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1973

Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971

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Publication Information & Recommended Citation

St. Antoine, Theodore J. "Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971." In Labor Relations Yearbook--1972. Washington, D.C.: Bureau of National Affairs, 1973.

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Labor Relations Yearbook—1972

Chronology of Events

Collective Bargaining

Labor Relations Conferences

Labor Organizations

Role of Federal Government

Economic Data

Prepared by
BNA Editorial Staff

PUBLISHED BY THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C.

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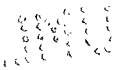
Washington, D. C. 20037



Printed in The United States of America
International Standard Book Number: 0-87179-044-0
Library of Congress Catalog Card Number: 66-19726

Another measure that will get priority will be a national health insurance bill. Hearings were held on these measures during the first session of the 92nd Congress, and the choice then appeared between the Griffith-Kennedy bill, with its initial cost of $57 billion, and the more modest Administration bill, which would work through private health plans.

With all the hearings that have been held in the House and Senate, chances are good that there will be legislation affecting private pension plans in the 93rd Congress. During the 92nd Congress, the Administration adhered to its view that the legislation should be limited to additional fiduciary responsibilities for plan administrators. But it finally indicated it would go for a formula providing for 50 percent vesting of benefits after a combination of 50 years of service and age. The Javits, Williams, and Dent bills, however, go way beyond the Administration proposal in the areas of funding, vesting, and reinsurance.

FOR THE FUTURE

Problems that are becoming acute in labor-management relations may lead to some far-reaching proposals in the near future. First, there is the problem of case loads. The NLRB's annual case intake is running over 40,000, that of the EEOC is close to 33,000, and arbitrators are estimated to be handling over 50,000 labor arbitrations a year—and there is a shortage of acceptable arbitrators. Then, there is the problem of the relationship between the federal and the state and local governments, with frequent suggestions that the federal government assume jurisdiction over all.

This has led to some elaborate proposals.

- In his ABA address, Chairman Miller suggested a system of labor courts throughout the country, with administrative law judges (formerly trial examiners) handling the cases and with increased authority. (See 80 LRR 352 for text of speech.)
- Then there is the Griffin bill to establish a United States Labor Court to handle unfair-labor-practice cases and the Tower Bill to transfer jurisdiction over unfair-labor-practice cases to the federal district courts. Moreover, there are the proposals of the blue ribbon panel of lawyers that would completely revise our basic labor law.
- Finally, there is the proposal to eliminate the procedural fragmentation that characterizes administration of federal labor law. This is the idea of Professor Charles J. Morris of Southern Methodist University Law School. He would establish a United States Labor Court with jurisdiction over the Taft-Hartley Act, the Railway Labor Act, and Title VII of the Civil Rights Act, and possibly other statutes. He also would merge representation and mediation functions.

With all the new laws and new proposals, there is much to think about.

Supreme Court's Labor Decisions, October Term 1971

Following is the text of an address by Theodore J. St. Antoine, Dean and Professor of Law, University of Michigan Law School, to the annual meeting of the American Bar Association's Section of Labor Relations Law held in San Francisco, August 12-15, 1972. Full title of the address is "Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971."

I. Introduction

Labor law, like most other law in the making, is intensely political at its margins. On certain central themes, such as the right to join a union and freedom of contract, judges and administrators of widely varying outlooks may be able to reach a consensus. But along the frontiers of the law, no such accord can be expected. Conscientious decision-makers will inevitably differ with one another, depending on their diverse social values. They may even differ with their own prior positions, depending on shifts in the political climate. Moreover, if the decision-makers happen to be justices

of the United States Supreme Court, that most institutional of judicial bodies, they cannot help but be differently influenced from time to time by the changing interaction among the Court's changing membership.

In the labor field, as elsewhere, a hallmark of the Warren Court was a bold inventiveness, even at the risk of some damage to the original congressional (or constitutional) design. A hallmark of the Burger Court, it becomes increasingly clear, is going to be a resurgence of traditional lawyerly skills and lawyerly cautiousness — even at the risk of some stunting of the growth of creative legal theory. All these characteristics are exhibited in the Supreme Court's labor law decisions of the past year, especially in the three I consider the most significant. Those are NLRB v. Burns International Security Services,[1] dealing with the obligations of "successor" employers; Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.,[2] dealing with the scope of mandatory bargaining subjects; and Central Hardware Co. v. NLRB,[3] dealing with the right of a union to solicit employees on company parking lots.

II. Burns and Successorship

Corporate mergers and acquisitions have become an American way of business.[4] Their increasing frequency underscores the practical importance of the Supreme Court's efforts in the Burns case to spell out the collective bargaining obligations of a surviving or "successor" employer. Yet ironically the first, and perhaps the most critical, point to be made about Burns is that it hardly represents a typical successorship situation, if indeed it can fairly be called a successorship case at all.

Wackenhut had a contract to provide protection services at a Lockheed plant. In March 1967 the United Plant Guards were certified as the bargaining agent of the Wackenhut guards at Lockheed, and in late April the UPG and Wackenhut entered into a three-year collective bargaining agreement. Meanwhile, Lockheed solicited bids for a new guard contract, to begin July 1. At a pre-bid conference attended by Burns among others, Lockheed informed the bidders of the UPG's certification and of its contract with Wackenhut. Both Wackenhut and Burns submitted estimates, and Lockheed accepted Burns' bid at the end of May. Burns retained 27 of the Wackenhut guards, and brought in 15 of its own guards from elsewhere. At the same time, Burns informed the former Wackenhut employees that they would have to join the American Federation of Guards, another union having contracts with Burns at other locations. On June 29, Burns recognized the AFG as the bargaining representative. On July 12, however, the UPG demanded that Burns recognize it and honor the collective bargaining agreement between the UPG and Wackenhut. When Burns refused, the UPG filed unfair labor practice charges.

The National Labor Relations Board found Burns had violated § 8(a)(2) of the National Labor Relations Act by unlawfully assisting and recognizing the AFG, and this routine finding was not thereafter contested by Burns. Next the Board, relying on a long line of cases[5] holding that a mere change of employers or of ownership does not affect a certification if a majority of the employees of the first employer are retained by the new management, ruled that Burns had violated § 8(a)(5) by refusing to recognize and bargain with the UPG. Then, in a reversal of a considerable body of precedent,[6] the Board went on to hold that Burns, as the "successor" employer in the Lockheed guard unit, was bound by the substantive terms of the collective agreement between the "predecessor" employer, Wackenhut,

1 406 U.S. 272, 92 S.Ct. 1571, 80 LRRM 2225 (U.S. 1972).

2 404 U.S. 157, 78 LRRM 2974 (1971).

3 407 U.S. 539, 92 S.Ct. 2238, 80 LRRM 2769 (U.S. 1972).

4 The number of annual corporate mergers and acquisitions more than doubled between 1961 and 1969, although there was a decline in 1970. 1971 Statistical Abstract of the United States 474.

5 See, e.g., South Carolina Granite Co., 58 NLRB 1448, 15 LRRM 122 (1944), enforced sub nom. NLRB v. Blair Quarries, Inc., 152 F.2d 25, 17 LRRM 683 (4th Cir. 1945); NLRB v. Downtown Bakery Corp., 330 F.2d 921, 56 LRRM 2097 (6th Cir. 1964).

6 See, e.g., Matter of ILWU (Juneau Spruce), 82 NLRB 650, 23 LRRM 1597 (1949), enforced, 189 F.2d 177, 28 LRRM 2064 (9th Cir. 1951), aff'd on other grounds, 342 U.S. 237, 29 LRRM 2249 (1952); Rohlik, Inc., 145 NLRB 1236, 1242 n. 15, 55 LRRM 1130 (1964).

and the UPG, and that Burns' failure to "honor" the contract was likewise a violation of § 8(a)(5).

In an opinion by Justice White, the Supreme Court sustained (5-4) the Board's view that Burns had to recognize and bargain with the UPG, but rejected (9-0) the notion that Burns also had to assume the Wackenhut contract. On the duty to bargain, Justice White emphasized that a "majority [7] of these employees" who had voted "a few months before" for the union had been hired by Burns for work in an "identical unit." He observed that it would be a "wholly different case" if (1) Burns' operational structure and practices differed from those of Wackenhut, so as to make the Lockheed bargaining unit no longer appropriate, or (2) Burns had, without any unlawful discrimination, hired employees not already represented by a certified union. It was noted that both Burns and Wackenhut were nationwide organizations, performing identical services at the same facility. Only the supervisory personnel were different. Beyond this, Justice White seemed content to rely upon lower court precedent to justify a bargaining order in favor of an "incumbent" union "where the bargaining unit remains unchanged and a majority [8] of the employees hired by the new employer are represented by a newly certified bargaining agent."

In denying the UPG's contract claims, Justice White laid primary emphasis on the congressional policy of promoting the bargaining freedom of employers and unions.[9] He also argued that holding either union or employer to the substantive terms of an old collective agreement could result in serious inequities. A potential buyer, for example, might be willing to take over a moribund business only if he could make substantial changes in employment practices. Burns, it was stressed, did not consent to be covered by the Wackenhut contract.

CONFLICT WITH WILEY

Justice White's analysis obviously raises the possibility of a conflict with the Court's earlier decision in John Wiley & Sons, Inc. v. Livingston.[10] There the surviving employer in a two-party merger was ordered to arbitrate the extent to which it was bound by a collective bargaining agreement negotiated by a union and the predecessor employer that had disappeared in the merger. Justice White listed several reasons for distinguishing Wiley & Sons from Burns, most of which seem far from convincing. Wiley, he said, involved a § 301 suit to compel arbitration, not an unfair labor practice proceeding like Burns. But in recent years the Supreme Court has been willing to sanction the Board's increasing intervention into the area of contract enforcement under the rubric of remedying refusals to bargain. Thus, in NLRB v. Strong,[11] the Supreme Court approved a Board order requiring an employer to sign and acknowledge a labor contract negotiated on his behalf by a multiemployer association, and to pay fringe benefits to union trust funds in accordance with the terms of the agreement. The Supreme Court, in my opinion, should properly keep the NLRB out of the business of adjudicating individual contract claims under collective bargaining agreements, consigning them instead to the courts or arbitrators.[12] At the same time the Court is apparently quite prepared, in appropriate circumstances, to let the Board exercise concurrent jurisdiction with courts and arbitrators when the issue raised goes to the very existence of a

7 406 U.S. 272, 92 S.Ct. at 1577, 80 LRRM 2225. It is unclear whether Justice White considers the critical "majority" to be (1) a majority of the predecessor's employees going into the successor's work force, or (2) a majority of the successor's work force coming from the predecessor employer, or (3) both. NLRB counsel apparently thought neither majority was essential ("a substantial number [of the predecessor's employees] . . . enough to give you a continuity of employment conditions in the bargaining unit"), although in Burns both majorities seem to have been present.

8 406 U.S. 272, 92 S.Ct. at 1579, 80 LRRM 2225. Contrast the use of the term "majority" here with that in the text, supra, at note 7.

9 See, e.g., H. K. Porter Co. v. NLRB, 397 U.S. 99, 73 LRRM 2561 (1970).

10 376 U.S. 543, 55 LRRM 2769 (1964).

11 393 U.S. 357, 70 LRRM 2100 (1969). See also NLRB v. C & C Plywood Corp., 385 U.S. 421, 64 LRRM 2065 (1967).

12 See, e.g., NLRB v. Strong, 393 U.S. 357, 360, 70 LRRM 2100 (1969); St. Antoine, "A Touchstone for Labor Board Remedies," 14 Wayne L. Rev. 1039, 1050-52 (1968). Cf. Collyer Insulated Wire, 192 NLRB No. 150, 77 LRRM 1931 (1971).

contract or its applicability to a particular employer.

In addition to emphasizing that Wiley was a § 301 case and not an unfair labor practice proceeding, Justice White declared that Wiley dealt directly only with the duty to arbitrate, and not with the ultimate question of whether the surviving company was bound by any substantive terms of the pre-existing contract. That is correct. But surely it would have been anomalous to require arbitration in Wiley unless the Court was ready to entertain the possibility that the arbitrator might render an enforceable substantive award. Despite Justice White's veiled suggestions to the contrary, therefore, I do not think the result in Burns would have been different if the case had reached the Supreme Court as a § 301 suit, either to secure arbitration or to enforce an arbitral award.

A further, rather curious, comment is made that Wiley occurred against a background of state law embodying the rule that the surviving corporation in a merger is liable for the obligations of the disappearing corporation. I should have thought that Lincoln Mills [13] and its progeny had long since made federal law controlling to the exclusion of state law in the determination of rights and obligations under labor contracts. Perhaps Justice White meant that state law can be helpful in ascertaining the parties' intent and their actual or constructive agreements. For after the reference to state law he immediately proceeded to what I consider the most solid basis for distinguishing Wiley from Burns: "Here there was no merger, no sale of assets, no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work. . . ." [14] Justice White then concluded that the mere hiring of Wackenhut employees was a "wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining contract."

In a final portion of its opinion, the Court held, again unanimously, that Burns did not have to reimburse its employees on the theory it had unilaterally changed the terms of the old Wackenhut contract without bargaining with the United Plant Guards.[15] The NLRB's long-standing general rule [16] has been that whether or not a successor employer is bound by its predecessor's contract, it must not institute terms of employment different from those in that contract without first bargaining with the employee's representative. In this respect the successor employer would be in the same position as employers generally during the period between collective bargaining agreements. Justice White was prepared to concede that when a new employer plans to retain all the employees in a unit, he should "consult" with the employees' union before he fixes the terms of employment.[17] But Justice White went on to say that in other situations it may not be clear until the successor has hired his full complement of employees that he has a duty to bargain with the union as a majority representative. Under this reasoning, Burns' obligation to bargain did not mature until it had selected its force of guards late in June. It was thus free to set the initial terms on which it would hire its employees.

VIEWS OF DISSENTERS

Justice Rehnquist, joined by the Chief Justice, Justice Brennan, and Justice Powell, dissented from the majority's conclusion that Burns was under a statutory obligation to bargain with the UPG. First, he argued, it was not mathematically demonstrable that a majority of Burns' 42 employees wanted the UPG as their bargaining representative. There was no evidence even as to the individual sentiments of the 27 employees com-

13 Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113 (1957).

14 406 U.S. 272, 92 S.Ct. at 1581, 80 LRRM 2225.

15 After the Supreme Court rendered its judgment in Burns, a dispute arose as to whether this issue was even properly before the Court.

16 See, e.g., Overnite Transportation Co., 157 NLRB 1185, 61 LRRM 1520 (1966), enforced, 372 F.2d 765, 64 LRRM 2359 (4th Cir. 1967), cert. denied, 389 U.S. 838, 66 LRRM 2307 (1967).

17 Burns has since been interpreted by the NLRB as authorizing the finding of an 8(a)(5) violation when a successor employer that has retained all the unit employees unilaterally changes the terms in the predecessor's contract without prior bargaining with the incumbent union. Howard Johnson Co., 198 NLRB No. 98, 80 LRRM 1769 (1972).

ing from Wackenhut, let alone of the 15 remaining employees of Burns. Justice Rehnquist further criticized the Board for automatically accepting Wackenhut's unit at Lockheed as appropriate for Burns, especially in the face of evidence that Burns regularly transferred employees from job to job, and had never bargained with a union consisting of employees at a single location. On both the questions of majority representation and appropriate unit, Justice Rehnquist insisted that the majority decision could be sustained, if at all, only by resort to the doctrine of "successorship."

Thereupon, Justice Rehnquist launched a bristling attack on the application of successorship doctrine to the Burns situation. The concept of successorship finds support, he said, in the need to grant employees some protection against a sudden transformation in their employer's business, which results in the substitution of a new legal entity but leaves intact significant elements of the former business. There must be continuity in the enterprise, as well as change, he maintained, and that continuity must be at least partially on the employer's side, and not wholly on the employees'. Burns, he pointed out, had acquired no assets, tangible or intangible, by negotiation or transfer from Wackenhut. It succeeded to the Lockheed service contract over Wackenhut's vigorous opposition. In short, in Justice Rehnquist's view, Burns was not a successor of Wackenhut, and should not be subject to Wackenhut's bargaining obligations on the basis of the successorship doctrine.

On the facts of Burns, Justice Rehnquist's analysis seems the more persuasive. Merely at the semantic level—which is often helpful because of what it tells us about the reasonable expectations of interested parties—it is hard to avoid feeling that "rival" or "competitor" is much more apt than "successor" to describe the relationship of Burns to Wackenhut. More substantively, it would appear that employees and their union should be entitled, with regard to either bargaining or contract rights, to consider themselves protected only against those changes in which their employer in some way participates. He may participate actively by merging or selling his business, or passively by being declared bankrupt, but at least there should be some involvement by the original entity with which the union bargained or contracted. It was, after all, only his statute, his prospects, his assets that the union could sensibly have relied on. Moreover, both bargaining status and labor contracts denote *relationships;* they have an employer quotient as well as a union-employee quotient. To transfer rights and duties, a nexus would seem necessary at the employer as well as the union-employee end of the relationship. Allowing the bare movement of employees from one employer to another to carry along either bargaining or contract rights and obligations ignores the employer side of the relationship.[18]

Justice Rehnquist also assumes a more logical stance than the majority in Burns by deciding both the bargaining issue and the contract issue the same way. Despite the considerable amount of Board precedent to the contrary, I am satisfied that in most of these successorship cases, bargaining rights and contract rights should stand together, or fall together. The same considerations of employee free choice, industrial stability, flexibility of business arrangements, and so on, that militate for or against the survival of bargaining rights also militate for or against the survival of contract rights. Justice Rehnquist's distaste for "unwarranted rigidity" in labor relations will probably lead him to be chary about the survival of rights in most cases. If Justice White meant what he said in stating that Burns turned on its "precise facts," however, the door has been left open for the Court to distinguish Burns in some of the more typical successorship situtions of sale or merger, and to find the predecessor's contract binding on a true successor.[19]

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18 A strong argument to the contrary is presented in a most comprehensive and thoughtful study of the successorship problem by Professor Stephen B. Goldberg of Illinois, "The Labor Law Obligations of A Successor Employer," 63 Nw. Univ. L. Rev. 735, 749-50, 805-06 (1969).

19 The NLRB, with little if any analysis, is

Even though Burns and Wiley are reconcilable in theory, their approaches are plainly divergent. Both Justice White and Justice Rehnquist in Burns speak in terms that would sound familiar in the mouth of a traditional Willistonian—for example, the need for "consent" under "normal contract principles," and the question of whether certain rights and duties were "in fact" "assigned" or "assumed." This is far cry from the attitude in Wiley. There the Court stressed that "a collective bargaining agreement is not an ordinary contract," but a "generalized code" setting forth "the common law of a particular industry or of a particular plant."[20] A predecessor's labor contract, according to Wiley, could bind the successor employer where there is "substantial continuity of identity in the business enterprise," without regard to the existence of actual consent. Wiley thus boldly relied on the force of the federal labor statutes to impose contractual obligations on an unconsenting successor; in contrast, Burns refocused attention on common law notions of individual assent.

On a still deeper level Burns reflects a clash between certain fundamental values in the labor field. On the one hand, there is a concern about protecting employees against a sudden and unforeseen loss of bargaining and contract rights. There is also a concern about maintaining industrial stability and labor peace, through reducing the number of representation elections and sustaining the life of labor agreements. On the other hand, stress is laid on the freedom and voluntariness of the collective bargaining process, on the importance of saddling neither unions nor employers with substantive contract terms to which they have not agreed. Stress is further laid on providing maximum flexibility in business arrangements, so that employers may respond to changing market conditions without being strait-jacketed by the bargaining or contractual obligations that may have been assumed by imprudent predecessors. The future development of successorship law undoubtedly depends far more on the way the members of the Supreme Court ultimately balance out these competing values than on any logical deductions from Wiley and Burns.

III. Pittsburgh Plate and the Duty to Bargain

The Supreme Court once more had to struggle with defining the scope of the duty to bargain in Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.[21] A union and an employer had a group health insurance plan in which retired employees could participate. When Medicare was enacted, the union sought midterm bargaining to renegotiate the insurance benefits for retired employees. The employer disputed the union's right to bargain on behalf of the retirees. Eventually, over the union's objections, the employer wrote each retired employee, offering to pay a supplemental Medicare premium if the employee would withdraw from the negotiated plan. After 15 of 190 retirees elected to accept this proposal, the union filed unfair labor practices with the NLRB. The Board found the employer had refused to bargain and had unilaterally changed terms of employment, contrary to § 8(d) and § 8(a)(5) of the NLRA.

Speaking through Justice Brennan, the Supreme Court held there was no violation of § 8(a)(5), rejecting all the various grounds for the Labor Board's decision. First, the Board had ruled that the retirees were themselves "employees" within the meaning of the Act, so that their benefits were a "term and condition" of their own employement. The Court dismissed this view, stating that § 2(3)'s definition of "employee" is limited to "working" persons, and does not cover those who have retired from the work force. Moreover, the Court reasoned that the retirees did not share a community of interest with active

apparently going to read Burns broadly for the proposition that a successor employer is not required to assume the contractual obligations of the predecessor. See, e.g., Howard Johnson Co., 198 NLRB No. 98, 80 LRRM 1769 (1972).

[20] John Wiley & Sons, Inc., v. Livingston, 376 U.S. 543, 550, 55 LRRM 2769 (1964), quoting in part from United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79, 46 LRRM 2416, 34 LA 561 (1960).

[21] 404 U.S. 157, 78 LRRM 2974 (1971).

workers substantial enough to justify their inclusion in the bargaining unit; even the Board denied them the right to vote in representation elections.

Alternatively, the Board had held that the pensioners' benefits were a mandatory[22] subject of bargaining on the theory that they "vitally" affected the "terms and conditions of employment" of the active employees, principally by influencing the value of their current and future benefits. In keeping with its precedents in the Oliver[23] and Fibreboard[24] cases, the Supreme Court agreed that there are occasional exceptions to the normal rule that matters involving individuals outside the employment relationship do not fall within the category of mandatory bargaining subjects under § 8(d). The Labor Board had correctly stated the "vital effect" test for these exceptions, but had wrongly applied it. The Supreme Court disagreed with the Board's assessment that the retirees' benefits "vitally" affected the active employees, concluding that the advantage to the latter of including retired employees under the same health insurance contract was "speculative and insubstantial at best."

Lastly, the Court ruled that the employer did not violate § 8(a)(5) by offering the retirees an exchange for their withdrawal from the already negotiated health insurance plan. Even if the proposal constituted a midterm "modification" of the contract within the meaning of § 8(d), said the Court, it would have been an unfair labor practice only if it changed a term that was a mandatory rather than a permissive subject of bargaining. This holding is obviously significant far beyond the area of retirees' rights. In effect, the Court is saying that the parties to a contract cannot convert a permissive bargaining subject into a mandatory subject, even for the term of the contract, by including it in their agreement. It is quite understandable that the Court, in light of its past acceptance of the mandatory-permissive dichotomy, would not let the parties permanently reclassify a particular topic. But it was surely not self-evident that the parties would be foreclosed from voluntarily subjecting otherwise permissive matters to the statutory duties of contract execution and administration. Nonetheless, the Court's reading is consistent with the language of § 8(d), and with the general congressional policy of leaving contract enforcement to the courts rather than the NLRB.[25] The Court recognized, of course, that the union in Pittsburgh Plate would have a contract action against the employer if the latter's midterm modification was a breach of its agreement.

IMPORTANT OVERTONES

The overtones of Pittsburgh Plate may be more important than its stated themes. During its earlier years, the so-called Kennedy-Johnson Board reclassified a whole range of managerial decisions as mandatory subjects of bargaining.[26] In Fibreboard the Supreme Court sustained the Board in ruling that an employer had to bargain about the decision to subcontract maintenance work, at least where the subcontractor's employees were going to "perform the same task in the same plant under the ultimate control of the same employer."[27] Thereafter, however, the Board and some courts of appeals divided over the criteria for determining mandatory subjects. The Board seemed to place primary emphasis on the employees' interest in avoiding "impairment of job tenure, employ-

22 A "mandatory" subject is one on which either party may insist upon bargaining as a condition of reaching agreement; negotiations can be carried to the point of "impasse," or deadlock, on such a topic. A "permissive" subject is one on which the parties may bargain if they both are willing, but neither party can insist on bargaining over the other's objection. See NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 42 LRRM 2034 (1958).

23 Teamsters Union v. Oliver, 358 U.S. 283, 43 LRRM 2374 (1959) (rentals or owner-operated trucks).

24 Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964) (contracting out).

25 H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42 (1947).

26 See, e.g., Town and Country Mfg. Co., 136 NLRB 1022, 49 LRRM 1918 (1962), enforced, 316 F.2d 846, 53 LRRM 2054 (5th Cir. 1963) (terminating a department and subcontracting its work); Ozark Trailers, Inc., 161 NLRB 651, 63 LRRM 1264 (1966) (closing one plant of a multiplant enterprise).

27 Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 224, 57 LRRM 2609 (1964) (Stewart, J., concurring).

ment security, or reasonably anticipated work opportunities." [28] The courts, concerned about the employer's "freedom to manage its own affairs," placed the emphasis on whether there was "a change in basic operating procedure, . . . a change in the capital structure." [29] The Supreme Court left this conflict unresolved. More recently, the Labor Board has apparently retreated from its former position, joining the courts in stressing the employer's "freedom to manage" and viewing a "major change in the nature of the . . . business" as a nonmandatory subject.[30] A sign that the Supreme Court is now prepared to adopt the Nixon Board's view may be found in Justice Brennan's cryptic remark in Pittsburgh Plate: "This is not to say that application of Oliver and Fibreboard turns only on the impact of the third-party matter on employee interests. Other considerations, such as the effect on the employer's freedom to conduct his business, may be equally important." [31]

Pittsburgh Plate is also important for its confirmation of the famous (or infamous) mandatory-permissive dichotomy first approved by the Supreme Court in the Borg-Warner case.[32] The notion that bargaining topics should be classified into those on which one party must bargain at the behest of the other, under pain of violating § 8(a)(5) for a refusal, and into those on which one party cannot insist upon bargaining unless the other agrees, under pain of violating 8(a)(5) for insisting, has been much criticized by divers critics.[33] The objections are various, and, in my judgment, generally well-founded. The mandatory-permissive categorization enables a federal administrative agency and ultimately the courts to wield too much power in determining what American employers and unions will bargain about; it tends to freeze collective bargaining in outworn molds; it establishes a uniform rule of law when the practices of different industries may call for quite different treatment; and it leads to duplicitous negotiations, as the parties create artificial deadlocks over mandatory subjects in order to win concessions on permissive subjects they could not demand directly. Moreover, it ignores the industrial reality that economic strength, not legal maneuvering, will eventually decide the content of most labor agreements anyway.

Any one of several possible alternatives would seem preferable to Borg-Warner in my eyes. The mandatory-permissive distinction could be retained, but Borg-Warner overruled in its holding that insistence on a permissive topic is equivalent to a refusal to bargain. Under this approach, only refusals to bargain over mandatory subjects would violate § 8(a)(5). Or all subjects that any party wished to put on the table (excluding, of course, unlawful proposals) could be considered mandatory in the sense that the Labor Board would enforce the duty to bargain about them. Or (and this last is a suggestion I feel we may not be able to evaluate properly without more facts) all subjects would be considered mandatory, but the NLRB could withhold its processes in its discretion after a viable collective bargaining relationship was established. The idea behind this last proposal is that meaningful negotiations are more often impeded than aided by the parties' k n o w l e d g e that they can make the filing of 8(a)(5) charges part of their bargaining tactics.

One of the shrewdest management attorneys I know thought that Borg-Warner should have made the argument that all lawful proposals are mandatory bargaining subjects, despite the obvious point that this expansive reading of § 8(d) would on its face seem to benefit unions more than employers. My friend's position was that the major problem for an employer is not negotiating over an

28 See, e.g., Westinghouse Electric Corp., 150 NLRB 1574, 58 LRRM 1257 (1965) (subcontracting of both maintenance and manufacturing operations).

29 See, e.g., NLRB v. Adams Dairy, Inc., 350 F.2d 108, 60 LRRM 2084 (8th Cir. 1965), cert. denied, 382 U.S. 1011, 61, LRRM 2192 (1966) (termination of distribution operations).

30 Summit Tooling Co., 195 NLRB No. 91, 79 LRRM 1396, 1400 (1972).

31 404 U.S. at 179 n. 19, 78 LRRM 2974.

32 NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 42 LRRM 2034 (1958).

33 See, e.g., Cox, "The Labor Decisions of the Supreme Court at the October Term 1957," in ABA Section of Labor Relations Law—1958 Proceedings 12, 30-40; Christensen, "New Subjects and New Concepts in Collective Bargaining," in ABA Section of Labor Relations Law—1970 Proceedings 245-252.

item the union wants to place on the table; it is being caught in the trap of unilaterally changing something the employer believed wasn't mandatory and subsequently learning from the Labor Board that it was. This employer lawyer reasoned that over time the general trend would be to extend the scope of mandatory subjects, and thus he felt it was better to end the uncertainty and the risk of the unilateral action trap by making everything mandatory once and for all. "Then I'll know in advance exactly what I have to bargain about," he concluded, "and the outcome will depend on negotiating skill and economic power, which is the way it ought to be."

Another solution is suggested by my learned friend and esteemed successor as Section Secretary, Dave Feller. He points out that the NLRB has assumed without analysis that the mandatory-permissive distinction should apply in the same way in the negotiating situation and in the unilateral action situation. At least one other possibility is that all matters any party wished to bring to the table would have to be bargained about, but since this concept could indeed impede employer flexibility if extended to unilateral action, employers would still be able to introduce changes with regard to certain matters, akin to those now labeled permissive, in the absence of a union request for bargaining. I agree that the Board's premise is an unexamined one, and yet it seems to have been confirmed without discussion in Pittsburgh Plate. In deciding that the employer did not violate § 8(a)(5) by offering the retirees a substitute for their benefits under the group health plan, the Supreme Court apparently accepted the notion of a parallelism between the matters on which bargaining can be required and the matters which cannot be the subject of a unilateral change. There was no hint that the scope of mandatory bargaining might be different in the two different contexts. The Court thus unfortunately continues its tradition of inadequately reasoned law-making in the vital area of duty to bargain.

IV. Central Hardware and Union Access

The ancient conflict between an employer's property rights and a union's right to proselytize came to the fore again in the Central Hardware case.[34] Central Hardware owned and operated two retail stores in large buildings surrounded on three sides by parking lots. The parking lots were maintained solely for the use of Central's customers and employees. There were other retail establishments with separate parking facilities in the vicinity, but the various stores were not part of a shopping center complex. A union began an organizational campaign at both of Central's stores. The campaign consisted largely of the solicitation of Central's employees by nonemployee union organizers on the employer's parking lots. When Central had a union organizer arrested for violating a company no-solicitation rule, the union filed unfair labor practice charges.

The NLRB and later a court of appeals ordered the employer to cease enforcement of its no-solicitation rule, on the ground the situation was controlled by the Logan Valley Plaza case.[35] In Logan Valley the Supreme Court had held that a union's organizational picketing of a retailer in a shopping center open to the public was protected under the First Amendment. But in Central Hardware the Supreme Court, per Justice Powell, reversed and remanded, holding that Logan Valley was inapplicable and that the proper guide to decision was NLRB v.. Babcock & Wilcox Co.[36] Babcock did not deal with constitutional rights but with the § 7 rights of employees under the NLRA to carry on organizational activities on an employer's premises. It laid down the rule that an employer is entitled, as master of his property, to exclude nonemployee union organizers from his premises as long as there are reasonably available alternative means of communicating with the employees. The Court in Central Hardware there-

34 Central Hardware Co. v. NLRB, 407 U.S. 539, 92 S.Ct. 2238, 80 LRRM 2769 (U.S. 1972).
35 Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 68 LRRM 2209 (1968).
36 351 U.S. 105, 38 LRRM 2001 (1956).

fore sent the case back to the court of appeals to consider the availability of alternative channels of communication.

Logan Valley is confined, said the Court, to those situations where a private party has taken on certain attributes of a public body. Generally, constitutional limitations apply only to state action, or to equivalent action by private persons. Examples of the latter are the operation of a "company town"[37] or, as in Logan, of a large commercial shopping center that has significantly displaced the functions of the normal municipal business block. It was thus not enough that Central's parking lots were "open to the public" in the sense that customers as well as employees could use them. Otherwise, as the Court quite aptly remarked, almost every retail and service establishment in the country would become subject to constitutional restrictions, and long-settled property rights would be infringed.

On their facts, Logan Valley Plaza and Central Hardware are clearly distinguishable. Logan involved a shopping center complex and Central only parking lots. At least for judges who wish to sustain Logan Valley, Central Hardware presents no barriers. But significantly Justice Marshall, the author of Logan, dissented in Central and was joined by Justices Douglas and Brennan. Justice Marshall agreed with the majority that the case should have been considered first under Babcock rather than under Logan. He believed, however, that before the Court decided whether the decision below was correct under the Constitution, it should have remanded to the NLRB, rather than to the court of appeals, for a specific ruling on the applicability of Babcock. Plainly, the Court was not of one mind in its solicitude for the integrity of Logan.

Proper assessment of Central Hardware calls for examination of a companion case, Lloyd Corp. v. Tanner,[38] involving non-labor activity in a shopping center. Again speaking through Justice Powell, the Court limited Logan Valley by holding that the First Amendment does not prevent a privately owned shopping center from forbidding the distribution of antiwar literature that is unrelated to the shopping center's operations, at least where adequate alternative means of communication exist. Justices Marshall, Douglas, Brennan, and Stewart dissented.

Lloyd Corp. is a prime illustration of the venerable technique of balancing competing interests in the resolution of constitutional issues. What is noteworthy is the unaccustomed vigor with which Justice Powell asserts that property rights are entitled to a weight on the scales equivalent to that of speech rights: "[T]he Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected."[39] It is true that antiwar literature may be said to have much less "relation" than union propaganda to the purposes for which a shopping center exists, and thus arguably the owner's property rights are appropriately immune to the burden of the former but not of the latter. In this way Logan Valley and Lloyd Corp. can logically stand together. Even so, in light of Justice Powell's powerful statements on behalf of property rights in Lloyd, and in light of the dissent in that case by all four of the surviving members of the Logan majority,[40] only the hardiest soul would claim that Lloyd leaves Logan's vitality unimpaired. My expectation is for the continuing limitation of Logan Valley in the future.

Central Hardware and Lloyd Corp. dealt with solicitation and the distribution of literature, not with picketing; Logan Valley was a picketing case. We therefore can know nothing explicit, although perhaps we can indulge in some surmise, about the attitude of the Lloyd majority toward Logan's treatment of this ambulatory form of propaganda. A broad dictum by Justice Marshall in Logan Valley cut through the murk that has shrouded too many Supreme Court opinions on this subject over the years, and aroused hopes that the

37 Marsh v. Alabama, 326 U.S. 501 (1946).
38 92 S.Ct. 2219 (U.S. 1972).

39 Id. at 2229.
40 Justice White, the sole surviving dissenter in Logan Valley, was joined by all four Nixon appointees to form the majority in Lloyd Corp.

Court had at last devised a manageable test for the constitutional right to picket. After making the obvious point that the patrolling element in picketing permits it to be regulated as conduct as well as speech, Justice Marshall went on to stress the "purpose" of the picketing as the crucial factor in determining whether it may constitutionally be prohibited or restricted. The cases where bans on picketing have been upheld, he stated, "involved picketing that was found either to have been directed at an illegal end . . . or to have been directed to coercing a decision by an employer which, although in itself legal, could validly be required by the State to be left to the employer's free choice."[41] That test, of course, still leaves hard questions to be answered. But it has the great merit of focusing attention, as in other free speech inquiries, on the content of the message, and not the form it takes.[42] I should consider it regrettable if the doubt cast by Lloyd on Logan Valley's balancing of free speech and property rights, when the location of the communicator is the issue, should carry over (as it may very well) to Justice Marshall's perceptive words on the wholly different issue of the constitutional status of picketing, regardless of its location.

V. Miscellany

Burns, Pittsburgh Plate, and Central Hardware bulk much the largest amidst the Supreme Court's production of labor decisions during the past term. Nonetheless, there were eight other cases of varying degrees of importance. To fulfill my reportorial mandate and make my accounting complete, I shall say a brief word about each of them.

A. *Pipefitters Local 562 and Political Funds*

In a decision of special significance in an election year, the Supreme Court continued to render the Corrupt Practices Act all but a dead letter as applied to union political activity. According to Pipefitters Local 562 v. United States,[43] 18 U.S.C. § 610 does not forbid contributions or expenditures from voluntarily financed union political funds. Reversing the convictions of a union and three of its officers, the Court declared:

> We hold that such a fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments. We hold, too, that, although solicitation by unions officials is permissible, such solicitation must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership or any other reprisal within the union's institutional power.[44]

For the Court, the key to the interpretation of 18 U.S.C. § 610 was the belief that Congress intended to ensure the voluntariness of union members' contributions, and not otherwise to inhibit the exercise of union political power.

B. *Nash-Finch and Preemption*

Even in the absence of unfair labor practice charges before it, the NLRB may now seek federal injunctive relief against preempted state court action. In NLRB v. Nash-Finch Co.,[45] the Supreme Court sustained the power of the Board to ask a federal court to enjoin a state court injunction against peaceful picketing, despite the usual prohibitions of 28 U.S.C. § 2283 against federal injunctions to stay state court proceedings, and despite the failure of the company involved to file § 8(b)(4) or § 8(b)(7) charges against the union. Since the Board had no basis for requesting a § 10(j) or § 10(l) injunction, the express exception in § 2283 permitting a federal court to enjoin state proceedings "in aid of its jurisdiction" was not applicable. But in order "to prevent frustration of the policies of the Act," the Board was held to have "an implied authority," as a federal agency, "to enjoin state action where its federal power preempts the field."

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41 Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 314 (1968).

42 See also Jones, "Free Speech: Pickets on the Grass, Alas!—Amidst Confusion, A Consistent Principle, 29 So. Cal. L. Rev. 137 157 (1956); St. Antoine, "What Makes Secondary Boycotts Secondary?" in Southwestern Legal Foundation, Labor Law Developments—Proceedings of the Eleventh Annual Institute on Labor Law 5, 8-12 (1965).

43 407 U.S. 385, 92 S.Ct. 2247, 80 LRRM 2773 (U.S. 1972).

44 Id. at 2264, 80 LRRM 2773.

45 404 U.S. 138, 78 LRRM 2967 (1971).

The holding of Nash-Finch is noteworthy because it gives the Labor Board a powerful weapon with which to combat what had previously been the practical omnipotence of certain injunction-wielding state trial judges. But the implications of the decision may be even more noteworthy. For the Burger Court, Nash-Finch reflects an unwanted hospitableness toward the doctrine of federal preemption. Only Justice White, in dissent was openly prepared to pursue the notion espoused two years ago in Ariadne[46] that the only labor activitity determined to be "actually, rather than arguably, protected under federal law should be immune from state judicial control." Perhaps the challenge posed by Ariadne to Garmon[47] will subside, and Justice Harlan's wise valedictory on preemption in Lockridge[48] will prevail.

C. *Flair Builders and Arbitration*

Further evidence of the Supreme Court's regard for the arbitration process was supplied by Operating Engineers Local 150 v. Flair Builders, Inc.[49] The Court held that whether a union grievance is barred by "laches" is a question for the arbitrator to decide under a broad arbitration clause applicable to "any difference" not settled by the parties within 48 hours of the occurrence. This is true even if the claim of laches is considered "extrinsic" to the arbitral procedures under the agreement.

D. *Plasterers and Scrivener: No Surprises*

A union's gallant if quixotic effort to overturn twenty-five years of unbroken Labor Board administrative practice came finally to nought in Plasterers Local 79 v. NLRB.[50] Reversing a court of appeals, the Supreme Court held that employers with substantial financial stakes in the outcome of § 10(k) proceedings were "parties to the dispute" within the meaning of the section. The NLRB was therefore empowered to determine the jurisdictional dispute under § 10(k) where only the unions, and not the employers, had agreed upon a voluntary method of adjustment. The unions were not allowed to settle the matter between themselves, without employer participation.

Another case where the surprises (and the importance) would have lain only in the decision's going the other way was NLRB v. Scrivener.[51] Even so, it was necessary to battle on up to the Supreme Court for a ruling that an employer violated § 8(a)(4) by discharging employees for giving written sworn statements to a Board field examiner investigating unfair labor practice charges against the employer, even though the employees had not, in the literal language of the statute, "filed charges or given testimony" in a formal hearing.

E. *One Each under the LMRDA, Title VII, and the RLA*

Rounding out this report are three procedural decisions, one each under Landrum-Griffin, Title VII, and the Railway Labor Act.

In Trbovich v. UMW,[52] the Supreme Court held that a union member who filed the initial election complaint with the Secretary of Labor may intervene in the Secretary's action to set aside the election under Title IV of the Labor-Management Reporting and Disclosure Act. Intervention is confined, however, to the claims of illegality presented by the Secretary's complaint. While agreeing that the Secretary's suit is the exclusive remedy, the Court said: "There is no evidence whatever that Congress was opposed to participation by union members in the litigation, so long as that participation did not interfere with the screening and centralizing functions of the Secretary."[53]

The Court continued to clear the path for civil rights claimants by brushing aside procedural objections based on mere technicalities. Under

46 Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 202, 73 LRRM 2625 (1970) (White, J., concurring).

47 San Diego Building Trades Council v. Garmon, 359 U.S. 236, 43 LRRM 2838 (1959) (establishing the "arguably protected or prohibited" test).

48 Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 77 LRRM 2501 (1971) (reaffirming Garmon).

49 406 U.S. 487, 92 S.Ct. 1710, 80 LRRM 2441 (U.S. 1972).

50 404 U.S. 116, 78 LRRM 2897 (1971).

51 405 U.S. 117, 92 S.Ct. 798, 79 LRRM 2587 (U.S. 1972).

52 404 U.S. 528, 79 LRRM 2193 (1972).

53 Id. at 532-33, 79 LRRM 2193.

Title VII of the Civil Rights Act, a state agency that is authorized to deal with employment discrimination must be given the opportunity to process a charge before it is filed with the Equal Employment Opportunity Commission: charges must be filed with the EEOC within a specified time following the commencement or termination of the state proceedings. In Love v. Pullman Co.,[54] the Court ruled that the statutory requirements were met if the EEOC, upon receiving a complaint, orally referred it to the appropriate state agency, suspended action until the state body could decide what to do, and then treated the complaint as formally filed once the state agency indicated it would not act. No further filing with the EEOC by the aggrieved party was necessary.

Finally, the Supreme Court laid an old ghost to rest in Andrews v. Louisville & Nashville R.R.[55] In Republic Steel Corp. v. Maddox,[56] the Court had held that ordinarily an employee must exhaust the grievance and arbitration procedures available under a collective bargaining agreement before he may resort to the courts, specifically, in this instance, for the enforcement of severance claims. Maddox, decided under the Taft-Hartley Act, left a cloud over Moore v. Illinois Central R.R.,[57] which had ruled that an employee did not have to exhaust his administrative remedies under the Railway Labor Act before suing for wrongful discharge. Andrews formally overruled Moore, thus aligning the Taft-Hartley and Railway Labor Acts on the exhaustion of remedies principle. Consistency undoubtedly does not rank high in today's hierarchy of jurisprudential values, but it counts for something, and we may as well give some small thanks to see it manifested here.

54 404 U.S. 522, 4 FEP Cases 150 (1972).
55 406 U.S. 320 92 S.Ct. 1562, 80 LRRM 2240 (U.S. 1972).
56 379 U.S. 650, 58 LRRM 2193 (1965)
57 312 U.S. 630, 8 LRRM 455 (1941).

VI. Conclusion

Sir Frederick Pollock once declared: "Caution and valour are both needed for the fruitful constructive interpretation of legal principles."[58] A few years ago, in assessing the work of the Warren Court, I commented that many observers would conclude that it was more conspicuous for "valour" than for "caution." I added that if a choice had to be made between the two, I thought "valour" the more appropriate quality to bring to the regulation of so dynamic a field as labor relations. The Burger Court apparently feels otherwise. I concede that it may be too much to ask of any single Court that it maintain an ideal balance between boldness and circumspection, and that successive adjustments may be the best we can hope for. After a decade and a half of forays into new terrain behind the clarion call of "valour," perhaps it is time for a bit of retrenchment under the more modest banner of "caution."

58 Pollock, "Judicial Caution and Valour," in Bar Ass'n of the City of New York, ed., Jurisprudence in Action 367, 373 (1953).

ABA'S SECTION OF JUDICIAL ADMINISTRATION

NLRB Chairman on Administrative Law Judges

The following is the full text of an address delivered by NLRB Chairman Edward B. Miller on August 12, 1972, in San Francisco at the annual meeting of the American Bar Association, Section of Judicial Administration.

I have chosen as the title of these remarks, "The Administrative Law Judge—Who, Where, How, When?" What I would like to explore with you for a few minutes, under the basic headings suggested by that title, might be rephrased as, "What are you going to be, now that you've grown up?"

The change in title from Hearing Examiner to Administrative Law Judge indicates that there has now