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Robert N. Golden

Frederick P. Tiballi

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MANDATORY SUBJECTS OF BARGAINING – OPERATIONAL CHANGES

In today's expanding economy management's need for operational flexibility is of vital importance. The demands of a constantly changing market combined with increased competition necessitate periodic reassessments by management of its economic position. Such reassessments often indicate the need to make changes in the operational structure of the business. For example, management may be faced with a decision to subcontract certain work, to sell or move the plant, to merge with another firm, to install labor replacing equipment, or to go out of business entirely.

Employers generally claim that arriving at these decisions is strictly a management prerogative, that management assumes the risk of capital investment and therefore such decisions are "none of the union's business." Juxtaposed against this right of management are the needs of the employees who are often skilled in a particular job and may not be able to make use of these skills if their jobs are eliminated. The unions, as the representatives of the employees, have argued that because operational decisions adversely affect their members they should be the subject of joint determination between union and management.

Since 1935 the Wagner Act has required the employer to recognize and meet with the elected representatives of his employees;[1] however, the formulation and interpretation of the ground rules for this meeting, that is, collective bargaining, have been delegated to the National Labor Relations Board.[2] The Board, in a long line of decisions[3] has made it clear that the parties are not compelled to

1. National Labor Relations Act §8(a)(5), 61 Stat. 140 (1947), as amended, 29 U.S.C. §158(a)(5) (1958).

2. See, *e.g.*, Address by John J. Adams, Conference on Recent Developments in Labor Law, Washington, D.C., Oct. 4, 1963, in 54 LAB. REL. REP. 165; Address by Board Member Brown, Seventh Annual Conference on Current Trends in Collective Bargaining, Univ. of Tenn., Nov. 7, 1962, in 51 L.R.R.M. 96; Address by Board Member Fanning before the Ninth Annual Institute on Labor Law, Dallas, Tex., Oct. 19, 1962, in 51 L.R.R.M. 86; Address by Boyd Leedom, Univ. of Chicago Seminar on Collective Bargaining, April 16, 1963, in 52 LAB. REL. REP. 413; Address by Arnold Ordman before Ga. Bar Ass'n, March 15, 1963, in 52 L.R.R.M. 86; Address by Stuart Rothman before Labor Law Section of the Wis. Bar Ass'n, Milwaukee, Wis., Feb. 15, 1963, in 52 L.R.R.M. 57.

3. See NLRB v. Swift & Co., 127 F.2d 30 (6th Cir. 1942); NLRB v. Griswold Mfg. Co., 106 F.2d 713 (3d Cir. 1939); Black Diamond S.S. Corp. v. NLRB, 94 F.2d 875 (2d Cir. 1938), *cert. denied*, 304 U.S. 579 (1938); N. Ben Weiner, 71 N.L.R.B. 888 (1946); Interstate S.S. Co., 36 N.L.R.B. 1307 (1941); Stonewall Cotton Mills, 36 N.L.R.B. 240 (1941), *enforced as modified*, 129 F.2d 629 (5th Cir. 1942), *cert. denied*, 317 U.S. 667 (1942); Singer Mfg. Co., 24 N.L.R.B. 444 (1940), *en-*

agree, but must approach negotiations in good faith, with an open mind, and make a reasonable effort to reach agreement.[4]

Section 8(d) of the Taft-Hartley Act, a codification of a long-standing position of the Board, provides that, "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times *and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .*"[5]

The Board, with the Supreme Court's approval in *NLRB v. Borg Warner Corp.*,[6] has placed the subjects of bargaining into three classifications: mandatory, permissive or nonmandatory, and prohibited.[7] The employer decides at his peril the appropriate classification of a bargaining subject, for he may misjudge and place a subject in the wrong category, or the Board may change the classification of a particular subject.[8]

Mandatory bargaining issues fall within the section 8(d) phrase "wages, hours, and other terms and conditions of employment"[9] and are the required subjects of bargaining. This class has been continuously expanded by the Board to include almost every conceivable subject of wages, fringe benefits, and conditions of employment.

The Board has formulated a second class of bargaining subjects

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forced as modified, 119 F.2d 131 (7th Cir. 1941), *cert. denied*, 313 U.S. 595 (1941); Pilling & Son, 16 N.L.R.B. 650 (1939), *enforced*, 119 F.2d 32 (3d Cir. 1941); Highland Park Mfg. Co., 12 N.L.R.B. 1238 (1939), *enforced*, 110 F.2d 632 (4th Cir. 1940); Scandore Paper Box Co., 4 N.L.R.B. 910 (1938); Atlas Mills, Inc., 3 N.L.R.B. 10 (1938); Atlantic Ref. Co., 1 N.L.R.B. 359 (1936); Houde Eng'r Corp., 1 N.L.R.B. 35 (1934).

4. In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Supreme Court in sustaining the constitutionality of the National Labor Relations Act stated: "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever." *Id.* at 45.

5. National Labor Relations Act §8(d), 61 Stat. 142 (1947), 29 U.S.C. §158(d) (1958). (Emphasis added.)

6. 356 U.S. 342 (1958): The Court noted that §8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" when read in light of §8(d), which states, in part, that to bargain collectively includes the obligation to meet and confer in good faith "with respect to wages, hours, and other terms and conditions of employment" established the obligation of the parties "to bargain with each other in good faith with respect to wages, hours and other conditions of employment . . . ." The Court concluded that "the duty is limited to those subjects, and within that area, neither party is legally obligated to yield." *Id.* at 349.

7. A detailed grouping of the classifications of bargaining subjects is found in McManemin, *Subject Matter of Collective Bargaining*, 13 LAB. L.J. 985 (1962).

8. See note 16 *infra*.

9. National Labor Relations Act §8(d), 61 Stat. 142 (1947), 29 U.S.C. §158(d) (1958).

that are "permissive" or nonmandatory.[10] These are subjects "you can bargain about if you want to and the other fellow is willing."[11] This class of bargaining subjects apparently embraces all issues that are neither mandatory nor illegal. The ostensible effect of the distinction is that a mandatory subject of bargaining may in good faith be insisted upon to the point of impasse, or a breakdown in the negotiations, but a nonmandatory subject may not in good faith be forced as a condition precedent to agreement on other subjects.[12] Both parties, if willing, are free to agree on a nonmandatory subject, and the resulting contract will be enforceable.

Forbidden or nonbargainable subjects include matters that are independently unlawful.[13] These subjects might be referred to as "the Elliot Ness or vestal virgin type subjects, untouchable and beyond reach."[14]

The fact that a party negotiates in good faith on a mandatory subject of bargaining does not give him the right "to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining."[15] The determination of which subjects are mandatory and which are nonmandatory is of far-reaching importance to an employer. He may insist in good faith to the point of impasse on an issue he believes to be

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10. Wooster Div. of Borg Warner Corp., 113 N.L.R.B. 1288 (1955).

11. Address by John J. Adams, Conference on Recent Developments in Labor Law, Washington, D.C., Oct. 4, 1963 in 54 LAB. REL. REP. 165.

12. *E.g.*, Excello Dry Wall Co., 145 N.L.R.B. No. 64 (1963) (where union insisted, as a condition to entering a contract, that employer establish a fund as security for payment of wages and fringe benefits, it violated the Act as such demand was not a mandatory subject of bargaining); Mill Floor Covering, Inc., 136 N.L.R.B. No. 76 (1962), *enforced*, 317 F.2d 269 (6th Cir. 1963) (industry promotion fund not a mandatory subject of bargaining under the Act thus union violated the Act by insisting that the contract provide for such a fund); Arlington Asphalt Co., 136 N.L.R.B. No. 67 (1962), *enforced*, 318 F.2d 550 (4th Cir. 1963) (an indemnity bond under which the union would be required to compensate the employer if the employer is picketed by other unions is not a proper subject of bargaining under the Act; hence an employer may not insist on such a bond as the price for signing a contract).

13. *E.g.*, Simplicity Pattern Co., 102 N.L.R.B. 1283 (1953) (employer may not bargain about his duty to grant exclusive recognition to the union); American Newspaper Publishers Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951) (union may not request inclusion of a closed shop provision); Sherwin-Williams Co., 34 N.L.R.B. 651 (1941), *enforced*, 130 F.2d 244 (3d Cir. 1942).

14. Address by John J. Adams, *supra* note 11.

15. NLRB v. Borg Warner Corp., *supra* note 6. Applying that definition to the facts in the case, the Court held that a local uncertified union was not required to bargain with respect to employer demands that (1) the local's international be excluded from recognition although it was in fact the certified representative; and (2) a prestrike secret vote of all employees (union and nonunion) be held for acceptance or rejection of the employer's last offer.

a mandatory subject of bargaining, however, if the Board subsequently decides that such issue is nonmandatory, the "recalcitrant" party is deemed guilty of an unfair labor practice[16] despite his good intentions.

In deciding whether the parties are bargaining in good faith, the Board of necessity must determine the subjects about which employers and unions are required to bargain. Since its only guide is the broad language of section 8(d) of the Act that requires the parties bargain in good faith "with respect to wages, hours, and other terms and conditions of employment," the Board's determination is necessarily almost wholly subjective.

Much of the voluminous litigation before the Board and the courts arises because of the failure of the Board to set forth adequate guidelines as to what issues fall within the realm of mandatory bargaining subjects. In this area the duty of the Board should be preventive rather than remedial. The remedy imposed by the Board on a company that has mistakenly refused to bargain or taken unilateral action with respect to a mandatory subject of bargaining can be disastrous. For example, where management has taken unilateral action in subcontracting work, which results in a decrease or destruction of the bargaining unit, the standard remedy is abrogation of the subcontracting agreement, reinstatement of the displaced employees, and back pay from the date of the discharge.[17] Management's lack of adequate knowledge of current Board policies is illustrated by the following results of a survey conducted in 1964.[18]

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16. Indeed, the employer is taking a chance when he relies on past Board precedents, *e.g.*, General Cable Corp., 139 N.L.R.B. 1123 (1962) (modifying to three years the two-year contract-ban rule in effect since 1947); A.P.W. Products Co., 137 N.L.R.B. 25 (1962) (changing a twenty-six year old rule); Crown Cafeteria, 135 N.L.R.B. 1183 (1962) (reversing a ruling handed down in the same case a year earlier); Calumet Contractors Ass'n 133 N.L.R.B. 512 (1961) (reversing a decision handed down in the same case a year earlier); General Motors Corp., 133 N.L.R.B. 451 (1961), *enforcement denied*, 303 F.2d 428 (6th Cir. 1962), *rev'd* by General Motors Corp., 373 U.S. 734 (1963) (reversing a prior holding in the same case upon petition for reconsideration); Minneapolis House Furnishing Co., 133 N.L.R.B. 104 (1961) (reversing a ruling handed down less than a year before).

17. Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558 (1961), *rev'd on reconsideration*, 138 N.L.R.B. 550 (1962), *enforced sub nom.* East Bay Union of Machinists v. N.L.R.B., 322 F.2d 411 (D.C. Cir. 1963), *cert. granted as to employer*, 84 Sup. Ct. 490 (1964), *denied as to union*, 84 Sup. Ct. 491 (1964).

18. In a survey conducted by the authors the presidents of one hundred national firms and the presidents of one hundred Florida firms were requested to give their personal attitudes on the bargaining status of these issues. Thirty-four national and eighteen Florida firms responded. There is of course no way of knowing how many of the presidents answered the questionnaires themselves because they were not requested to identify themselves on the response.

PERCENTAGE OF ANSWERING FIRMS CONSIDERING OPERATIONAL CHANGES TO BE MANDATORY SUBJECTS OF BARGAINING

Issues	Florida Firms (Percentage)	National Firms (Percentage)
Right of management to go totally out of business		
(a) The management *decision* to shut down	0.0	0.0
(b) The *effect* of the decision to shut down	11.1	58.8
Plant relocation		
(a) The *decision* to relocate	0.0	2.9
(b) The *effect* of relocation	11.1	64.7
Subcontracting		
(a) The *decision* to subcontract	0.0	6.1
(b) The *effect* of the decision to subcontract	5.6	55.9
Investment in equipment that will displace workers		
(a) The *decision* to invest in such equipment	0.0	0.0
(b) The *effect* of such investment	11.1	57.6
Introduction of an independent contractor system of distribution, maintenance, et cetera		
(a) The *decision* to use independent contractors	0.0	2.9
(b) The *effect* of the decision	5.9	61.8
Sale or merger of the firm		
(a) The *decision* to sell or merge	0.0	0.0
(b) The *effect* of the sale or merger	0.0	52.9

All of the above questions have been held by the Board to be mandatory issues of bargaining.[19] The validity of the responses must be discounted for inherent defects in the structure of the questionnaire and the natural bias of those who responded,[20] but the great disparity between the answers of the Florida firms and the national firms is significant.

The questionnaire elicited attitudes as opposed to "legal positions." The comments from the Florida firms in many instances were quite vehement in their assertion that the best interests of the employees could be served by the company and not by a union. Such attitudes form the basis of many actions resulting in unfair labor practice charges and extensive, expensive litigation.

Many southern states, such as Florida, presently are the objects of intense organizational campaigns by the unions. In this respect these

19. Darlington Mfg. Co., 139 N.L.R.B. 241 (1962), *enforcement denied,* 325 F.2d 682 (4th Cir. 1963), *cert. granted,* 84 Sup. Ct. 1170 (1964); Adams Dairy, Inc., 137 N.L.R.B. 815 (1962), *enforced as modified,* 322 F.2d 553 (8th Cir. 1963), *petition for cert. filed,* 32 U.S.L. WEEK 3255 (U.S. Jan. 8, 1964) (No. 741); Renton News Record, 136 N.L.R.B. 1294 (1962); Town & Country Mfg. Co., 136 N.L.R.B. 1022 (1962), *enforced,* 316 F.2d 846 (5th Cir. 1963).

20. See note 18 *supra.*

states are now in the position occupied by the heavily unionized northern states twenty years ago. This is reflected by the results of the survey. The process of unionization in Florida will be accomplished with less friction if the Board takes pains to communicate clearly to management its policies on these various issues. The tremendous cost and suffering involved in discovering the Board's policies "the hard way" can at least be partially averted by diligent inquiry into current Board policies by management and its legal counsel.

In its initial rulings on the subject, the Board held that an employer could institute operational changes without prior consultation with the union. The Board's only restriction was that the changes could not be motivated by union animus.[21] Although the Board held that an employer did not have to discuss the *decision* with the union, he did have to bargain over the economic *impact* of the change on the displaced employees.[22] This reasoning has now been extended to include the *decision* to institute changes as a mandatory subject of bargaining upon a request by the union.[23] The practical effect of this policy is to prohibit an employer from instituting any unilateral business changes, which substantially affect wages, hours, terms and conditions of employment of the bargaining unit, without first bargaining in good faith with the union involved if it has requested the employer to do so. In at least one recent case the Board has apparently gone so far as to hold that the employer in such cases must of his own initiative discuss the proposed change with the union in the absence of a prior request to do so.[24] The controversy surrounding the question whether collective bargaining is to be a required prerequisite to a decision to institute operational changes has primarily concerned the areas of (1) subcontracting, (2) automation and, (3) complete shutdown of the business facilities.

THE DECISION TO MAKE OPERATIONAL CHANGES — A MANDATORY SUBJECT OF BARGAINING

Subcontracting

In 1962 the Board, overruling its holding of a year earlier,[25] held in several decisions that employers must bargain with employees'

21. W. L. Rives Co., 125 N.L.R.B. 772 (1959), *enforcement denied*, 288 F.2d 511 (5th Cir. 1961); Pepsi-Cola Bottling Co., 72 N.L.R.B. 601 (1947); Hays Corp., 64 N.L.R.B. 406 (1945).

22. Smith's Van & Transp. Co., 126 N.L.R.B. 1059 (1960); Mount Hope Finishing Co., 106 N.L.R.B. 480 (1953), *enforcement denied*, 211 F.2d 365 (4th Cir. 1954); National Gas Co., 99 N.L.R.B. 273 (1952), *aff'd on rehearing*, 106 N.L.R.B. 819 (1953), *enforcement denied*, 215 F.2d 160 (8th Cir. 1954).

23. Adams Dairy, Inc., *supra* note 19.

24. Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963).

25. Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558 (1961).

representatives prior to deciding whether to subcontract part of their operations.[26] In *Town & Country Manufacturing Co.*[27] the company had subcontracted its trucking operations one month after union certification. The Board found that the decision to subcontract was discriminatorily motivated[28] and, by way of dictum, stated that the company would have been under a duty to bargain even if its decision had been based entirely upon economic considerations.[29] The opinion thus indicated a willingness to extend considerably the scope of section 8 (a) (5). The Fifth Circuit[30] ignored this dictum, however, and enforced the Board's order that the company reinstate its drivers with back pay, abrogate the subcontract, and, upon request by the union, bargain with respect to the decision to subcontract.

In that the Board's order was based upon a finding of discrimination and on this basis enforced by the court, *Town & Country* is consistent with previous decisions of the Board.[31] Moreover, the Board's conclusion that the actual change in working conditions of the bargaining unit constituted a "unilateral change in wages, hours, and other terms and conditions of employment" was in line with the Supreme Court's decision in *NLRB v. Benne Katz.*[32]

Shortly after its decision in *Town & Country* the Board in *Fibreboard Paper Products Corp.*[33] gave effect to its proposed extension of section 8 (a) (5) made in the former case. The collective bargaining agreement in *Fibreboard* provided for automatic renewal on July 31, 1959, if neither party gave notice of its desire to seek modification. On May 26, 1959, the union gave notice and tried to arrange bargaining sessions. The company did not meet with the union until July 27 when it announced that the maintenance work performed by the

26. Hawaii Meat Co., 139 N.L.R.B. 966 (1962), *enforcement denied,* 321 F.2d 397 (9th Cir. 1963); Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550 (1962), *enforced sub nom.* East Bay Union of Machinists v. NLRB, 322 F.2d 411 (D.C. Cir. 1963); Adams Dairy, Inc., 137 N.L.R.B. 815 (1962), *enforced as modified,* 322 F.2d 553 (8th Cir. 1963), *petition for cert. filed,* 32 U.S.L. WEEK 3255 (U.S. Jan. 8, 1964) (No. 741); Town & Country Mfg. Co., 136 N.L.R.B. 1022 (1962), *enforced,* 316 F.2d 846 (5th Cir. 1963).

27. 136 N.L.R.B. 1022 (1962).

28. The employer had also visited the homes of a number of his employees informing them that if the union came in, he would subcontract.

29. Town & Country Mfg. Co., *supra* note 26, at 1027.

30. Town & Country Mfg. Co. v. NLRB, 316 F.2d 846 (5th Cir. 1963).

31. W. L. Rives Co., 125 N.L.R.B. 772 (1959), *enforcement denied,* 288 F.2d 511 (5th Cir. 1961) (subcontracting); Industrial Fabricating Inc., 119 N.L.R.B. 162 (1957), *enforced per curiam sub nom.* NLRB v. MacKneish, 272 F.2d 184 (6th Cir. 1959) (transferring work to subsidiary); Houston Chronicle Publishing Co., 101 N.L.R.B. 1208 (1952), *enforcement denied,* 211 F.2d 848 (5th Cir. 1954) (changing to independent contractor system).

32. 369 U.S. 736 (1962).

33. Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550 (1962).

union workers would be subcontracted effective August 1, and that further negotiations would therefore be useless. The Board had originally determined that the company's decision was economically motivated, and since the entire bargaining unit represented had been extinguished, the company had committed no unfair labor practice.[34] On reconsideration, however, the Board held that the company's economic motive did not justify its refusal to bargain over the decision to subcontract work performed by the unit.[35] The company was directed to cancel its subcontract, bargain with the union, and reinstate the discharged employees with back pay from the date of the second decision.[36] The District of Columbia Circuit adopted the Board's extension of section 8 (a) (5) and enforced its order.[37]

In *Hawaii Meat Co. v. NLRB*[38] the company and the recently certified union failed to reach an agreement after several meetings. The company, foreseeing the possibility of a strike, decided to subcontract the work performed by the unit employees. When the strike occurred, the company executed the subcontract and informed the employees that the new arrangement was permanent. The Board held that the company had failed to discharge its duty to bargain under section 8 (a) (5) and ordered the same remedy as that given in *Town & Country*. The Court of Appeals for the Ninth Circuit denied enforcement holding that an employer commits no unfair labor practice when he does not, during an economic strike, on his own initiative, offer to bargain with a striking union about a decision to subcontract.[39]

NLRB v. Adams Dairy Inc.[40] illustrates the typical business decision that invokes the doctrine of *Town & Country*. Adams Dairy was a processor and seller of milk and milk products. It employed both driver-salesmen and independent contractors to deliver and sell milk. The driver-salesmen had been represented by the union under the collective bargaining agreement since 1954. During negotiations for a new contract, the union unsuccessfully sought a contract clause that would have prohibited the company from substituting independent contractors for the driver-salesmen on company routes. In November and December of 1959 the company outlined its unfavorable competitive position to the union and requested that the union propose a feasible solution. The union offered no acceptable plan, and

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34. Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558, 1560 (1961).

35. Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550 (1962). It was not denied that the employer would realize annual savings of $225,000 as a result of such a change.

36. *Id.* at 554-55.

37. Fibreboard Paper Prods. Corp. v. NLRB, 322 F.2d 411 (D.C. Cir. 1963).

38. 321 F.2d 397 (9th Cir. 1963).

39. *Id.* at 400.

40. 322 F.2d 553 (8th Cir. 1963), *petition for cert. filed*, 32 U.S.L. WEEK 3255

on February 22, 1960 the company substituted independent contractors for its twenty-four driver-salesmen. The collective bargaining agreement contained the provision that "Nothing herein contained . . . shall prevent the employer from . . . eliminating any route or routes . . . ."[41] The contract further provided that the employer make payments of four months' wages in the event of termination. The employer actually paid only one week's wages. Despite the specific language of the existing collective bargaining agreement and the fact that no discriminatory motive could be found, the Board followed *Fibreboard* and ordered reinstatement with back pay for the discharged driver-salesmen.

The Eighth Circuit refused enforcement of the Board's order directing reinstatement with back pay for the driver-salesmen whose employment had been terminated.[42] Quoting extensively from the Supreme Court's decision in *NLRB v. Erie Resistor Corp.*,[43] the court held that the Board had not shown the requisite illegal intent on the part of the company and that the company's legitimate business purpose was a defense to the unfair labor practice charge. In *Erie Resistor* the Court concluded that an employer must have a specific illegal intent to discourage unionism before he is guilty of an unfair labor practice or that his decision itself must have, as its natural consequences, a discouragement of union membership constituting an encroachment upon the vested interests of the employees.[44] The *Adams* court found that the natural consequences of the managerial decision to terminate the driver-salesmen was not such conduct that carried its own indicia of illegal intent.[45] The court held that although the employer was not obligated to bargain over the decision to subcontract, he was obligated to bargain over the effects of his decision. Moreover it stated that this obligation should be satisfied by an adherence to the contract terms, which had contemplated the contingency that occurred, that is, payment of four-months wages upon termination.[46]

Classification of Operational Changes

Implicit within the Board's holding in *Town & Country* is the concept that the employer has a duty to bargain only with respect

(U.S. Jan. 8, 1964) (No. 741).

41. 322 F.2d at 562-63.

42. *Id.* at 563.

43. 373 U.S. 221 (1963).

44. 373 U.S. at 227-28.

45. In *Erie Resistor* the employer's grant of super-seniority to replacements and employees who deserted the strike, was held to have as its natural consequences a discouragement of union membership. 373 U.S. at 230.

46. NLRB v. Adams Dairy, Inc., 322 F.2d 553, 563 (1963).

to those decisions to make operational changes that fall within the statutory provision "wages, hours, terms and conditions of employment." The same principles underlying the subcontracting cases would seem to be equally applicable where the employees are shifted to different departments or their work week is materially shortened because of the change. However, when the contemplated change has a less substantial impact upon the terms and conditions of employment, the employer may be justified in refusing to bargain about his decision.[47] In this situation the Board could adopt one of three approaches in determining whether the employer had violated section 8 (a) (5): (1) the existence of a subjective belief of the employer that conditions of employment would not be substantially affected would constitute a defense to a charge of a refusal to bargain in good faith; (2) an objective test requiring a reasonable belief that bargaining was not necessary; or (3) the Board might hold the employer guilty of an unfair labor practice if it disagreed with his belief that a change would not substantially affect conditions of employment.[48]

The present philosophy of the Board indicates that any decision to change operations that would substantially affect employment falls within the purview of "terms and conditions of employment," and is therefore a mandatory subject of bargaining. Conditions of employment may also be drastically affected by a decision to purchase or sell assets, relocate or terminate operations, introduce automation, or merge corporations. This philosophy represents the *final* turn in the wheel of values from emphasis on maximum industrial productivity regardless of the cost to labor to a scheme whereby the economic welfare of the affected workers is considered *prior* to a decision to institute production-increasing operational changes.

This turnabout in the social conscience is strikingly illustrated by a comparison of two similar cases, decided sixty-five years apart. In *Hopkins v. Oxley Stave Co.*,[49] decided in 1897, the employer, a manufacturer of barrels and casks, installed in its cooperage plant certain machines that materially lessened the cost of manufacture. The Coopers Union demanded that the employer discontinue the use of these hooping machines and revert to the exclusive manufacture of hand-hooped barrels. When the employer refused, the union induced a boycott of all products packaged in machine-hooped barrels. The Eighth Circuit held the employees' conduct was unlawful in that its effect, "was to deprive the public at large of the advantages to be

47. See Shell Oil Co., 53 LAB. REL. REP. 217 (July 2, 1963) (decision of trial examiner).

48. An NLRB trial examiner recently intimated that the third standard would be applicable since the employer "can easily avoid the peril by resolving any doubts in favor of notifying and bargaining with the union." *Id.* at 219.

49. 83 Fed. 912 (8th Cir. 1897).

derived from the use of an invention which was not only designed to diminish the cost of making certain necessary articles, but to lessen the labor of human hands."

In *Renton News Record*,[50] decided in 1962, the employer, in order to meet increased competition and expanding markets, decided to utilize a cold-type method of composition that gave an increased volume of production at lower cost, provided a superior final product, and afforded an increased flexibility over past operations. To facilitate this change the publisher, along with other local publishers, set up an independent corporation to handle their cold-type composition needs.

The Board held that the employer violated section 8 (a) (5) by refusing to bargain with the union concerning its desire to implement automation and the effect of such change upon its composing room employees. Reiterating its philosophy suggested in *Town & Country* and established in *Fibreboard*, the Board concluded:[51]

> The change in the method of operations in this case is the result of technological improvements. Obviously, such improvements serve the interests of the economy as a whole and contribute to the wealth of the nation. Nevertheless, the impact of automation on a specific category of employees is a matter of grave concern to them. It may involve not only their present but their future employment in the skills for which they have been trained. Accordingly, the effect of automation on employment is a joint responsibility of employers and the representatives of the employees involved.

The Board's reasoning was based primarily on the proposition that "the adverse effect of changes in operation brought about due to improved, and even radically changed, methods and equipment, could be at least partially dissipated by timely advance planning by the employer and the bargaining representative of its employees."[52]

In 1897 the value placed upon "progress" measured by a decrease in the number of man-hours necessary to achieve production was paramount. In contrast, the value placed on the displacement of workers in a community in which jobs were abundant was inconsequential. Today, an abundance of job opportunities, particularly for the unskilled, no longer exists, thus the desirability of increased production must now be balanced with the goal of full employment.

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50. 136 N.L.R.B. 1294 (1962).
51. 136 N.L.R.B. at 1297.
52. 136 N.L.R.B. at 1297-98.

Complete Termination of Business Operations

Perhaps the most emotional issue in the area of operational changes concerns the question whether management must bargain with the union prior to making a decision to go out of business. In *Star Baby Co.*[53] the employer, in order to discourage unionization, liquidated his entire clothing manufacturing business. Although the employer violated section 8 (a) (5) by offering salary increases to individual employees engaged in a recognition strike, the Board stated: "By unilaterally terminating their business operations without informing the union, the Respondents further violated Section 8 (a) (5) . . . ."[54] In *Weingarten Food Center*[55] the employer sold five of his six stores. Although the complaint was dismissed,[56] a majority of the three-member panel stated that the employer was under a duty to bargain before reaching a decision to sell the stores.

Of recent interest are the decisions of the Board and the Fourth Circuit in *Darlington Manufacturing Co. v. NLRB.*[57] In *Darlington* the employer sustained continued business losses over an extended period, but during the same period engaged in an extensive modernization of his facilities. Shortly after the union won a representative election, the employer announced that he was going out of business and ignored the union's request to bargain.

The employer asserted that he had an unfettered right to go out of business irrespective of his reasons, including union animosity; alternatively he contended that he had bona fide economic reasons for his actions. The Board's position was that an employer may go out of business for bona fide economic reasons if they were honestly invoked and were not in fact a mere pretense to cover discrimination.[58] The Board concluded, however, that an employer may not go out of business without violating section 8 (a) (3) if partially motivated by discrimination against the union. Section 8 (a) (3) provides in part:

> It shall be an unfair labor practice for an employer – by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

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53. 140 N.L.R.B. 678 (1963).

54. 140 N.L.R.B. at 681.

55. 140 N.L.R.B. 256 (1962).

56. The complaint was dismissed because the NLRB General Counsel had failed to argue this violation before the trial examiner and therefore was prevented from raising the issue for the first time before the panel.

57. 139 N.L.R.B. 241 (1962), *enforcement denied,* 325 F.2d 682 (4th Cir. 1963), *cert. granted,* 84 Sup. Ct. 1170 (1964).

58. Compare Savoy Laundry, Inc., 137 N.L.R.B. 306 (1962).

In *Darlington* the Board stated:[59]

> Darlington discriminated in regard to its employees tenure of employment by closing its plant — thereby discharging the employees — and, because the plant closing was the direct result of the employees' selection of the Charging Union as their collective-bargaining representative, Darlington's retaliation against the employees for their activities in behalf of the Union discouraged the employees' continued membership in the Union.

Neither the Board nor the Fourth Circuit reached the question whether an employer, who solely for economic reasons desires to terminate his business, must first consult with the union. The Board did not rely upon the principles of *Town & Country,* but rather upon the specific wording of section 8 (a) (3).

The Fourth Circuit Court of Appeal in a three-to-two decision, denied enforcement of the Board's order stating that:[60]

> The fundamental purpose of the National Labor Relations Act is to preserve and protect the rights of both industry and labor so long as they are in the relationship of employer and employee . . . . It does not compel one to become or remain an employer . . . . If cessation of business is adopted to avoid labor relations, the proprietor pays the price of it: permanent dissolution of his business, in whole or in part.

Thus the employer was found to have an unrestrained right to decide unilaterally to go out of business without committing an unfair labor practice.[61] The *Darlington* case is now pending before the Supreme Court.

Decisions in Conflict

It is clear that the Board maintains the position that an employer who is desirous of altering his operations to the economic detriment of his employees must engage in collective bargaining prior to effecting such change. When the employer acts to defeat union activity, the Board, with assurance of judicial affirmation, is quick to find a section

59. 139 N.L.R.B. at 247. See, *e.g.*, NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962).

60. Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 685 (4th Cir. 1963).

61. *But cf.* NLRB v. Norma Mining Corp., 206 F.2d 38 (4th Cir. 1963), in which the court found that an employer violated §§8 (a) (1) and (3) by shutting down its mine after threatening to do so because of his employees' union activities. The court in *Darlington,* however, distinguished *Norma Mining* on the basis that *Darlington* was an absolute desistance not a temporary intermission as apparently contemplated by *Norma Mining.*

8 (a) (3) violation. When the employer is motivated purely by economic reasons, the Board may nevertheless find a violation of section 8 (a) (5). In this regard four circuit courts of appeal have reached conflicting decisions on the issue of subcontracting.

In *Town & Country*[62] the Fifth Circuit ignored the language of the Board to the effect that economic motivation did not foreclose a possibility of a section 8 (a) (5) violation, but the court enforced the Board's order on the basis of substantial evidence that the company's decision was the result, at least in part, of a determination to undermine the union. The United States Court of Appeals for the District of Columbia held in *Fibreboard*,[63] however, that an employer must bargain about a decision to subcontract even if based solely on economic grounds. In *Hawaii Meat*[64] the Ninth Circuit denied enforcement of the Board's order upon the narrow ground that during an economic strike an employer does not have to take the initiative in offering the union an opportunity to bargain about the economic decision to subcontract. The Eighth Circuit in *Adams Dairy*[65] held that there must be a discriminatory intent and motivation, actual or implied, before the court will sustain a finding of an unfair labor practice. The *Adams* court stated, "that the decision on the part of Adams to terminate a phase of its business and distribute all of its products through independent contractors *was not a required subject of collective bargaining.*"[66]

There is a direct conflict between the Eighth Circuit in *Adams Dairy* and the District of Columbia Circuit in *Fibreboard*. Only the District of Columbia Circuit in *Fibreboard* has directly upheld the Board's position with reference to economically motivated decisions.[67] The Ninth Circuit in *Hawaii Meat* assumed *arguendo* that in the absence of an economic strike an employer must bargain about the economic decision to subcontract.[68] This language indicates a rapport with the decision of the District of Columbia Circuit in *Fibreboard* and a potential adoption of the Board's position. Two days after the Supreme Court granted certiorari in *Fibreboard*,[69] the union in *Adams Dairy* filed its petition for the writ.[70]

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62. NLRB v. Town & Country Mfg. Co., 316 F.2d 846 (5th Cir. 1963).

63. NLRB v. Fibreboard Paper Prods. Corp., 322 F.2d 411 (D.C. Cir. 1963).

64. NLRB v. Hawaii Meat Co., 321 F.2d 397 (9th Cir. 1963).

65. NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963).

66. *Id.* at 562. (Emphasis added.)

67. Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550 (1962), *enforced sub nom.* East Bay Union of Machinists v. N.L.R.B., 322 F.2d 411 (D.C. Cir. 1963).

68. 321 F.2d at 398.

69. Fibreboard Paper Prods. Corp. v. NLRB, 84 Sup. Ct. 490 (1964).

70. Adams Dairy, Inc. v. NLRB, 32 U.S.L. WEEK 3255 (U.S. Jan. 8, 1964) (No. 741).

Remedy

If the Supreme Court establishes that the employer is under a duty to bargain over the decision to make operational changes, a serious problem arises as to the proper remedy in the event of unilateral action by the employer. The Board has generally required a return of the *status quo ante*.[71] Such a remedy requires an employer, who acted solely for economic reasons, to reinstate the affected employees and to resume the operation he discontinued without consulting the union. The Board's rationale is that "no genuine bargaining over a decision to terminate a phase of an operation can be conducted where that decision has already been made and implemented."[72] However, special facts and circumstances may vary the remedy. For example, in *Renton News Record*[73] the company was faced with the choice of either changing its method of operations or going out of business. It selected the former alternative. The company's change involved a totally different process and required the participation of other weekly newspapers. In this situation the Board did not order the company to resume its operation because resumption would have had a detrimental impact on participants who were not parties to the suit. Such an order would have been a penalty and not a remedial action. Thus, the employer was required only to bargain with the union as to the effect of such a change on its employees. Another illustrative case is *Star Baby*[74] in which a partnership was liquidated upon the discontinued operation of the business. The employer, who had discriminatorily closed his plants and discharged his employees, was not ordered to resume operations or to reinstate his employees. However, he was required to place the discharged employees on a preferential hiring list and to reinstate them in the event that either one of the partners resumed operations. Moreover, he was required to reimburse the employees for the period extending from completion of disposal of his business assets (thus effectuating the discharges of these employees) to such time as each employee secured substantially equivalent employment.[75]

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71. See, *e.g.*, Hawaii Meat Co., 139 N.L.R.B. 966, 973 (1962); Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550, 556 (1962); Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1032 (1962). Compare Adams Dairy, Inc., 137 N.L.R.B. 814, 817 (1962) where the Board, in requiring reinstatement of terminated employees, did not specifically order abrogation of the subcontracts.

72. Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1026 (1962).

73. 136 N.L.R.B. 1294 (1962).

74. 140 N.L.R.B. 678 (1963).

75. *Id.* at 672.

Future Trends in Litigation

Darlington Manufacturing Co.[76] represents the hybrid situation where the employer completely terminates his operations partially for economic reasons and partially because of union animus. The facts of *Darlington* should be viewed with two points in mind. First, because there is some question whether Darlington Manufacturing Co. is a single employer or a subsidiary of a larger complex, the decision of the Fourth Circuit may *not* stand for the proposition that an employer can unilaterally decide to close his business. Second, the employer's conduct is clearly open to criticism. It is undisputed that the Darlington Company had carried on a running battle with the union for a considerable period of time prior to ceasing its operations.

These factors may prevent the Supreme Court from reaching the question of *Darlington's* "right" to go out of business purely for economic reasons, for if the Court finds Darlington was a single employer, the company's apparent union animus may motivate the Court to base its decision on section 8 (a) (3)[77] and accordingly reverse the Fourth Circuit.

In all probability the Supreme Court will adopt the position of the Board and the District of Columbia Circuit in *Fibreboard* and reject the Eighth Circuit's position in *Adams Dairy.* Both employers dealt with the union in an arbitrary manner. Neither company's decision was precipitated by an economic strike,[78] nor one that they were unable to anticipate because of a sudden change in the company's business environment. The following factors should be relevant: (1) the indication of the employer's bad faith in failing to inform the union of its intention to institute an operation change; (2) the union's continuing interest in this issue; (3) the possibility that the union may have offered an acceptable solution to the employer's difficulty had the union been informed; (4) the general need to prevent unnecessary erosion of the labor force, and (5) the over-all need to effectuate the policy of the Act by encouraging the peaceful settlement of disputes through consensual agreements between the parties.

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76. 325 F.2d 682 (4th Cir. 1963).

77. For examples of operational changes found to violate §8 (a) (3) see NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962) (work subcontracted to another employer); NLRB v. United States Air Conditioning Corp., 302 F.2d 280 (1st Cir. 1962) (plant shut down then work resumed under subcontract guise); NLRB v. Winchester Electronics, Inc., 295 F.2d 288 (2d Cir. 1961) (plant shut down and work transferred to another plant owned by same employer).

78. *Cf.* NLRB v. Hawaii Meat Co., 321 F.2d 397 (9th Cir. 1963); Betts Cadillac-

The union in *Fibreboard* was informed of the decision only four days before it was to be implemented.[79] This relieves the union from any charge of unreasonableness. The union in *Adams Dairy*, however, had sought unsuccessfully to include a clause in the existing contract that would prevent Adams from selling employees' routes to independent contractors; but there is no indication that the union had clearly and unmistakably waived its right to bargain over the decision to extend the use of independent contractors.[80]

The technical argument advanced by management in *Darlington Manufacturing Co.* and the first *Fibreboard* decision, to the effect that once its decision is implemented the unit is extinguished and therefore the workers are no longer employees and as a result are not protected by the Act, is simply begging the question.[81] The purpose of the Act is to bring the parties together, not to deepen the schism.

The delineation of those activities that are mandatory subjects of collective bargaining must be kept flexible so that the Act can be administered to meet the changing conditions of society.[82] In enforcing the Board's order in *Fibreboard,* the court stated:[83]

> The purpose of imposing legal duties upon employers to meet and bargain with the representatives of employees is to create a structure of industrial self-government for a particular plant arrived at by consensual agreement between management and employees within the framework of the statute.

By imposing such a duty on the employer, it may be possible to partially eliminate industrial strife. Management has a right to operate its business in the most efficient manner possible, and this includes the right to subcontract unit work when such a change is economically

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Olds, Inc., 96 N.L.R.B. 268 (1951).

79. The company's attitude is illustrated by a letter transmitted to the union representatives four days before the proposed operational change. "For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959. In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you." Fibreboard Paper Prods. 322 F.2d 411, 412 (D.C. Cir. 1963).

80. See Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), *enforced,* 196 F.2d 680 (2d Cir. 1952). During the existence of a contract, the *Jacobs* rule relieves either party from an obligation to discuss subjects and proposals that were explored in the negotiation of the contract but upon which no agreement was reached.

81. *Cf.* Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 685 (4th Cir. 1963); Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558, 1560 (1961).

82. NLRB v. Borg Warner Corp., 356 U.S. 342 (1958) (dissenting opinion).

83. 322 F.2d at 414.

advantageous. But management's need for operational flexibility must be viewed in context with the effect of such decisions upon the labor force.[84] Society's requirement that a peaceful compromise be reached necessitates some sacrifice of management's freedom to act unilaterally.

When the union is given the opportunity to bargain over the decision, it is placed in a preventive rather than a remedial position. Once in this position it becomes in the union's own self-interest to suggest economically feasible alternatives[85] upon which an agreement can be reached.[86] If the union has participated in reaching the decision, that decision will generally be more acceptable to the union's rank and file even though detrimental to their interest. Further, the employer by bargaining with the union can only enhance his position in the eyes of the Board.

CONCLUSION

The Dividing Line Between Mandatory and Nonmandatory Bargaining Issues

It is important to realize the far-reaching impact of *Borg Warner*, for the Court in this decision has established that good-faith negotiation to an impasse on a *lawful* subject of bargaining constitutes per se an unfair labor practice if such issue falls within the nonmandatory

84. Plant removals and subcontracting obviously results in the loss of employment for individual workers. The burden of unemployment is particularly heavy when the workers affected are over forty years of age, have limited or nontransferable skills, are members of minority groups, and are thrown into labor markets where considerable slack already exists.

85. In *Adams Dairy*, if the company had informed the union of its need to extend its use of independent contractors to meet the demands of competition, the union might have acceded to Adams earlier proposals to reduce the unit of pay for the employees. "Certainly in some cases, the adverse effect of changes in operation . . . could be at least partially dissipated by timely advance planning by the employer and the bargaining representatives of the employees." Town & Country Mfg. Co., 136 N.L.R.B. 1294, 1297-98. However, it is difficult to conceive how the Board could find the union had no indication of the changeover after Adams had repeatedly asked the union's aid in improving the company's deteriorating competitive position.

86. "The consequences of Town and Country are far less fearsome than its critics anticipate. Labor, like management, has no suicidal instinct. Enlightened management has long recognized that a stable and adequately paid working force is essential to its own well-being, and enlightened labor knows its own vital stake in a prosperous economy. There is no basis to anticipate that either labor or management will prove more intransigent, more intractable on issues of subcontracting, of automation, of technological improvement than they proved to be on bread-and-butter issues of wages and hours in a more depressed economy." Address by Arnold Ordman, Labor Law Section of the Georgia Bar Association, March 15, 1963, in 52 L.R.R.M. 86, 90.

classification. As a practical matter this means that it may be futile for either party to propose a nonmandatory subject of bargaining. If the other side objects, it cannot be insisted upon, but must be dropped. In *Borg Warner* Mr. Justice Harlan, in his dissent, asserted that the Board has intruded into the substantive aspects of bargaining, because "the right to bargain becomes illusory, if one is not free to press a proposal made in good faith to the point of insistence."[87] This nonmandatory category of bargaining issues allows the Board to sit in judgment on the lawful issues on which the parties can exert their full powers of persuasion. In this respect the Board has made an unwarranted intrusion into the collective bargaining process. Good faith bargaining to an impasse on any legal subject should not be a violation of the Act. Collective bargaining is a flexible and dynamic process. The Board should restrain itself from interfering with the bargaining relationship by dictating what the parties may or may not discuss. The test should always be: (1) whether the subject itself is legal, and (2) whether good faith exists. A distinction between a mandatory or permissive subject of bargaining should not be relevant.

The Decision To Institute Operational Changes as a Mandatory Subject of Bargaining

The dynamic scope of collective bargaining must continue to expand — not because of the zeal or the perversity of labor or management, but rather because of the simple economic fact that our industrial complex is growing. A member of the Board has observed:[88]

> Today the twin problems of chronic unemployment and automation have given greater dimension to the issues involved; the economic climate surrounding bargaining as to subcontracting or the curtailment of operations has become more acute in an economy where upwards of four to five million employable men and women find themselves unemployed.

The Board has decided that the elimination of unit jobs, albeit for economic reasons, is a matter encompassed by the statutory phrase "other terms and conditions of employment," and is a mandatory subject of collective bargaining within the meaning of section 8 (a) (5). It is important to remember, as the majority stated in *Town & Country*, that this obligation neither restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business nor obligates him to yield to a union's demand that

87. 356 U.S. at 352 (dissenting opinion).
88. Fanning, *The Duty to Bargain in 1962*, 14 LAB. L.J. 18, 23 (1963).

a subcontract not be executed.[89] The obligation does require the parties to engage in prior discussion before taking unilateral action that substantially affects "wages, hours, and other terms and conditions of employment."

The critics of the *Town & Country — Fibreboard* principle have relied heavily on the proposition that the bargaining leading to an agreement or impasse may be lengthy. Meanwhile, the employer who may be faced with dire business necessity is deprived of both freedom of decision and power to act. Thus the Board's decision is considered as a usurpation of management's prerogatives and a hindering factor in its drive for operational flexibility. However, these allegations are not altogether realistic. Normally there is a considerable interim between the time that an employer assesses his need for an operational change and its actual implementation. During this interval a discussion of these proposed changes with the representatives of the employees would not be economically detrimental.

When a union files a complaint of an unfair labor practice because of the employer's unilateral action, the Board should take into consideration the amount of time within which the employer could have bargained with the union without substantial economic injury, the existence or nonexistence of dire economic necessity, and the good faith of the employer.

The test in this area must be a flexible one. Failure of an employer to bargain with respect to a decision to institute operational changes should not be per se an unfair labor practice. There will undoubtedly be a time when an employer is economically forced to implement such changes at once and cannot afford to discuss them in advance with the union. Under such circumstances the employer's immediate business necessity outweighs the benefits to be derived from prior discussion; and if the employer has acted in good faith, unilateral action should not be an unfair labor practice.

For the present, management must accept the fact that, whenever able, it is required to engage in good-faith discussions prior to making certain decisions. Of course if after such discussions an impasse is reached, an employer is free to implement such unilateral changes as his economic position dictates.

FREDERICK P. TIBALLI

ROBERT N. GOLDEN

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89. 136 N.L.R.B. at 1026.