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Memorandum on the Duty of Employers to meet and confer under Fiberboard Case, circa 1979

Martin Smith
Law Offices of Warren C. Ogden

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Memorandum on the Duty of Employers to meet and confer under Fiberboard Case, circa 1979

Abstract

Memo to all WCIRA consultants, about a legal doctrine regarding the employer's duty in cases that would seem to involve exclusively management prerogatives (Fiberboard Case), circa 1979.

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*file
→ collective bargaining*

TO: All WCIRA Consultants

FROM: Martin Smith, Law Offices of Warren Ogden, Seattle

RE: Duty of Employers to meet and confer under Fiberboard Case

Several situations among our clients urges us to remind you of an important legal doctrine involving the Employer's duty to meet, confer and negotiate in cases that would seem to involve exclusively management prerogatives. These situations usually involve "contracting-out or subcontracting situations. But others may be anticipated.

Simply stated, Fiberboard Paper Products vs NLRB 379 U.S. 203 LRRM 2609 (1964) expands the scope of mandatory subjects for collective bargaining into those acts of Employer which affects and may affect wages, hours and conditions of employment. If an Employer proposes to contract-out certain plant services which may cause lay-offs or other reductions in hours, an Employer must be willing under 8(d) of the Act to "meet at reasonable times and confer in good faith..." with respect to any spin-off effect from the managerial decision.

For Fiberboard, the Employer made a cost-benefit analysis of its maintenance operation and decided to save money by contracting-out this work to a maintenance firm who supplied its own labor and materials. The union set up unfair labor practice pickets. The Board ruled that, even if the Company wasn't motivated by anti-union animus, but by economic considerations, a violation of 8(a)(5) had occurred. "Contracting-out" fit within the statutory description of "other terms and conditions and employment."

The Supreme Court agreed, saying that the facts indicated a certainty that terminations of employment would occur. Thus a "term or condition of employment" was stated. But the Court added a caveat: other forms of contracting-out or subcontracting may not be encompassed by this phrase. The court seemed to indicate that a situation where no unit employee's jobs, wages, or hours were cut would be beyond the scope of the Act and not subject to 8(a)(5) sanction or 8(d) obligation. Our best guess is that this exception is very limited and might fit very few situations. Thus an employer ought to refuse to bargain only after a comprehensive analysis of the impact of the unilateral charge.

We also hasten to remind you of the remedy (penalty) that the Supreme Court approved in this case. (1) the NLRB properly ordered the employer to resume its operations in the maintenance field. (2) As a mandatory subject for bargaining contracting-out must be negotiated;

(3) Reinstatement and backpay was proper for employees laid-off because of the subcontract agreement. Fiberboard has recently been followed in American Cyansand Co. vs NLRB, F. 2^d (7th Cir. 1979) 100 LRRM 2640 (1979) (where contracting-out converted an economic strike into an unfair labor practice strike!); ACF Industries, Inc. vs NLRB, F. 2^d (8th Cir. 1979) 100 LRRM 2711 despite lack of anti-union animus (reinstatement with back-pay proper); and AMCAR Div. of ACF, F. 2^d (8th Cir. 1979) 100 LRRM 3074; Brockway Motor Trucks v NLRB, 582 F. 2^d 720 (3rd Cir. 1978) 99 LRRM 2015.

Please be apprised of the significant dangers in this area and the potential for expensive Board litigation if an 8(a)(5) is filed. In arguable cases, however, we will assist Employers in urging that a unilateral charge is in an area with no impact upon wages, hours or conditions, and that the changes are protected by management prerogatives.

Cordially,



J. Martin Smith
Law Offices of
Warren C. Ogden

JMS/mm