supra* note 2; see also *Winchester Electronics, Inc.*, 128 NLRB 1292 (1960); *Diaper Jean Mfg. Co.*, 109 NLRB 1045 (1954).

<sup>49</sup> *Supra* note 40; see also *Tennessee-Carolina Transp. Co.*, 108 NLRB 1369 (1954); *Schieber Millinery Co.*, *supra* note 31.



relocation as well.<sup>50</sup> These interpretations of the Act by the NLRB, which make the runaway shop an unfair labor practice, have usually been subsequently approved by the Federal Courts.<sup>51</sup>

At this point, we must note a fundamental distinction between the 8(a)(3) problems and the contract problems that we have previously discussed.

The contract problems do not depend upon the motive for the removal but only upon the terms of the governing agreement; regardless of motive, good or bad, the plant moving may offend protected contract rights. The 8(a)(3) problems turn entirely upon motive,<sup>52</sup> i.e., whether the basic reason for the removal is economic,<sup>53</sup> in which event it is lawful and immune,<sup>54</sup> or whether the basic reason is to avoid dealing with a union,<sup>55</sup> in which event it violates the NLRA.

A leading case dealing with the runaway shop resolved the issue of motivation in the employer's favor although the final decision to move a textile plant from Massachusetts to North Carolina came only two days after a union won a NLRB election at the plant.<sup>56</sup>

On the fundamental question of whether an employer may close up shop and go out of business to avoid dealing with a union, the NLRB has decided the answer is "no."<sup>57</sup> Just as an employer cannot shut down part of his business in order to avoid dealing with a union, the Board held, so he cannot terminate the entire operation for that reason.

<sup>50</sup> *Josper Blackburn Products Corp.*, 21 NLRB 1240 (1940); *Friedman-Harry Marks Clothing Co.*, 1 NLRB 411 (1936).

<sup>51</sup> *Gerity Whitaker Co.*, 33 NLRB 393 (1941), *aff'd.* 137 F. 2d 198 (CA 6, 1942), *cert. den.* 318 U. S. 801 (1943); *NLRB v. Wallick*, 198 F. 2d 477 (CA 3, 1952); *NLRB v. Schieber*, 116 F. 2d 281 (CA 8, 1940); *NLRB v. Hopwood Retinning Co.*, *supra* note 30.

<sup>52</sup> *NLRB v. Rapid Bindery*, 293 F. 2d 170 (CA 2, 1961).

<sup>53</sup> *NLRB v. Lassing*, 284 F. 2d 781 (CA 6, 1960), *cert. den.* 366 U. S. 909 (1961); *NLRB v. R. C. Mahon Co.*, 269 F. 2d 44 (CA 6, 1959); *NLRB v. Houston Chronicle Pub. Co.*, 211 F. 2d 848 (CA 5, 1954).

<sup>54</sup> *Kipbea Baking Co., Inc.*, 131 NLRB 56 (1961); *Fiss Corp.*, 43 NLRB 125 (1942); *Trenton Garment Co.*, 4 NLRB 1186 (1938).

<sup>55</sup> *Ox-Wall Prod. Mfg. Co. v. IAM (AFL-CIO)*, 135 NLRB 87 (Feb., 1962).

<sup>56</sup> *Mount Hope Finishing Co. v. NLRB* (CA 4, 1954), 33 LRRM 2742. The Court's ruling emphasized that the company's business had been deteriorating for a number of years and that its managers had been seeking a suitable southern location for some time.

<sup>57</sup> *Darlington Mfg. Co.*, NLRB (1962), LRRM 1278.

There is nothing in the Taft-Hartley Act to keep an employer from discontinuing an unprofitable operation—or, for that matter, a profitable one, as long as employees' union activities are not the motivating factor. Moreover, as some of the cases show, ruinous union demands may be reason enough for shutting down—if the employer can show that he made a real effort to get the union to be reasonable.

In *Diaper Jean Manufacturing Company*,<sup>58</sup> the Board ruled: A manufacturer who moved part of his operations to another city was upheld because the move was based on the city's offer of capital for the purchase of machinery, plus other economic advantages. In return, the company agreed to hire its workers from the immediate vicinity. It was found that the move was for a "legal economic consideration" rather than for anti-union motives.

Contrary to the NLRB holding, no violation was found in *NLRB v. Lassing*,<sup>59</sup> where a company speeded up a planned change to subcontracting on learning of union organizing efforts, with the resultant discharge of employees. The court said that the union's coming "was a new economic factor which necessarily had to be evaluated" by the company. It is "highly unrealistic in the field of business," the court added, "to say that management is acting arbitrarily or unreasonably in changing its method of operation based on reasonably anticipated increased costs."

In the following instances, however, plant removals were held to be unlawful avoidance of unions:

In *Rome Products Company*,<sup>60</sup> involving removal of a plastic plant to another city in the same state after the employer repeatedly threatened to move rather than to bargain with a union affiliated with the AFL or the CIO; In *Deena Products Company*,<sup>61</sup> where there was a transfer of one department of an electric lamp plant to another location after the department's workers were organized.

Another variation of the theme can be seen in *Sidele Fashions, Incorporated*,<sup>62</sup> where the employer, a manufacturer of wo-

<sup>58</sup> NLRB (1954), 34 LRRM 1504.

<sup>59</sup> 47 LRRM 2277 (CA 6, 1961), cert. den., U. S. Sup. Ct. (1961), 48 LRRM 2070. To the same effect: *NLRB v. Houston Chronicle Pub. Co.*, (CA 5, 1954), 33 LRRM 2847; *NLRB v. Rapid Bindery Co.*, *supra* note 52.

<sup>60</sup> *Supra* note 28.

<sup>61</sup> NLRB 1951, 27 LRRM enforced by (CA 7, 1952), 29 LRRM 2624.

<sup>62</sup> 133 NLRB 49, 48 LRRM 1679 (1961), (CA 3, 1962), 50 LRRM 2957.

men's blouses, had been in business at the same location for twenty years, and all the stock in the company was owned by him. In 1952, he closed his plant because the union would not agree to a wage cut. Some seven years later, he opened a new plant down south under a different name. At all times, he denied any intentions of moving. The NLRB found a violation of 8(a) (1), (3) and (5), holding that an employer cannot move his shop just because he cannot reach a satisfactory agreement with the union. He has a duty to stay at his old location and to negotiate a contract that contains better terms for him. To shut down a plant in such a manner was viewed as a "tactic" to force acquiescence with bargaining proposals.

### Threatening Plant Removal

The most rudimentary kind of runaway shop situation exists where an employer, faced with the threat of organized labor, makes a statement to the effect that, "If a union comes in, I go." A statement of this sort may or may not constitute an unfair labor practice, depending on many extrinsic factors, the most important of which is the history of troubled or cordial relations the employer has had with the union in the past.<sup>63</sup> If the threat is "effective" it may be a violation of Sections 7,<sup>64</sup> 8(a) (1),<sup>65</sup> (2),<sup>66</sup> (3),<sup>67</sup> or (5),<sup>68</sup> of the NLRA.

In two distinct cases<sup>69</sup> it was held to be an unfair labor prac-

<sup>63</sup> NLRB v. Reynolds Int'l. Pen Co., 162 F. 2d 680 (CA 7, 1947).

<sup>64</sup> 49 Stat. 452 (1935), *supra* note 45, the section states that: employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities—except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

<sup>65</sup> 49 Stat. 452 (1935), 29 U. S. C. sec. 158 (1) (1958). This section provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed . . . in section 7.

<sup>66</sup> 49 Stat. 452 (1935), 29 U. S. C. sec. 158 (2) (1958). An employer may not "dominate or interfere with the formation or administration of any labor organization. . . ."

<sup>67</sup> 49 Stat. 452 (1935), 29 U. S. C. sec. 158 (3) (1958). An employer may not "encourage or discourage membership in any labor organization. . . ."

<sup>68</sup> 49 Stat. 452 (1935), 29 U. S. C. sec. 158 (5) (1958). An employer may not "refuse to bargain collectively with the representatives of his employees. . . ."

<sup>69</sup> Sance Piece Dye Works, Inc., 38 NLRB 690 (1942); Ansin Shoe Mfg. Co., 9 NLRB 929 (1936).

tice for a company owner to threaten to move his factory elsewhere unless a company-dominated union was selected to replace the incumbent union. The NLRB has even held that a threat to relocate, 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 the union and thus to be an unfair labor practice.<sup>70</sup> An order directing the employer to cease and desist from future threats and to publicly announce his withdrawal of the threat is usually issued in these situations.<sup>71</sup>

On the other side of the ledger, in regard to threats to relocate, a statement indicating an intent to relocate, made by company officials motivated by the company's weakened financial condition, and not for the purpose of injuring a union, was held not to be an unfair labor practice.<sup>72</sup>

Specifically, if there is no anti-union motivation, there is no violation. It is probably easier to show anti-union motivation in a threat of plant removal than in a case of actual relocation, as the threat is normally made with direct reference to some particular union activity.<sup>73</sup> For instance, a declaration that an employer might remove his plant, during a union organization drive, has been held to be an illegal threat.<sup>74</sup>

However, an employer's statement that he might remove his plant, without more, is protected as privileged free speech under Section 8(c) of the Act.<sup>75</sup> That section provides that expressions of views, opinions and arguments not coercive in nature do not constitute a violation of the NLRA.<sup>76</sup>

### **Plant Removal, a Tool in Collective Bargaining**

When an employer fails to notify the union representing his employees about an impending relocation of the plant, it not only

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<sup>70</sup> *H. Linsk & Co.*, 62 NLRB 276 (1945); see also *Irving Air Chute Co.*, 52 NLRB 201 (1943): an employer called an employee 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.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Lengel-Fencil Co.*, 8 NLRB 988 (1938).

<sup>73</sup> 2 CCH Lab. L. Rev., op. cit., *supra* note 1.

<sup>74</sup> *Robinson*, 2 NLRB 460 (1936).

<sup>75</sup> 49 Stat. 452 (1935), as amended 61 Stat. 140 (1944), 29 U. S. C. sec. 158 (C) (1959).

<sup>76</sup> *Ibid.*

indicates a runaway shop, but also is an unfair labor practice in itself.<sup>77</sup>

A secret move is a violation of the employer's duty to bargain, under Section 8(a) (5).<sup>78</sup> The circumstances differ from the other unfair labor practices, heretofore mentioned, inasmuch as the duty to notify is in no way lessened by the fact that plant removal is prompted by legitimate rather than by anti-union motives.<sup>79</sup> Thus, even if the NLRB finds that the secrecy of the move is not sufficient evidence of a runaway shop, the employer's failure to give notice will sustain the finding of an unfair labor practice.<sup>80</sup>

As soon as the employer has notified the union, the burden is on the union representing the employees to initiate bargaining concerning the impending move.<sup>81</sup>

If the union fails to request bargaining over the impending move, it may be precluded from later alleging that the employer's move was an unfair labor practice.<sup>82</sup> At the same time, where the union has knowledge and does demand bargaining prior to the move, the employer must negotiate the plant removal in good faith.<sup>83</sup>

Recently a revolutionary development has come out of the 8(a) (5) violation embodied in the so-called *Town & Country Doctrine*.<sup>84</sup> In *Town & Country*, an employer contracted out work which the employees had theretofore been doing. He made no effort beforehand to bargain about the matter with the union representing his employees. A three-member majority of the Board held that, even if the decision was entirely motivated by valid economic considerations, it nevertheless constituted a violation of Section 8(a) (5) of the Act. The majority also ruled that the appropriate remedy was to abrogate the subcontract, re-

<sup>77</sup> Diaper Jean Mfg. Co., *supra* note 48; Rome Products Co., *supra* note 28; Scheiber Millinery Co., *supra* note 31; Taulane, *op. cit.*, *supra* note 28.

<sup>78</sup> *Ibid.*

<sup>79</sup> Brown Truck and Trailer Mfg. Co., 106 NLRB 999 (1953); Diaper Jean Mfg. Co., *supra* note 48.

<sup>80</sup> *Ibid.*

<sup>81</sup> Kipbea Baking Co., *supra* note 54; Auto Store Works, 81 NLRB 1203 (1949).

<sup>82</sup> *Ibid.*

<sup>83</sup> Levy, 24 NLRB, 786 (1940).

<sup>84</sup> *Town & Country Mfg. Co.*, 136 NLRB 111 (1962), overruling *Fibrebound Paper Products Corp.*, 130 NLRB 1558 (1961), *aff'd.* CA 5, 1963 on narrow ground of subcontracting in connection with 8(a) (3) violation, avoiding the 8(a) (5) violation question.

instate the workers with back pay, and require the employer to bargain with the union over any future decision to subcontract the work.<sup>85</sup>

Relying on the decision of the Supreme Court under a parallel provision of the Railway Labor Act in *Telegraphers v. Chicago and N. W. R. Co.* [362 U. S. 336 (1960)], the majority held that "the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining." To hold otherwise, the majority said, would "unduly extend the area within which an employer may curtail or eliminate entirely job opportunities for its employees without notice to them or negotiation with their bargaining representatives."

Here we see a new concept, that there is violation even though the motivation is economic considerations. The effect of this doctrine, until there is Supreme Court clarification, is to suggest that an employer is taking a great risk if he moves his plant, or subcontracts his work, or automates his factory, or otherwise displaces his workers in the bargaining unit, without first bargaining with the union.

### Remedies For the Runaway

When a potential runaway is still but a threat by the employer, the Board can easily provide a satisfactory remedy.<sup>86</sup> Under the authority granted by Section 10(c) of the Act,<sup>87</sup> the employer is ordered to "cease and desist" such an unfair labor practice.<sup>88</sup> Once the threat has been carried out, the NLRB is confronted by a more complex problem in formulating a remedy.<sup>89</sup>

The NLRA is remedial in scope.<sup>90</sup> The NLRB, in ordering affirmative action, cannot impose a punitive penalty on an em-

<sup>85</sup> The three-member majority also held that in this case the motive actually was not economic but discriminatory and thus violated Sec. 8(a)(3), too.

<sup>86</sup> *Sanco Piece Dye Works, Inc., Ansin Shoe Mfg. Co.*, *supra* note 69.

<sup>87</sup> 49 Stat. 453 (1935), as amended 61 Stat. 146 (1949), 29 U. S. C. sec. 160 (C) (1959).

<sup>88</sup> *NLRB v. Friedman-Harry Marks Clothing Co.*, *supra* note 50.

<sup>89</sup> 2 CCH Lab. L. Rep. 3795 (1961), *supra* note 1.

<sup>90</sup> *Republic Steel Corp. v. NLRB*, 311 U. S. 7 (1940); *NLRB v. Grower-Shipper Vegetable Ass'n. of Cal.*, 122 F. 2d 368 (CA 9, 1941), beyond the Board's authority to order back pay to the government.

ployer because he has committed an unfair labor practice—even though the Board may be of the opinion that the policies of the Act would be effectuated by such an order.<sup>91</sup>

In determining the proper remedy, most of the union suits for runaway shops have been brought under Section 8 (a) (1).<sup>92</sup> Since the language of Section 8 (a) (1) of the Act is general, many types of employer activity have been held to interfere with employee organizations. Coercive acts or statements, or runaway shops, or almost any type of activity which would tend to interfere with employee organization may be held to be violative of Section 8 (a) (1).<sup>93</sup>

The NLRB's choice is rather extensive. When there has been an "effective" removal that cannot be justified, the NLRB may order reinstatement,<sup>94</sup> back pay,<sup>95</sup> transportation expenses,<sup>96</sup> reasonable commuter expenses,<sup>97</sup> or a retransfer of the plant to its old location.<sup>98</sup> The order is almost always stated in terms of alternate remedies, so that the employer must choose whether he will accept the reinstatement and back pay provisions or move back to his old location and restore the prior status quo.<sup>99</sup>

One of the reasons for alternate remedies is the "unwarranted hardship" involved in forcing an employer to move back. Another reason sometimes given is that by forcing a re-transfer, the employees' rights at the new location will be prejudiced.<sup>100</sup>

In recent cases, through its decision making power, the NLRB has developed the following policy: If an employer has closed his only plant and gone out of business, he will not be required to reinstate employees even though they were discharged discriminatorily, but he can be ordered to provide back pay from the date of the discrimination to the date when the plant was closed.<sup>101</sup> Furthermore, the NLRB has ordered an em-

<sup>91</sup> *Ibid.*

<sup>92</sup> Berry, Runaway Shop—A Perennial Threat to Organized Labor, 37 Notre Dame Law. 3 (1962).

<sup>93</sup> CCH Labor Law Course 1548 (12th ed. 1961), *supra* note 40.

<sup>94</sup> Irving Air Chute Co., *supra* note 70.

<sup>95</sup> Bermuda Knitwear Corp., 120 NLRB 332 (1958).

<sup>96</sup> Omaha Hat Corp., 4 NLRB 878 (1938).

<sup>97</sup> New Madrid Mfg. Co., *supra* note 46.

<sup>98</sup> Klotz & Co., *supra* note 45.

<sup>99</sup> Schieber Millinery Co., *supra* note 31.

<sup>100</sup> Klotz & Co., *supra* note 45.

<sup>101</sup> Colonial Fashions, Inc., 110 NLRB 1197 (1954), 32 LRRM 1302.

ployer to offer jobs to discharged workers if he has other plants. In the alternative, the NLRB will require him to place the discharged workers on a waiting list, at other plants, for jobs as they become vacant. The NLRB also has required him to pay the employees' expenses of moving made necessary in order to take a job at one of his other plants.<sup>102</sup>

If a company has permanently discontinued business operations, it will not be ordered to compensate employees for the period subsequent to the permanent closing, the Board has held, even though the decision to go out of business was motivated by anti-union considerations. However, the company will be required to put the employees on a preferential hiring list and to reinstate them without loss of seniority or other rights should operations be resumed.<sup>103</sup>

Very early in its career the NLRB adopted the practice of directing orders to remedy unfair labor practices not only to the employer who violated the Act but also to his "successors and assigns." The Supreme Court approved this practice in the *Regal Knitwear* case, stating that the NLRB orders may be binding upon successors who operate merely as "a disguised continuance of the old employer."<sup>104</sup>

The Court of Appeals has held that the crucial question in determining whether a successor company may be held liable is whether the business has remained substantially the same since the transfer of ownership. If it has, the NLRB order may be enforced against the successor, even though the transfer of ownership was not designed to evade the order and was a bona fide transaction carried out at arm's length.<sup>105</sup>

Does the Board ever order "move back"? I cannot find an instance where it has ordered an entire plant to return from the new location to the old. It has, however, as mentioned before, ordered return of some transferred operations to the extent necessary to effectuate reinstatement.<sup>106</sup>

<sup>102</sup> *Symms Grocer Co.*, 109 NLRB 346 (1954), 34 LRRM 1326; *Bonnie Lass Knitting Mills, Inc.*, 126 NLRB 164 (1960), 45 LRRM 1477; *St. Cloud Foundry & Machine Co.*, 136 NLRB 58 (1961), 47 LRRM 1412; *Yoseph Bag Co.*, 128 NLRB 21 (1960), 46 LRRM 1279; *Winchester Electronics Inc.*, *supra* note 48, 46 LRRM 1453, 295 F. 2d 288 (CA 1, 1961); *New England Web Inc.*, 135 NLRB 102 (1962), 49 LRRM 1620.

<sup>103</sup> *Barbers Iron Foundry*, 126 NLRB 5 (1960), 45 LRRM 1283.

<sup>104</sup> *Regal Knitwear Co. v. NLRB*, 324 U. S. 9 (1944).

<sup>105</sup> *NLRB v. Auto Ventshade, Inc.* (CA 5, 1960), 45 LRRM 3010; *NLRB v. Tempest Shirt Mfg. Co.* (CA 5, 1960), 47 LRRM 2298.

<sup>106</sup> *Winchester Electronics, Inc.; New England Web, Inc.*, *supra* note 102.



### Conclusion

As we have seen, there are many forms of "runaway". The remedies available in some cases are inadequate. The NLRB's alternative remedy solution often has proved to be an inadequate method of restoring the status quo ante. By allowing an employer to remain at his new site, the burden is placed on employees who wish to be reinstated. Even though back pay and travel expenses are involved, seldom will a worker want to move 1,000 miles, sever family ties, go into a new plant under strained conditions, and expect everything to be as it was before the plant moved. Obviously, many of the employees will choose to remain at the place where their homes are established.

Perhaps if the courts could get into the matter before the NLRB, in problems of plant removal, some of the problems might be alleviated. If a union could go directly to a court, upon receiving word that an employer is moving, and get an injunction from the court temporarily restraining the move until an investigation and a court determination of the matter can be had, the remedy problem of the already moved plant could be solved for the employee. After all, there is no law that says an employer must remain where he is if he has good cause to leave. Why not let him show this good cause before he moves?

This procedure would face up to the fact that an award of damages, which in a particular case may be adequate compensation, rarely succeeds in deterring a runaway shop, and thus fails to promote collective bargaining—the basic objective of our national labor relations policy. Encouragement of collective bargaining is better achieved by preventing "runawayism" than by awarding damages after the harm has been done.