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THE SPECTER OF DARLINGTON—RESTRICTIONS ON AN EMPLOYER'S RIGHT TO MAKE A CHANGE IN HIS BUSINESS OPERATIONS

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I. INTRODUCTION

Confusion now hath made his masterpiece.

—Shakespeare

These words might well have been uttered by an attorney trying to make his way through the mass of detail, opinions, appendages, and rulings which comprises this country's labor law. As confusing as the problems may seem, they are still fascinating and, of course, of vital interest. One of the major issues which now concerns the labor bar involves the "subcontracting-closing" problem.

This issue involves important questions of statutory interpretation as well as a balancing of social and economic factors of the greatest magnitude. Representatives of management and labor have repeatedly stepped into the legal arena to do battle before the National Labor Relations Board, circuit courts and the Supreme Court in their efforts to resolve the conflict.

Stated simply, the question is whether and to what extent an employer must bargain about proposed changes in his business prior to implementing them. At what point does a change in a business operation become a shut-down? What is required of an employer before he can make a change? May he merely notify the union; must he discuss the matter with them; must he acquiesce in the views of the union? Are there instances where he may act unilaterally?

The intent of this article is to draw some of these loose ends together and define the law as it stands today. Then, with the temerity that only one versed in labor law can know, an attempt will be made to predict the direction which the law will follow.

II. THE STATE OF THE LAW PRIOR TO TOWN & COUNTRY

Sections 8(a)(5) and 8(d) of the National Labor Relations Act provide:

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> It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees. . . .[1]
>
> For the purposes of this section, 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, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .[2]

The problems presented by these few words are enormous. Who are the "representatives of his employees"? What is bargaining? What constitutes a "refusal"? Refuse to bargain about what? Subcontracting? Partial closing? Complete closing? Automation? When must the employer bargain? For how long? When does the bargaining relationship end?

A look at some of the early Board decisions which construed these statutory provisions proves illuminating. In *Timken Roller Bearing Co.*,[3] the Board affirmed a Trial Examiner's decision which held that section 8(a)(5) required an employer to discuss the practice of subcontracting certain production and maintenance work which was identical to the work done by unit employees which the union represented. The Trial Examiner found that the employer had an established practice of subcontracting this work, and that the union requested discussion on the matter, but that the employer refused on the ground that subcontracting was exclusively a management function. In rejecting the employer's contentions, the Trial Examiner stated:

> [I]t seems apparent that the respondent's system of subcontracting work may vitally affect its employees by progressively undermining their tenure of employment in removing or withdrawing more and more work, and hence more and more jobs, from the unit. . . . It is the respondent's duty to sit down and discuss these matters with the Union when requested to do so. During such discussion it may develop, for example, that the Union will engage to supply sufficient skilled labor in the crafts in question, so that more work may be done by the respondent's employees and less by

[1] 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(5) (1964).
[2] 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).
[3] 70 N.L.R.B. 500 (1946).

> workers outside the unit . . . or some other and presently unthought of solution agreeable to both parties may suggest itself . . . .
>
> On none of the issues now dividing the parties is the respondent compelled to reach an agreement with the Union . . . . The requirement is that the respondent *consult* with the Union . . . .[4] (Emphasis added.)

Thus, the Board required an employer merely to *consult* with a recognized union before making changes which would eliminate jobs. There was no premium placed on *reaching agreement.*

Subsequent cases touched on the issues involved without meeting them squarely. In *Houston Chronicle Publishing Co.*,[5] the employer abolished its circulation department and created a system of independent distributions. The Board found this change in operations was not based on economic considerations, but was implemented for the illegal purpose of avoiding the obligation to deal with the union. The discharged employees were ordered reinstated, and the employer was ordered to revert to the former system of distribution. The Fifth Circuit denied enforcement of the Board's order,[6] finding the evidence insufficient to support its conclusions with respect to discriminatory intent. The court never considered the possibility that the 8(a)(5) violation could exist apart from a finding of illegal motivation.

III. Town & Country

In a critical refinement of policy, the Board set down the rule in *Town & Country Mfg. Co.*[7] that an employer must bargain about a decision to subcontract part of his operations, despite legitimate economic motivation. In this case, the employer was a manufacturer of mobile home trailers and maintained his own trucking operations to make delivery of the trailers. When confronted by a union, he exercised what he considered to be "management prerogative," discharged his drivers, and subcontracted the hauling without notifying the union of his decision.

The Board found that the subcontract was discriminatorily motivated and constituted a violation of section 8(a)(5) even though it may have been for purely economic motives:

> [T]he elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase "other terms and conditions of employment" and is a mandatory subject of

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[4] Id. at 518.
[5] 101 N.L.R.B. 1208 (1952), enforcement denied, 211 F.2d 848 (5th Cir. 1954).
[6] Ibid.
[7] 136 N.L.R.B. 1022 (1962), enforced, 316 F.2d 846 (5th Cir. 1963).

> collective bargaining within the meaning of Section 8(a)(5) of the Act. Moreover, the duty to bargain about a decision to subcontract work does not impose an undue or unfair burden upon the employer involved. This obligation to bargain in nowise restrains an employer from formulating or effectuating an economic decision *to terminate a phase of his business operations*. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment. Experience has shown, however, that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. But it commands no less.[8] (Emphasis added.)

Having found that the employer terminated its hauling operations and discharged the drivers for anti-union reasons, the Board ordered abrogation of the subcontract, resumption of the hauling operations as before, and reinstatement of the drivers discharged. Interestingly, and consistent with the finding of the section 8(a)(5) violation, the Board stated that it would have taken the same action even if the employer as a matter of fact was motivated solely by economic considerations.[9]

Subsequently, the principles enunciated in *Town & Country* were applied in a series of cases which were important both for their treatment of remedy and for the expansion of the *Town & Country* principles to new situations.

In *Adams Dairy, Inc.*,[10] a decision which proved to be of singular significance, the employer sold the delivery phase of his business to independent distributors, and discharged his driver-salesmen, without bargaining with the union about the decision. Citing *Town & Country*, the Board found a violation of section 8(a)(5) and, without deciding whether the discharge was also violative of section 8(a)(3), ordered the employer to reinstate the driver-salesmen with back pay. The Board viewed this case as falling within the *Town & Country* doctrine, since the unilateral decision, although not a decision to "subcontract," resulted in the elimination of unit work.[11]

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[8] Id. at 1027.

[9] Id. at 1027-28.

[10] 137 N.L.R.B. 815 (1962), modified and enforced in part, 322 F.2d 553 (8th Cir. 1963), vacated and remanded, 379 U.S. 644 (1965), modified, 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966).

[11] Accord, Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410 (1964); American Mfg. Co., 139 N.L.R.B. 815 (1962), enforced in part, 351 F.2d 74 (5th Cir. 1965), modified on remand, 156 N.L.R.B. No. 109 (1966), discussed at pp. 75-76 infra. In the latter

In *Renton News Record*,[12] a group of newspaper publishers, in order to meet competitive demands, formed a separate corporation to purchase a press. They then formed a second corporation which would operate the press. These two new corporations printed the newspapers, eliminating the jobs of composing room employees, while the publishers themselves engaged only in commercial printing. There was no notice afforded the union either of the change in operations or its effects on the employees. The Board found that neither of the two newly formed corporations was an alter ego of the publishers, thus excusing them from any unfair labor practices, but found the publishers in violation of section 8(a)(5). No violation of section 8(a)(3) was found. The Board considered the case a combination of contracting out and automation, amounting to a change in the method of operations resulting from technological improvements. The emphasis, however, was on the "automation" rather than the "contracting out,"[13] the latter being considered only the vehicle used in effectuating the decision to automate. Were the method of operations not so changed, the employers would have been forced out of business. Clearly a capital investment was undertaken, yet the fact that jobs were being eliminated was sufficient to impose the obligation to bargain. Indeed, considering *Town & Country* as focusing on job elimination, the decision to automate, thereby replacing men with machines, is no different in kind from a decision to subcontract, replacing men with men. It should be noted that the Board did not order a return to the *status quo ante*, nor did it order bargaining over future changes, since the decision to change the operations was impelled by economic survival, the change involved parties not involved in the unfair labor practice proceedings,[14] and such an order would have been punitive rather than remedial. The respondents were ordered, however, to bargain about the effects of the decision.[15]

In contrast to *Renton News*, the Board in *Winn-Dixie Stores, Inc.*[16] ordered bargaining not only about the effects of the employer's unilaterally discontinued cheese operations, which resulted in the elimination of unit jobs, but also about their resumption. Distinguishing *Renton News* in this regard, the Board pointed to the employer's past

case, the Board ordered resumption of the unilaterally discontinued trucking operations, the Fifth Circuit denied enforcement of that remedy, and, on remand, the Board deleted the restoration requirement from its order.

[12] 136 N.L.R.B. 1294 (1962).

[13] Id. at 1297.

[14] See generally Assonet Trucking Co., 156 N.L.R.B. No. 35 (1965); Savoy Laundry Co., 148 N.L.R.B. 38 (1964), modified, 327 F.2d 370 (2d Cir. 1964).

[15] See also Puerto Rico Tel. Co., 149 N.L.R.B. 950 (1964), enforced in part, 359 F.2d 983 (1st Cir. 1966). In that case, even though the Board found a violation of section 8(a)(5), abrogation of the subcontracts was not ordered.

[16] 147 N.L.R.B. 788 (1964).

unfair labor practices, the absence of innocent third-party interests, and the fact that the unilateral change was not compelled by economic necessity. "Practical considerations," however, militated against ordering the employer to restore the abolished operations. These considerations included the nature of the business, the probability that discharged employees would be placed elsewhere in the business, and the possibility that the abolished operations were outmoded.

Continuing to focus on the concept of elimination of unit jobs, the Board in *Hawaii Meat Co.*[17] declared an employer in violation of section 8(a)(5) when he subcontracted, without bargaining, work which previously had been performed by employees who were then on strike. Noting that the right of an employer to replace his strikers was settled by the Supreme Court in *NLRB v. Mackay Radio & Tel. Co.*,[18] the Board stated that "in this case, individual strikers are not being replaced by other employees, but instead, the positions they held before the strike have been eliminated so that no replacement is being substituted for the striker."[19] Without finding any section 8(a)(3) violation, the Board then ordered "that the Respondent must be required to discontinue any arrangement involving the contracting out of its delivery operations and to reestablish this operation as it existed on July 1, 1960."[20] Here, then, although there was a substitution of men for men via subcontract, no economic motive was present, at least in terms of saving labor costs, and the Board found an 8(a)(5) obligation.

There were certain situations, however, in which the Board felt that no bargaining was necessary. Among these were instances where the union representative had seen the movement to equipment incident to the subcontract but had not requested bargaining,[21] where the employer's "overall conduct, both prior and subsequent to the execution of the subcontracting agreement" was fair and honest,[22] and where there was no "significant detriment" to the employees in the bargaining unit and there was a past practice of subcontracting not previously objected to by the union.[23]

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[17] 139 N.L.R.B. 966 (1962), enforcement denied, 321 F.2d 397 (9th Cir. 1963).

[18] 304 U.S. 333 (1938).

[19] 139 N.L.R.B. at 969. Compare Empire Terminal Warehouse Co., 151 N.L.R.B. 1359 (1965), enforced sub nom. Dallas Gen. Drivers Union, Local 745 v. NLRB, 355 F.2d 842 (D.C. Cir. 1966); Shell Oil Co., 149 N.L.R.B. 283 (1964); Shell Chem. Co., Div. of Shell Oil Co., 149 N.L.R.B. 298 (1964).

[20] 139 N.L.R.B. at 971.

[21] Motoresearch Co., 138 N.L.R.B. 1490 (1962). See also White Consol. Indus., Inc., 154 N.L.R.B. No. 127 (1965).

[22] Hartmann Luggage Co., 145 N.L.R.B. 1572, 1573 (1964). See also United Industrial Workers v. Board of Trustees of Galveston Wharves, 351 F.2d 183 (5th Cir. 1965), 7 B.C. Ind. & Com. L. Rev. 1025 (1966); Georgia-Pacific Corp., 150 N.L.R.B. 885 (1965).

[23] Kennecott Copper Corp. (Chino Mines Div.), 148 N.L.R.B. 1653 (1964). See

In *William J. Burns Int'l Detective Agency, Inc.*,[24] which did not involve subcontracting, but instead the partial termination of the employer's business, the Board felt that the *Town & Country* principles were also applicable. In that case, the employer furnished guard services throughout the United States. He had had several contracts in the Omaha, Nebraska area, and all but the one with Creighton University had been terminated. The company solicited the cancellation of that account after a cost analysis indicated that it would be unprofitable to continue operations in Omaha with only one contract. The employer failed to bargain with the union. The Board found such failure to constitute a violation of section 8(a)(5) and ordered the employer to bargain about both the effects of the cancellation on the employees and the resumption of the prior operations. It also ordered back pay for the guards dismissed from Creighton University.

The Board was confronted with a new problem in *Burns:* subcontracting without prior notice is violative of section 8(a)(5), but is a failure to afford advance notice of a partial termination of a business likewise violative? In the former situation, the employer merely substitutes others for his own employees while continuing that portion of his business. In the latter case, however, there is not substitution, but elimination. Burns Detective Agency did not continue its services in any way at Creighton University; it left the performance of guard services to whomever should successfully bid for that contract with the University itself. Yet the Board did not make this distinction, although such a distinction would have become critical at the court level.[25] Member Leedom would have found a violation of section 8(a)(5) simply because of the failure to bargain over the *effects* of the cancelled contract, and Member Jenkins would have so found only because the contract was cancelled during negotiations with the union, an act which supported a finding of bad faith bargaining.[26]

In a similar case, *Royal Plating & Polishing Co.*,[27] the employer operated his plant in two separate buildings. All employees were represented by a single bargaining unit. Without prior notice to the union, the company shut down one of the two buildings, having decided to sell to the local housing authority. In finding that the employer had

Westinghouse Elec. Corp. (Bettis Lab.), 153 N.L.R.B. No. 33 (1965); Allied Chem. Corp., 151 N.L.R.B. 718 (1965), enforced, 358 F.2d 234 (4th Cir. 1966); Westinghouse Elec. Corp. (Mansfield Plant), 150 N.L.R.B. 1574 (1965); General Motors Corp., Buick-Oldsmobile-Pontiac Assembly Div., 149 N.L.R.B. 396 (1964).

[24] 148 N.L.R.B. 1267 (1964), enforced in part, 346 F.2d 897 (8th Cir. 1965).

[25] The Eighth Circuit noted that Burns' action in no way constituted a subcontract, but was a complete withdrawal. 346 F.2d at 902 n.2.

[26] 148 N.L.R.B. at 1268 n.2.

[27] 148 N.L.R.B. 545 (1964), remanded, 350 F.2d 191 (3d Cir. 1965), aff'd on remand, 152 N.L.R.B. 619 (1965).

violated section 8(a)(5) by failing to bargain about the decision, the Board stated:

> Had Respondent consulted with the Union in this case, the latter at least would have been able to negotiate concerning effects on employees of Respondent's decision to close down the operations, rather than devoting its energies and attention to the establishment of phantom rates of pay and conditions of employment. Moreover, the Union might have been able to advance a solution to the problems confronting Respondent, however remote that possibility may have been. It is not necessary that a satisfactory solution to the serious issues involved in a closedown of operations be the probable result of bargaining negotiations for the obligation to give notice and opportunity for discussion of such matter to be a viable and intrinsic part of the statutory bargaining obligation.[28]

The Board then ordered the employer to give back pay to employees affected by the closedown until they secured substantially equivalent employment elsewhere, but not past the date on which the premises were to be turned over to the housing authority. The Board viewed the employer's action here as a partial cessation of business and had no difficulty in finding an obligation to bargain in such circumstances.[29] Again, the elimination of unit jobs was the touchstone.

The Board had occasion to consider the bargaining obligation incident to a *complete* termination of a business in *Star Baby Co.*[30] and found violations of sections 8(a)(1), (3) and (5) of the act. The sections 8(a)(1) and (3) violations were predicated on a finding that the purpose of the shutdown was to avoid the union, and therefore the layoffs incident to the shutdown were discriminatory. The section 8(a)(5) violation stemmed from a unilateral termination without consulting the union concerning the *decision* to terminate. *Town & Country* was cited by the Board in finding the violation. Since the employer was no longer in business, the Board did not order the resumption of operations, nor the reinstatement of discharged employees. Instead, they ruled that should operations be resumed, the discharged employees were to be offered immediate reinstatement, with back pay from the time of the dissolution of the business until they could secure

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[28] 148 N.L.R.B. at 547.

[29] See also Weingarten Food Center, Inc., 140 N.L.R.B. 256 (1962).

[30] 140 N.L.R.B. 678 (1963), enforced as modified sub nom. N.L.R.B. v. Neiderman, 334 F.2d 601 (2d Cir. 1964). The Second Circuit did not find it necessary to determine whether a complete cessation of business was a mandatory subject of bargaining.

substantially equivalent employment elsewhere. The Board was conscious of the unusual nature of its back pay remedy, since normally an employer may terminate his back pay liability by reinstating the employees; in this case, however, "the employer's inability to end the back pay by rehiring the employees is the direct result of the employer's own unlawful conduct in discriminatorily terminating his business."[31]

What, then, is the obligation, the burden, placed on the employer in these situations? For the purpose of this discussion, it might be worthwhile to treat the obligation in a truncated manner, with an emphasis on what is *not* required. Contrary to some assertions, "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 a subcontract not be let."[32] The word "yield" is critical. As the Board emphasized in *Town & Country*, the obligation does not require the employer to change his mind or to let a subcontract "on terms inconsistent with management's business judgment."[33] The object is to create an atmosphere conducive to a solution that will permit the continuation of a harmonious relationship. A solution may be arrived at whereby the employer's business may continue to prosper while employees retain their jobs. The Board found the mediatory effect of such discussion a vital factor in their *Town & Country* decision. They quoted with approval a statement of Archibald Cox wherein the noted labor law professor stated:

> Participating in [collective bargaining] debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strengths or weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion.[34]

The duty to bargain is, of course, not quite as simple as it may at first appear. Not only must an employer discuss his proposed business change, but he must discuss it in "good faith." It is this latter requirement which might cause the casual observer to become disturbed by

[31] 140 N.L.R.B. at 684.

[32] Address by Board Member Fanning, Ninth Annual Institute on Labor Law, Southwestern Legal Foundation, Dallas, Texas, October 19, 1962.

[33] Town & Country Mfg. Co., supra note 7, at 1027.

[34] Id. at 1027 n.9, quoting Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1412 (1958).

the Board's *Town & Country* doctrine, for the Board has stated that the parties must evince "a sincere desire to resolve differences and reach a common ground."[35] Thus the question arises: in evincing this "sincere desire" to reach a "common ground," must the employer in fact alter his position? Assuming, *arguendo*, that there may be certain bargaining situations in which the employer must negotiate with an open mind, *Town & Country* does not seem to be one of those situations. It would appear that an employer can enter into a bargaining conference similar to that in *Town & Country* with his decision made before he entered the room.[36] Good faith bargaining in these conferences would seem to require no more of the employer than listening to the union's proposals, examining them with the union, and sincerely considering them. Whether the discussion was *in fact* sincere would depend on the overall facts of the case and "the totality of [the employer's] . . . conduct."[37]

That the Board so construes the employer's obligation is clear from the language in *Town & Country* itself. This construction was later asserted in the Board's brief in *Fibreboard Paper Prods. Corp. v. NLRB*, wherein they defined the employer's duty in the following manner:

> He must hear in good faith any union arguments for a contrary policy. Alternatives must be explored. Then either the employer and union will agree or the employer will make its decision and the union may resort to self-help.[38]

Thus, after considering this facet of the Board's delineation of the employer's obligation, one may conclude that even in the area where an employer must discuss proposed business changes with his employees' bargaining representative, he may still make the business decision he considers most suitable without committing an unfair labor practice.

IV. Fibreboard

It is in the context of these developments that one of the most important cases in the 8(a)(5) area—*Fibreboard Paper Products*[39]—must be considered. In *Fibreboard*, the union had for many years represented a unit of fifty maintenance employees. In 1960 the employer

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[35] General Elec. Co., 150 N.L.R.B. 192, 196 (1965).

[36] See Note, 77 Harv. L. Rev. 1100, 1104 (1964). Whether this position is well taken is certainly open to debate.

[37] General Elec. Co., supra note 35, at 197. See Cumberland Shoe Corp., 156 N.L.R.B. No. 103 (1966).

[38] Brief for Respondent, p. 50, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

[39] Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558 (1961), rev'd on rehearing, 138 N.L.R.B. 550 (1962), enforced, 322 F.2d 411 (D.C. Cir. 1963), aff'd, 379 U.S. 203 (1964).

concluded a study of the feasibility of contracting out this work. The study showed that the employer could save $225,000 annually by subcontracting his maintenance operations. Accordingly, the decision was made to subcontract the work. When the union attempted to reopen the existing contract for negotiations, the employer refused on the grounds that any negotiations would be useless in view of the proposed change in operations. The employer did agree, however, to discuss the effects of the change. The union filed an 8(a)(5) charge alleging a refusal to bargain about the *decision* to subcontract.

The Board initially considered the problem in 1961. A majority of the panel found that the employer had not violated the act. They reasoned that although section 8(a)(5) of the act is extremely broad and protects employee rights arising from the employment relationship, whether the claim for them is made before or after the termination of the employment relationship, the coverage only extends to matters growing out of an *existing* bargaining unit. Where, as in *Fibreboard*, the discussion would only relate to the question of whether there should be *any* unit, the employer might choose to dispense with bargaining. When the employment relationship comes to an end there can be no "condition of employment" to discuss. "Here . . . no employees remained in the unit to be represented by the Union, and thus there necessarily could be *no impact on the employment conditions of employees remaining in the unit.*"[40] (Emphasis added.)

Member Fanning issued a strong dissenting opinion. He argued that in the *Timken Roller Bearing* case,[41] the Board held that subcontracting is a mandatory subject of collective bargaining prior to the institution of any change and that the employer should not be relieved of this duty to bargain while the unit exists. He found support for his view in a Supreme Court decision interpreting a section of the Railway Labor Act.[42] In *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*,[43] the Court had construed "working conditions" under the Railway Labor Act to include the abolition of unit work, against which the union had a right to protect itself via the strike. Thus, if "working conditions" under the Railway Labor Act includes the possible loss of unit jobs, it must have the same meaning under the National Labor Relations Act. *Timken*, according to Member Fanning, only served to reinforce this view.

With the Board's apparent reversal of policy in *Town & Country* a year later, both the charging union and the Board's General Counsel petitioned for reconsideration of the decision in *Fibreboard*. The peti-

40 130 N.L.R.B. at 1561.
41 Supra note 3.
42 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-88 (1964).
43 362 U.S. 330 (1960).

tion was granted, and, in a 2-1 decision, the Board ruled that the employer had violated the act by failing to bargain with the union with respect to the decision to subcontract the maintenance work.

In a dissenting opinion, Member Rodgers attacked the majority's holding as one which would stifle management. He felt that a basic management right had been taken away—the right of a businessman "to make those economic decisions necessary to the improvement, or indeed the survival, of the business concern with which [he] . . . is identified."[44] The majority answered this contention by specifically stating that the only duty imposed on the employer is to bargain in good faith; he can still reach the same decision with respect to the proposed change.

The court of appeals affirmed the Board's decision.[45] The court, speaking through Judge Burger, held that the decision fell within the realm of the Board's expertise and that it merely constitutes a part of the Board's role in fashioning a system of industrial self-government within the "framework" of the National Labor Relations Act.

After a petition for rehearing was denied, the employer filed a petition for a writ of certiorari. The writ was granted, and the Supreme Court had before it a case which, in the words of NLRB counsel, "impinges, in its broadest aspects, upon some of the most difficult and most important questions of labor-management relations."[46]

The Court agreed unanimously that the Board's order should be upheld.[47] The majority found that subcontracting of this type fell well within the meaning of "terms and conditions of employment" about which an employer must bargain under section 8(d) of the act, and noted the Board's holding in *Timken* with approval. It would therefore appear that the majority extended the obligation to bargain with respect to the *effects* of a decision to include bargaining with respect to the *decision* itself. Whether the latter follows from the former may be questionable, since the interests involved are so wholly different. The majority apparently noticed this possible incongruity, for they go on to severely limit the scope of their decision:

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation . . . . *No capital investment was contemplated*; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of em-

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[44] 138 N.L.R.B. at 557.

[45] 322 F.2d 411 (D.C. Cir. 1963).

[46] Brief for Respondent, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

[47] Though the Court unanimously affirmed, Mr. Justice Goldberg took no part in the decision and three other justices joined in a separate concurring opinion.

ployment. *Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.*[48] (Emphasis added.)

The Court also emphasized that these matters, like those in *Timken*, are peculiarly susceptible to solution in the "mediatory" atmosphere of collective bargaining. Thus the Court limited itself to the facts of the instant case and did not consider the broad problems presented by subcontracting.[49]

The concurring opinion attempts to supply answers omitted by the majority. Mr. Justice Stewart, who wrote the concurring opinion, considered the majority holding to be limited to the instance where employees in a bargaining unit are replaced by those of a subcontractor doing the same work under similar conditions. He would restrict the duty to bargain on "conditions of employment" to those instances where the managerial decision is aimed *primarily* at these conditions:

> Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about *conditions* of employment, though the effect of the decision may be necessarily to terminate employment . . . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.[50] (Emphasis added.)

Mr. Justice Stewart points to the liquidation of a business or the purchase of labor-saving machinery as examples of acts not *primarily* aimed at conditions of employment. He finds the type of subcontracting in the instant case a mandatory subject of bargaining because it merely involved the replacement of one group of workers by another. Thus, this was an act aimed *directly* at conditions of employment.

After *Fibreboard*, the Board continued to find violations in traditional *Fibreboard* situations.[51] The Board also continued to develop a doctrine which excused a failure to bargain prior to a change in operation when the employer's overall conduct indicated good faith.

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[48] 379 U.S. at 213.

[49] As the Chief Justice stated:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy. (Footnote omitted.)

Id. at 215.

[50] Id. at 223.

[51] See, e.g., Ador Corp., 150 N.L.R.B. 1658 (1965).

The Board first took this view in *Hartmann Luggage Co.*[52] and used *Hartmann* as support for a finding that the failure to discuss the termination of part of a business did not constitute a violation.[53] *New York Mirror*[54] is probably the most striking example of this unusual approach of the Board. In the *Mirror* case, the employer entered into secret negotiations for the sale of its business, a newspaper, to a competing newspaper. The employer realized that the sale would result in a total shut-down. After negotiations were completed, the company gave notice of the sale to every employee and union involved. This was the first notice any of the unions had received. Over 1300 employees were laid off. Most of the unions then had representatives contact the employer's general manager. Although some mention was made of the failure to discuss the matter prior to the sale, most of the discussion revolved around the *effect* of the closing. The employer fully discussed these matters and went so far as to create an employment office so that the laid-off employees could secure other positions.

The Board found no violation of the act. They acknowledged the fact that *Fibreboard* placed an employer under a duty to bargain with his employees' representatives prior to the termination of an entire operation and that the "management rights" clause in the contract was not the type of clear waiver needed to relinquish the statutory right of bargaining granted the unions. However, the Board noted the long history of bargaining, the total harmony between the parties with respect to the handling of the effects of the shutdown, the fact that the unions' primary concern after the announcement was about the effects, and the pressing economic necessity for the sale. In all these circumstances the Board was satisfied "that effectuation of the purposes of the Act would not require a remedial order even if a technical violation were found."[55]

It should be noted that the *Mirror* doctrine appears to disregard the underlying rationale of *Town & Country* and *Fibreboard*—that the employer, by talking with the union, may be made aware of some cost-cutting device which could save the unit. The reason for the Board's failure to find a violation apparently was based on the fact that a *fait accompli* had occurred and, in fact, the union could not have prevented it. Does this then mean that an employer is required to bargain only about the *effects* of a change in operations when the *decision* to change could not possibly be averted by the union? The answer is not clear.

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[52] Supra note 22.

[53] Georgia-Pacific Corp., supra note 22.

[54] 151 N.L.R.B. 834 (1965).

[55] Id. at 842.

V. Darlington and Its Impact on Section 8(a)(5)

In March of 1965, the Supreme Court rendered a decision which has created considerable discussion with respect to the problems heretofore treated. In *Textile Workers* v. *Darlington Mfg. Co.*,[56] the Court decided that it is not a violation of section 8(a)(3) for an employer to completely terminate his business for anti-union motives; neither is it a violation of section 8(a)(3) for an employer to go partially out of business for anti-union motives, as long as the purpose and effect is not to "chill unionism" in the remainder of his business.[57]

Confronted with the successful organizing campaign of the Textile Workers Union, the Deering Milliken Company, which operated seventeen textile manufacturing plants, determined that it would close its Darlington plant rather than deal with the bargaining representative of its employees. The liquidation was accomplished without discussing the matter with the union. The Board found that this action was based on anti-union animus and violated sections 8(a)(1), (3) and (5) of the act.[58] The Fourth Circuit Court of Appeals denied enforcement of the Board's order.[59] A petition for certiorari was granted with respect to the Board's findings relative to sections 8(a)(1) and (3).

The Supreme Court did not have before it the section 8(a)(5) issues to which the Board had addressed itself. In a footnote, however, the Court did refer to the Board's finding of a section 8(a)(5) violation:

> The union asked for a bargaining conference on September 12, 1956 (the day that the board of directors voted to liquidate), but was told to await certification by the Board. The union was certified on October 24, and did meet with Darlington officials in November, but no actual bargaining took place. The Board found this to be a violation of § 8(a)(5). Such a finding was in part based on the determination that the plant closing was an unfair labor practice, and no argument is made that § 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise. Cf. *Fibreboard Paper Products Corp.* v. *Labor Board*. . . .[60]

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[56] 380 U.S. 263 (1965).

[57] Section 8(a)(3) provides that it is 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. . . ." 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1964). Upon remand of *Darlington*, the Trial Examiner found no evidence of an intent to chill unionism elsewhere by closing the plant. 62 L.R.R. 344 (Aug. 22, 1966).

[58] 139 N.L.R.B. 241, 245 (1962).

[59] 325 F.2d 682 (4th Cir. 1963).

[60] 380 U.S. at 267 n.5.

As the Court observed, the Board had found a violation of section 8(a)(5), relying in part on the flagrant violations of section 8(a)(3). The Board had stated:

> The Trial Examiner found that Darlington's violations of section 8(a)(3) "were so complete as to discourage and ultimately thwart the Union from pursuing its right to bargain" and were *a fortiori* violative of Section 8(a)(5). In his opinion "as it is discriminatory against its employees, so does it constitute a refusal to bargain for an employer, on the basis of a union's campaign propaganda, oral and in writing, concerning improved working conditions and greater pay, to anticipate demands and compulsion to grant such demands, and therefore to terminate its operations and avoid bargaining." The Trial Examiner also found that Darlington's refusal to furnish the Union with wage and related bargaining information independently violated Section 8(a)(5). We adopt these findings of the Trial Examiner. We find further that Darlington's refusal to bargain collectively with respect to the employees' tenure of employment was in derogation of the Union's status as the majority representative of the employees.[61] (Footnote omitted.)

Thus, there were three section 8(a)(5) violations found by the Board: (1) avoidance of bargaining by terminating operations for a discriminatory purpose; (2) failure to furnish wage data and other relevant bargaining information; (3) failure to bargain about the employees' tenure of employment.

When the Supreme Court noted that the 8(a)(5) violation was based in part on the closing itself being an unfair labor practice, it could only be referring to the first of the above infractions, for the second and third were independent of any discriminatory closing. It is important to make this distinction, for without it one is improperly led to conclude that the Court said that the 8(a)(5) violation was based on a finding of an 8(a)(3) violation. The Court simply noted that when the violation is based on the elimination and avoidance of an atmosphere in which good faith bargaining could take place, discriminatory intent, which happens to be an element of 8(a)(3), is necessary to find a violation of 8(a)(5).

In its comment on section 8(a)(5), the Court recognized the important fact that no argument was made that an employer was under a duty to bargain about a purely business decision to go out of business. This indicates a critical issue: since the argument simply was not

[61] 139 N.L.R.B. at 252-53. The Trial Examiner's statement appears id. at 276.

made, nothing regarding such an obligation can or should be drawn from the Court's opinion. Yet, as will be seen, both the Board and courts have cited *Darlington* as authority in deciding 8(a)(5) violations in situations where an employer has completely or partially terminated his business.

VI. Post-Darlington Cases

Prior to the Supreme Court's *Fibreboard* decision, the various federal circuit courts had viewed with disfavor Board orders which required an employer to bargain with respect to a change in business operations.[62] Most courts, however, did not object to the Board's rule requiring an employer to bargain with respect to the *effects* of a decision to institute such a change.[63] The decision of the District of Columbia Circuit Court in the *Fibreboard* case indicated a departure from this policy.[64] It was in this context that the Supreme Court rendered its narrow *Fibreboard* decision, followed by the broad, sweeping statements of labor policy in *Darlington*. The problem to be explored at this point is what effect, if any, *Darlington* has on the scope of the *Fibreboard* decision.

Immediately after *Darlington*, the Third Circuit remanded *Royal Plating*[65] to the Board to consider the impact of *Darlington* on the Board's finding that the employer had violated section 8(a)(5) by failing to notify and bargain with the union about the decision to close one of its two plants. The Board adhered to its original decision, emphasizing that it was concerned with a partial and not a total termination of business. As the Board stated:

> [W]e are not here faced with the question of whether a decision to go out of business completely is a mandatory subject of bargaining. Consequently, we need not, and do not, determine the impact on that question of the Supreme Court's holding in the Darlington case ". . . that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness towards the Union, such action is not an unfair labor practice."[66]

The Board explained that it found nothing in *Darlington* "dealing with the discriminatory partial closing of a business which warrants withholding application of the Act's collective-bargaining provisions to Respondent's decision to close down the Bleeker Street plant."[67]

[62] E.g., Jays Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961).
[63] E.g., NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).
[64] Supra note 45.
[65] Supra note 27.
[66] 152 N.L.R.B. 619, 621 (1965).
[67] Id. at 622.

Indeed, the Board felt that if a management decision to partially terminate a business is liable to section 8(a)(3) scrutiny, there is no reason why such decision should not also be subject to section 8(a)(5) scrutiny.

The Board also ruled that the employer's decision to close one of its plants and the effects of this decision on the employees concerned were mandatory subjects of bargaining.[68] The fact that the decision was economically and not discriminatorily motivated was considered even more reason why the employer should have afforded the union an opportunity to bargain. In response to the argument that the employer had made a decision concerning allocation of his capital, the Board observed that employees had been deprived of jobs and rights acquired through the years. In the Board's view, the latter was determinative.[69]

As has been indicated, the Supreme Court, in *Darlington*, had specifically precluded any consideration of the 8(a)(5) aspects of the case, and the Board never made an argument based on that section. It is important to note that the factors which prompted the enactment of section 8(a)(5) are wholly different from the reasoning and goals of section 8(a)(3). The former requires neither a showing of illegal motivation nor of discrimination. Its purpose is not to restrict either party but to bring them together for discussion. Once the discussion has taken place, the parties are under no duty to act or refrain from acting. Section 8(a)(5) is a mediatory section which seeks, regardless of effect or motive, to bring the parties to the bargaining table, while section 8(a)(3) is primarily concerned with *effect* and *motive*.

Furthermore, the Court itself distinguished between the *Darlington* situation and the problem wherein the work was transferred to another plant.[70] The Court also distinguished those cases, such as *NLRB v. Savoy Laundry Inc.*[71] and *NLRB v. Missouri Transit Co.*,[72] where, although a part of the business has been closed, a portion of the business remains in operation.[73] In addition, the Court noted the peculiar fact in *Darlington* that the employer could not hope to receive any future benefits from his action.

Why this preoccupation with *Darlington* if it appears so easily distinguishable from the *Fibreboard-Town & Country* problem?—simply because certain circuit courts have not found it so readily distinguishable. The Eighth Circuit, for example, relied on the *Darlington*

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[68] Ibid. In this connection, the Board cited the *Railroad Telegraphers* case, supra note 43.

[69] See also Carmichael Floor Covering Co., 155 N.L.R.B. No. 65 (1965).

[70] 380 U.S. at 272-73.

[71] 327 F.2d 370 (2d Cir. 1964).

[72] 250 F.2d 261 (8th Cir. 1957).

[73] 380 U.S. at 273 n.19.

decision in both the *Burns*[74] and *Adams*[75] cases. Judge Van Oosterhout, who sat on the panel which heard the *Adams* case, wrote the *Burns* opinion. In *Burns*, Judge Van Oosterhout distinguished *Fibreboard* because, unlike the situation in *Fibreboard*, the cancellation of the contract with Creighton University and the subsequent discharge of employees was tantamount to a complete termination of a part of the business operation. He referred to Mr. Justice Stewart's concurring opinion to find that such an act lies at the "core of entrepreneurial control."[76] He then looked to *Darlington* to determine if the decision to eliminate a part of an operation must be discussed with the employees' collective bargaining representative and came to the conclusion that the rationale of the Supreme Court in *Darlington* with respect to section 8(a)(3) of the act may be applied to an 8(a)(5) situation not specifically considered in *Fibreboard*. No violation of the act was found since there was no showing of anti-union motive in the closing. Judge Van Oosterhout concluded:

> Under Darlington, the finding of lack of antiunion motivation in closing the Omaha division for economic reasons precludes a finding of unfair labor practice in refusing to bargain with the Union on the cancellation of the Creighton contract and the closing of the Omaha division.[77]

The court appears to have completely failed to distinguish between two wholly different sections of the act. Nowhere, in either the majority or concurring opinion of *Fibreboard*, is there any hint of requiring a showing of anti-union animus as a prerequisite to a finding of an 8(a)(5) violation.[78] On the contrary, even the most limited reading of that decision must indicate that no such finding is required or contemplated. Consequently, though the *Burns* court might very well be correct in concluding that *Fibreboard* does not control the situation in that case, it is hard to imagine how *Darlington* could. In view of the holding in *Fibreboard* that anti-union animus is not a prerequisite to a finding of an 8(a)(5) violation, the Eighth Circuit's conclusion to the contrary is a bitter pill to swallow. With respect to the argument that *Darlington* sets out certain rules to be followed in partial closing situations, it is sufficient to remember that the Court was considering a

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[74] William J. Burns Int'l Detective Agency, Inc., 346 F.2d 897 (8th Cir. 1965).

[75] Adams Dairy, Inc., 137 N.L.R.B. 815 (1962), modified and enforced in part, 322 F.2d 553 (8th Cir. 1963), vacated and remanded, 379 U.S. 644 (1965), modified, 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966).

[76] 379 U.S. at 223 (1964).

[77] Supra note 74, at 902.

[78] Indeed, the Supreme Court has held that a unilateral act during the course of bargaining negotiations constitutes a refusal to bargain under section 8(a)(5) without any showing of anti-union animus. NLRB v. Katz, 369 U.S. 736 (1962).

different section of the act, which by its own words requires a showing of anti-union animus.

Much the same tack was followed by the Eighth Circuit in its second encounter with the *Adams* case.[79] Adhering to its original decision,[80] the court found that "the situation in Adams Dairy is so factually distinguishable from that in Fibreboard as to take Adams Dairy outside of the scope of the collective bargaining requirements."[81] Relying on the concurring opinion in *Fibreboard*, the court reasoned that a "basic operational change" occurred here "in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in Fibreboard, there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment."[82] The findings of a change in basic operations and capital structure ensued from the elimination of a phase of the employer's business. Whereas Adams Dairy had previously been engaged in the processing, sale and distribution of milk and dairy products, it was now engaged only in the first two operations. In effecting this change, the company sold all the trucks which had been used in the distribution of its products to independent distributors who took title at dockside. Once having accepted the products, the independent distributors were no longer under the control of the company. Thus, according to the court, a limitation on such a change "would significantly abridge [the employer's] . . . freedom to manage [his] . . . own affairs."[83]

The court then proceeded to quote extensively from *Darlington*, emphasizing the fact that there must be an intent to "chill unionism" before an 8(a)(3) violation can be found in a partial closing situation. Again, the court seems to have confused the intent requirements of section 8(a)(3) with section 8(a)(5).[84] As it did in *Burns*, the court here disregarded the Supreme Court's specific statement to the effect that it was not deciding an 8(a)(5) issue in *Darlington*.

One other point should be noted. In neither *Adams* nor *Burns* did

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[79] 350 F.2d 108 (8th Cir. 1965).

[80] 322 F.2d 553 (8th Cir. 1963).

[81] 350 F.2d at 110.

[82] Id. at 111. Cf. Young Motor Truck Serv. Inc., 156 N.L.R.B. No. 56 (1966). In that case, the employer sold one of his two operations and transferred the other without prior bargaining or notice. In overruling the Trial Examiner's finding that there was no 8(a)(5) obligation to bargain about the decision, the Board said that "in making these findings, the Trial Examiner made certain erroneous interpretations of the Act, such as that Section 8(a)(5) does not impose any obligation on an employer to refrain from unilateral action with respect to a proposed sale or transfer of his business." Id. at 2.

[83] 350 F.2d at 111. This position became dictum since the court subsequently found that even if bargaining was required, such bargaining actually occurred.

[84] See text accompanying note 77 supra.

the Eighth Circuit discuss the Supreme Court's emphasis in *Darlington* on the fact that the employer's cessation of business did not result in any economic benefit to him. In both *Adams* and *Burns* the converse was true: both employers secured financial savings by changing their operations.

One other case worthy of mention at this point is *Royal Plating*,[85] not only because of the emphasis placed on *Darlington*, but also because the Third Circuit held that the NLRB could not require an employer to bargain about a partial cessation of business.

The Third Circuit approached the issue in terms of whether a partial termination of operations is a mandatory subject of bargaining under section 8(d) of the act. It distinguished *Fibreboard* by finding that here the employer's decision went to the heart of management prerogative since it involved the disposition of capital. The court also quoted at length Mr. Justice Stewart's concurring opinion in *Fibreboard*, and then concluded that "an employer faced with the *economic necessity* of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down."[86] (Emphasis added.) The meaning of the court's language is somewhat enigmatic, for it had found that the employer's decision was not really voluntary since the housing authority could have condemned the property, and that the only topic for negotiations would have been a move to another location. If the court, by the phrase "economic necessity," meant "no choice" in view of the condemnation threat, then it is difficult to see how anyone would impose an obligation to bargain, since there would be nothing about which to bargain. Indeed, one may wonder whether *Fibreboard* principles are relevant to a situation where there has been no real decision made by the employer. Although the court's ultimate conclusion may be correct, it would seem to be disregarding the restrictive majority view of the Supreme Court in favor of the views taken by the minority of three Justices.

The Fifth Circuit has also had an opportunity to consider the applicability of *Darlington* and *Fibreboard* to the *Town & Country* doctrine. In *NLRB v. American Mfg. Co.*,[87] this court arrived at a different conclusion from the courts in *Adams*, *Burns*, and *Royal Plating*. On facts very similar to those in *Town & Country*, the court enforced the Board's order requiring the employer to bargain with the union, but did not compel the employer to resume discontinued operations. As a manufacturer of oilfield pumping equipment, the employer

[85] Royal Plating & Polishing Co., 148 N.L.R.B. 545 (1964), remanded, 350 F.2d 191 (3d Cir. 1965), aff'd on remand, 152 N.L.R.B. 619 (1965).

[86] 350 F.2d at 196.

[87] 351 F.2d 74 (5th Cir. 1965), enforcing in part 139 N.L.R.B. 815 (1962).

operated a fleet of delivery trucks. The transportation department was unilaterally abolished and the work subcontracted, partly for anti-union motives and partly because of problems with the Interstate Commerce Commission.[88] The Board had found a violation of section 8(a)(3) in the discriminatory abolition of the trucking operations, and of section 8(a)(5) in the failure to bargain about the decision to subcontract. The court affirmed the 8(a)(3) violation, reasoning that *Darlington* supports such a finding where a partial closing is accompanied by anti-union motive.[89] *Fibreboard* supported the finding of an 8(a)(5) violation, in the court's view, even absent anti-union motive.[90]

It should be noted that in the present case about $150,000 of capital investment was involved. The court felt this expenditure did not warrant a different result, however, for the same work was being done by an independent contractor. Yet the court considered the employer's investment to be of critical significance as far as the Board remedy ordering resumption of the trucking operation was concerned. Remanding this remedial order to the Board, the court stated:

> This is not the simple case where resumption of the former operation is little more than the old employee picking up the broom and starting to sweep where the contractor left off. We are here concerned with an order, which if enforced, would require an Employer to purchase a fleet of trucks and all related equipment necessary to operate a large transportation department.[91]

The court then pointed out that "to require bargaining is not to require a bargain,"[92] and that after bargaining, the company could still maintain its position that the elimination of the transportation department was necessary. In this court's view, capital investment is a factor in fashioning remedy, not in determining whether the decision to divest is a mandatory subject of bargaining as indicated by the concurring members of the Supreme Court in *Fibreboard*.[93]

An interesting parallel can be drawn between the *American Mfg.* and *Adams Dairy* cases. In *Adams*, the employer ceased its trucking

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88 In 1958, American had been convicted of violating ICC safety regulations, and, in 1960, the ICC was again investigating them for similar violations. Id. at 77.

89 Indeed, if abolition of the trucking department and subsequent subcontracting of that work amounts to a "partial closing" within the meaning of *Darlington*, then absent a showing that the purpose and effect of the closedown was to "chill unionism" elsewhere in the plant, there would be no violation of 8(a)(3). Textile Workers v. Darlington Mfg. Co., supra note 73, at 275.

90 351 F.2d at 80.

91 Ibid.

92 Ibid.

93 See note 50 supra and accompanying text.

operation and hired independent contractors to do the work. In *American*, the employer's business underwent the same modification. In each case, the employer changed his operation and gave up substantial control over the day-to-day supervision of deliveries. In each case, the employer hired an independent third party to supply the equipment and labor formerly under the employer's control. Since the Eighth Circuit did not find that an 8(a)(5) violation had occurred, the decisions seem to be antithetical. It would appear that the Fifth Circuit decision is more consistent with the Supreme Court's holding in *Fibreboard*, for it clearly falls within the limited framework of that case. It would also appear clear that the issue of anti-union animus is an irrelevant consideration in determining whether an 8(a)(5) violation exists.

The decisions in *Burns* and *Royal Plating* present more difficult problems. In neither case was the operation in question continued by the employer, nor did he have someone else do the work for him. Thus, it would seem that the issues involved would not fall within the narrow holding of *Fibreboard*. Whether *Fibreboard precludes* the imposition of a bargaining duty in such a situation is a different question. The majority and concurring opinions seem only to imply that most of the Court preferred to withhold deciding tangential problems until they arose.

VII. Remedies

Finding violations in the myriad of *Town & Country* situations would be but a hollow determination unless accompanied by an adequate remedy. Restoration of the *status quo ante* would be the optimum solution, but in many instances this is impossible, impractical, inequitable or unduly punitive. Innocent third parties may be involved; capital assets may have been bought or sold; an operation may have been abolished simply because the employer no longer wanted to continue it; a plant may have been sold with no possibility of repurchasing it, or anything comparable, in the proximate geographical area. Perhaps the employer had failed to discharge his obligation to bargain, but was not prompted by any anti-union animus. Perhaps the employer bargained about the effects of his decision, although not the decision itself. Perhaps the remainder of the business would be seriously weakened financially if the discontinued uneconomical operations were restored, and consequently other unit jobs might be jeopardized. These are just examples of the numerous factors which must be considered in fashioning a remedy that will best serve to further the purposes of the National Labor Relations Act.

The Board has been extremely cautious in ordering restoration to the *status quo ante* in those instances where *Town & Country* viola-

tions have been found. Indeed, because of this necessary caution, much of the concern expressed about the Board's policies regarding decisions about which an employer must bargain ought to be mollified. In fact, the very considerations which Mr. Justice Stewart treated in his concurring opinion and which several of the circuits have treated in their analyses of subjects appropriate for bargaining have been dealt with by the Board in fashioning remedies. The Board has relegated such factors as anti-union animus, third party interests and capital expenditures to remedy. It would be an impossible undertaking to detail the remedies appropriate to specific types of instances; such matters are particularly suited to the Board's expertise on a case-by-case basis.[94]

VIII. The Future of Town & Country

The few courts which have considered the *Town & Country* issues in light of *Fiberboard* and *Darlington* have reached varied conclusions. The Eighth Circuit has generally restricted *Fibreboard* to the situation in which one group of employees is substituted for another by means of a subcontract. In that instance, this circuit would require no preliminary finding of anti-union animus to establish a violation. Beyond this limited situation, an initial finding of anti-union animus would be essential. The Third Circuit, which has considered the problem in a more limited context, would exclude partial shutdowns from the purview of *Fibreboard*, although they specifically require bargaining with respect to the effects thereof. The view taken by the Fifth Circuit appears to be more closely allied with that of the Board, although the factual situation presented to it involved a subcontract squarely within the realm of *Fibreboard*; its views in another context remain unknown.

The Supreme Court in *Fibreboard* and *Darlington* has provided very little guidance in this field. It has been argued, for instance, that the latter case holds that management need not bargain a decision to partially terminate its business.[95] This view seems to reflect an inaccurate reading of that case. In *Darlington*, the Court held that a partial termination of business, designed to "chill unionism," was a violation of 8(a)(3), because the employer was trying to secure future benefits by using an economic weapon. But the implication of the opinion is that an unnegotiated or discriminatory use of economic weapons to secure future benefits might be violative of 8(a)(5).

Even if the *Darlington* doctrine is sufficiently extensive to be considered relevant where an employer does receive economic benefit, other Supreme Court decisions indicate that the Court may now take a less restrictive view toward Board policy than it did in *Darlington*.

[94] See Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

[95] See, e.g., Royal Plating & Polishing Co. v. NLRB, 350 F.2d 191 (3d Cir. 1965); William J. Burns Int'l Detective Agency v. NLRB, supra note 74.

In 1960 the Court handed down the famed *Steelworkers* trilogy,[96] wherein they detailed a broad theory of non-interference in the labor arbitration process. Nearly a year before *Fibreboard*, the Court decided *John Wiley & Sons v. Livingston*,[97] and stated in that case:

> The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.[98]

In light of these cases, one may wonder whether the Board's strong policy in favor of bargaining prior to the elimination of jobs is as incompatible with the Court's judicial philosophy as it has seemed. It would appear just as likely that the Court may follow the philosophy of *Wiley* and *Steelworkers* as that of *Darlington* in determining whether an employer must bargain with his employees' union prior to undertaking action which will eliminate unit jobs, whether by the replacement of those employees or not.

In fact, it seems probable that the former course is the most logical when one again considers the policy behind the limited bargaining obligation of *Town & Country*. It also appears more likely when one separates the remedies from the violation. Although the Supreme Court may desire to limit the Board to remedies which do not involve invasion of the employer's use of capital, there is no reason to limit the *finding* of a violation, which does not require the invasion of this "management prerogative." Thus, distinctions based on the replacement of one group of employees by another would seem to have no valid basis except for the purposes of remedy. It is the loss of unit jobs which should be the focal point of consideration and, if this is so, then distinctions drawn between subcontracting and partial shutdowns have little analytical value.[99]

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[96] United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[97] 376 U.S. 543 (1964).

[98] Id. at 549.

[99] One decision which clearly results in elimination of unit work and which would seemingly also carry an obligation of antecedent bargaining is to "wind up" a business completely. In this unique case, however, since no future benefits can be derived, a substantive distinction can be made which would find its basis in *Darlington*. Furthermore, possible remedies are de minimis, and any finding of violation would present a moot question.

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