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## Legal Barriers to Worker Participation in Management Decision Making

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# LEGAL BARRIERS TO WORKER PARTICIPATION IN MANAGEMENT DECISION MAKING

THEODORE J. ST. ANTOINE\*

## I. INTRODUCTION: THE STATUTORY DUTY TO BARGAIN

Collective bargaining lies at the heart of the union-management relationship. It is the end and purpose of the whole effort to protect employees against reprisals when they form an organization to represent them in dealing with their employers. Collective bargaining is grounded in the belief that industrial strife will be checked, and the workers' lot bettered, if workers are given an effective voice in determining the conditions of their employment.<sup>1</sup> My thesis is that federal law, even while placing the force of government behind collective bargaining, has so artificially confined its scope that the process has been seriously impeded from achieving its full potential.

One of the most disarmingly simple provisions of the National Labor Relations Act (NLRA) is section 8(a)(5),<sup>2</sup> which makes it an unfair labor practice for an employer "to refuse to bargain collectively" with a union representing its employees. Strangely, Senator Wagner's original "labor disputes" bill, as reported from committee in 1934,<sup>3</sup> contained no explicit requirement of collective bargaining, although the Senator believed it was implicit in the employees' right to organize.<sup>4</sup> Some felt that

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1. See, e.g., 78 CONG. REC. 3443 (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 15 (1949) (statement of Sen. Robert Wagner) [hereinafter cited as LEG. 1 HIST. NLRA]; *id.* at 10351, 10559; 1 LEG. HIST. NLRA at 1117, 1122 (remarks of Sen. Walsh) (illustrating belief that collective bargaining reduces employer-employee conflict, checks economic waste, and promotes economic recovery).

2. 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. § 158 (a)(5) (1976)).

3. S. 2926, 73d Cong., 2d Sess. (1934), reprinted in 1 LEG. HIST. NLRA, *supra* note 1, at 1070. See also S. 1958, 74th Cong., 1st Sess. (1935), reprinted in 1 LEG. HIST. NLRA, *supra* note 1, at 1295.

4. *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 16 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 2490 (statement of Sen. Robert Wagner) [herein-

imposing a statutory duty to bargain would amount to no more than a pious exhortation. Sumner Slichter, for example, caustically likened it to legislating "that the lions and lambs shall not fail to exert every reasonable effort to lie down together."<sup>6</sup> Other labor experts took a different tack, opposing "legislation by implication"<sup>6</sup> and insisting that failure to mandate collective bargaining "omits the very guts" of the organizational process.<sup>7</sup> The views of the latter prevailed and their recommended language was accepted.<sup>8</sup>

Yet what exactly had been done was left uncertain. The NLRA's two leading proponents diverged sharply over the meaning of the duty to bargain. Senator Wagner, the Act's sponsor, thought it would obligate an employer to "negotiate in good faith" and "make every reasonable effort to reach an agreement."<sup>9</sup> Senator Walsh, the chairman of the Senate Labor Committee, felt instead that the parties would merely be required to

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after cited as 2 LEG. HIST. NLRA].

5. *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Education and Labor*, 73d Cong., 2d Sess. 59 (1934), reprinted in 1 LEG. HIST. NLRA, *supra* note 1, at 89 (statement of Dr. Sumner Slichter, Professor of Economics, Harvard University).

6. *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 175 (1935), reprinted in 2 LEG. HIST. NLRA, *supra* note 4, at 2649 (statement of Francis Biddle, Chairman, NLRB).

7. *National Labor Relations Board: Hearings on S. 1958 Before Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 137 (1935), reprinted in 1 LEG. HIST. NLRA, *supra* note 1, at 1517 (statement of Lloyd Garrison, Dean of Law School, University of Wisconsin). See also *id.* at 79-80, 136-37 (1935), 1 LEG. HIST. NLRA, *supra* note 1, at 1455-56, 1516-17 (statements of Francis Biddle, Chairman, NLRB, and Lloyd K. Garrison); *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Education and Labor*, 73d Cong., 2d Sess. 234 (1934), reprinted in 1 LEG. HIST. NLRA, *supra* note 1, at 264 (statement of William M. Leiserson, Chairman, Petroleum Labor Policy Board).

8. S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), reprinted in 2 LEG. HIST. NLRA, *supra* note 4, at 2312; H. REP. NO. 1147, 74th Cong., 1st Sess. 20 (1935), reprinted in 2 LEG. HIST. NLRA, *supra* note 4, at 3069. See generally Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 252-53 (1964); Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988 (1961); Gross, Cullen & Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 CORNELL L. REV. 1009 (1968) (discussing collective bargaining cases, analyzing the tests used in determining if the good faith standard has been met, and examining alternative means of evaluating collective bargaining); Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1084-86 (1941).

9. 79 CONG. REC. 7571 (1935) (citing *Houde Eng'g Corp.*, 1 N.L.R.B. (old) 35 (1934)), reprinted in 2 LEG. HIST. NLRA, *supra* note 4, at 2336 (statement of Sen. Robert Wagner).

get together, to meet and confer. "The bill," said he, "does not go beyond the office door."<sup>10</sup> These contrasting positions pre- saged a long and continuing debate. An influential pair of arti- cles in 1950 by Archibald Cox and John Dunlop<sup>11</sup> insisted that the Wagner Act was concerned with "*organization for bargain- ing*—not with the scope of the ensuing negotiations."<sup>12</sup> They la- mented that the NLRB, with judicial endorsement, had em- barked on the mission of "defining the scope of collective bargaining."<sup>13</sup> Eventually, nevertheless, Senator Wagner's con- cept of a duty to bargain in good faith prevailed.<sup>14</sup> Even so, as late as 1961 a distinguished labor study group branded the bar- gaining requirement "unrealistic," adding that "the provisions designed to bring 'good faith' have become a tactical weapon used in many situations as a means of harassment."<sup>15</sup>

Over the years, however, there has been increasing evidence that the statute has had a positive practical effect, including vol- untary compliance by management. One survey revealed that successful bargaining relationships were eventually established in seventy-five percent of the cases sampled that were pursued to a final Board order as well as in ninety percent of the cases that were voluntarily adjusted after the issuance of a com- plaint.<sup>16</sup> Although a recalcitrant offender can drag his heels with impunity, because a Board order to bargain operates only pro- spectively and ordinarily does not furnish any monetary relief,<sup>17</sup>

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10. 79 CONG. REC. 7659 (1935), *reprinted in* 2 LEG. HIST. NLRB, *supra* note 4, at 2373.

11. Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 394 (1950) [hereinafter referred to as Cox & Dunlop, *Regulation*]; Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097 (1950) [hereinafter referred to as Cox & Dunlop, *Duty to Bargain*].

12. Cox & Dunlop, *Regulation*, *supra* note 11, at 394 (emphasis in original).

13. *Id.* at 397.

14. *E.g.*, NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

15. LABOR STUDY GROUP, COMM. FOR ECONOMIC DEV., THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 82 (1961). The members of the Study Group were Clark Kerr, Chairman, Douglass V. Brown, David L. Cole, John T. Dunlop, William Y. Elliot, Albert Rees, Robert M. Solov, Philip Taft, and George W. Taylor.

16. P. ROSS, THE GOVERNMENT AS A SOURCE OF UNION POWER 180-230 (1965); *see also* McCulloch, *The Development of Administrative Remedies*, 14 LAB. L.J. 339, 348 (1963) (discussing the NLRB's stewardship of collective bargaining).

17. *See* NLRB v. Food Store Employees Local 347 (Heck's, Inc.), 417 U.S. 1 (1974); H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970); Tiidee Prods., Inc. 194 N.L.R.B. 1234 (1972), *enforced*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) (courts

the majority of American employers and unions are law-abiding. However hard it may be to identify "good faith" and to classify legally such particular tactics as "take-it-or-leave-it" bargaining,<sup>18</sup> it would seem almost perverse at this late date to deny that, overall, the statutory duty to negotiate has had a salutary impact.

Nonetheless, important problems remain. This paper will focus on one of the most crucial: the subject matter about which the NLRA mandates bargaining.

## II. MANDATORY SUBJECTS OF BARGAINING

The pro-union Congress that passed the Wagner Act in 1935 and imposed thereby the duty to bargain did not see fit to define that duty. This lack was remedied, in a manner of speaking, by the pro-management Congress that enacted the Taft-Hartley amendments in 1947. A code of union unfair labor practices was adopted, and unions, like employers, were made subject to a duty to bargain. A new section, section 8(d),<sup>19</sup> was added to the NLRA, declaring that to "bargain collectively" meant the "mutual obligation" of employer and union to confer "in good faith" with respect to "wages, hours, and other terms and conditions of employment." Section 8(d) also took pains to state that no party would be under a compulsion to "agree to a proposal" or make any concessions. If the House of Representatives had its way, the statute would have been much more specific, even definitive, in enumerating the subjects of bargaining. In so doing, the Act would have made clear, as the House Labor Committee put it, that a union had "no right to bargain with the employer about . . . how he shall manage his business . . ." <sup>20</sup>

The more general language that was finally adopted was seen as a confirmation of the course that the Labor Board had been following.<sup>21</sup> That course was for the Board itself to define

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refused to expand the Board's grant of relief to operate retroactively).

18. *E.g.*, Gen. Elec. Co., 150 N.L.R.B. 192 (1962), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

19. 61 Stat. 136, 142-43 (1947) (codified as amended at 29 U.S.C. § 158(d) (1976)), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 8 (1948).

20. H. REP. No. 245, 80th Cong., 1st Sess. 22-23 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 19, at 313-14.

21. *See* Cox & Dunlop, *Regulation*, *supra* note 11, at 400-01. *See also* post-1947

for employers and unions the "mandatory" subjects of bargaining about which either party could be required to negotiate at the behest of the other.<sup>22</sup> Moreover, if a topic was mandatory, a party could require an agreement on it as the price of any contract. Stated differently, negotiations could be carried to the point of impasse or stalemate on such an issue. Matters outside this charmed circle of mandatory subjects were merely "permissive." The parties could negotiate concerning such topics if both sides were willing, but neither party could insist on bargaining over them if the other party objected. These permissive topics could not be the basis for an impasse or deadlock in negotiations.<sup>23</sup>

The Supreme Court was eventually called upon to appraise this scheme in *NLRB v. Wooster Div. of Borg-Warner Corp.*<sup>24</sup> The facts of *Borg-Warner* were curiously atypical. An employer demanded that its collective bargaining agreement contain, *inter alia*, a clause requiring a vote of the employees by secret ballot before the union could go on strike. A majority of the Supreme Court held first that the "ballot" clause related to a matter of purely internal union concern, and was thus not a mandatory subject of bargaining. Then, in a step not logically necessitated by section 8(d) and highly dubious as a matter of healthy industrial relations, the Court agreed with the NLRB that the employer's insistence on a "permissive" clause as a condition of agreement amounted in effect to an unlawful refusal to bargain on mandatory subjects.

At least two other approaches might have made more sense. I am told the lead attorney for the company in *Borg-Warner* seriously considered arguing for the most straight-forward solution, which would have been the obliteration of the whole mandatory-permissive distinction.<sup>25</sup> Under this approach, any

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cases cited *infra* note 22.

22. *Inland Steel Co.*, 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (pensions); *J. H. Allison & Co.*, 70 N.L.R.B. 377 (1946), *enforced*, 165 F.2d 766 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948) (merit increases).

23. See generally R. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 496-98 (1976) [hereinafter referred to as R. GORMAN]; 1 C. MORRIS, *THE DEVELOPING LABOR LAW* 761-64 (2d ed. 1983) (explaining the distinction between mandatory and permissive matters for collective bargaining).

24. 356 U.S. 342 (1958).

25. Conversation with James C. Davis, Esq., of Cleveland, Ohio, about litigation strategy of company counsel in the *Borg-Warner* case (1960).

topic put on the table by either party would have triggered the duty of good faith negotiating. The other party, it should be emphasized, would never be obligated to agree, only to bargain. Why, after all, should a federal agency, rather than the parties themselves, determine whether a particular item is so important that it is worth a strike or a lockout? The subject matter of collective bargaining ought to be flexible rather than frozen into rigid molds by governmental fiat.<sup>26</sup> Furthermore, the Board's doctrine encourages hypocrisy in negotiations. If a party deeply desires a concession on a permissive subject that may not legally be carried to impasse, it will be tempted to hang the bargaining up on a false issue that happens to enjoy official approbation as a mandatory topic. Candor would have been enhanced by a different rule, and unresolved disputes would have been recognized for what they ordinarily become in any case—matters to be decided by economic muscle.

Making all topics subject to the duty (and therefore the right) of good faith bargaining would of course have won the case for the employer in *Borg-Warner*. But it is readily understandable why the employer there shrank from such strong medicine. Ordinarily it would be the union, not the employer, that would profit most from an expanded range of negotiations. The right to force good faith bargaining on any topic would enable the union to demand bargaining over those most sensitive of issues, basic business decisions now classified as managerial prerogatives. On the other hand, even the prospect of bargaining to an impasse over a business decision would not be the worst thing that could happen to an employer from the viewpoint of the sophisticated management attorney. Much worse is to be told, after the fact, that a business decision unilaterally implemented without prior negotiation with the union involved a mandatory subject of bargaining, and that the unilateral change therefore constituted an unfair labor practice that must now be

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26. Contemporaneous criticisms of *Borg-Warner* along these lines were voiced by Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1083-86 (1958); Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process*, N.Y.U. TWELFTH ANNUAL CONFERENCE ON LABOR 39, 46-51 (1959); Note, *The Impact of the Borg-Warner Case on Collective Bargaining*, 43 MINN. L. REV. 1225, 1233-36 (1959); Note, *Bargaining on Nonmandatory Topics Constitutes Refusal to Bargain*, 11 STAN. L. REV. 188, 193 (1958).

undone at some substantial expense to the company.<sup>27</sup> Such indeed was the ill fortune of numerous employers during the 1960's, when the NLRB significantly enlarged the scope of required bargaining. The wiser course might well have been to end the confusion and uncertainty by treating all lawful subjects as mandatory. But that was the road not taken.

A second, more modest approach would also have allowed the employer in *Borg-Warner* to prevail. That was the position adopted by Justice Harlan and three other Justices,<sup>28</sup> who would have retained the mandatory-permissive distinction, but with a difference. Either party would still be required to bargain to an impasse about mandatory subjects but not about permissive subjects, as is the case under the existing law. At the same time, however, either party under the Harlan formulation could persist in pursuing any lawful demand, regardless of how the Board might categorize it, and could refuse to contract absent agreement on that item. In short, Justice Harlan read section 8(d) of the NLRA to mean what it says, and only that: A party is obligated to bargain about wages, hours, and working conditions, but an insistence on bargaining about more is not the equivalent of a refusal to bargain about a mandatory subject. A union, for example, could dismiss out of hand an employer's demand for a secret-ballot strike vote procedure, but the employer would not commit an unfair labor practice if it remained adamant.

Either of these two approaches would probably have comported better with the realities of collective bargaining than does the law as now propounded. If it is too late in the day to press for fundamental revisions, at least a recognition of past missteps may help guide our future course aright.

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27. See, e.g., *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *American Needle & Novelty Co.*, 206 N.L.R.B. 534 (1973) (which rejected management's unilateral decisions and required that the issues be resolved by collective bargaining). In the exercise of its discretion, however, the Board often did not order a financially troubled employer to restore the status quo ante. E.g., *Renton News Record*, 136 N.L.R.B. 1294 (1962).

28. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 350-51 (1958) (Frankfurter, J., concurring in part and dissenting in part; Harlan, J., joined by Clark, J., and Whittaker, J., concurring in part and dissenting in part).



## III. MANAGERIAL DECISIONS AND EMPLOYEE JOB SECURITY

The mandatory subjects of bargaining are wages, hours, and working conditions.<sup>29</sup> It is now well established that wages include compensation in almost every conceivable form, from straight hourly wages<sup>30</sup> through the most complex pension plan,<sup>31</sup> not to mention the traditional Christmas turkey.<sup>32</sup> Hours cover not only the total number of hours in a day or a week, but also the times of particular shifts,<sup>33</sup> the scheduling of overtime,<sup>34</sup> and the like. Working conditions plainly encompass such physical aspects of the job as heat and cold, dirt and noise, lighting, safety hazards, and other assorted stresses and strains.<sup>35</sup> But over the last two decades, the most controversial issue concerning the duty to bargain has been the extent to which employers must negotiate about managerial decisions that result in a shrinkage of job opportunities for employees. Under the *Borg-Warner* rubric, the crucial question is whether a subject is classified as a condition of employment or as a management right.<sup>36</sup>

For a long time the NLRB held that in the absence of anti-union animus, employers were not required to bargain over decisions to subcontract, relocate operations, or introduce technological improvements. Their only requirement was to negotiate regarding the *effects* of such decisions on the employees displaced. Layoff schedules, severance pay, and transfer rights were thus bargainable, but the basic decision to discontinue or change an operation was not.<sup>37</sup> Under the so-called Kennedy-Johnson Board, however, a whole range of managerial decisions were reclassified as mandatory subjects of bargaining. These included

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29. See *supra* text accompanying note 19.

30. Gray Line, Inc., 209 N.L.R.B. 88 (1974), *enforced in part*, 512 F.2d 992 (D.C. Cir. 1975).

31. Inland Steel Co., 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), noted in 43 Ill. L. Rev. 713 (1948) and 58 Yale L.J. 803 (1949).

32. *E.g.*, K-D Mfg. Co., 169 N.L.R.B. 57 (1968), *enforced*, 419 F.2d 467 (5th Cir. 1969).

33. Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947); see also *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965).

34. Colonial Press, Inc., 204 N.L.R.B. 852, 860-61 (1973).

35. *E.g.*, NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967) (safety rules).

36. See NLRB v. Wooster Div. of Borg-Warner, 356 U.S. 342, 349-50 (1958).

37. *E.g.*, Brown-Dunkin Co., 125 N.L.R.B. 1379 (1959), *enforced*, 287 F.2d 17 (10th Cir. 1961); Brown-McLaren Mfg. Co., 34 N.L.R.B. 984 (1941).

decisions to terminate a department and subcontract its work,<sup>38</sup> decisions to consolidate operations through automation,<sup>39</sup> and decisions to close one plant of a multiplant enterprise.<sup>40</sup> The key seems to have been whether the employer's action would result in a "significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit."<sup>41</sup>

In *Fibreboard Paper Products Corp. v. NLRB*,<sup>42</sup> the Supreme Court gave limited approval to this shift of direction. The Court sustained a bargaining order issued when a manufacturer wished to subcontract out its maintenance work within a plant. The Court emphasized that the subcontracting did not alter the company's "basic operation" or require any "capital investment."<sup>43</sup> It simply involved a replacement of one group of employees with another group to do the same work in the same place under the same general supervision. Bargaining would not "significantly abridge" the employer's "freedom to manage the business."<sup>44</sup>

One court of appeals, elaborating on this rationale, held that there was no duty to bargain about subcontracting involving a "change in the capital structure."<sup>45</sup> Other courts of appeals, in cases of partial shutdowns and relocations, attempted to balance such factors as the severity of any adverse impact on unit jobs, the extent and urgency of the employer's economic need, and the likelihood that bargaining would be productive.<sup>46</sup>

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38. *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

39. *Renton News Record*, 136 N.L.R.B. 1294 (1962).

40. *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966).

41. *Westinghouse Elec. Corp.*, 150 N.L.R.B. 1574, 1576 (1965).

42. 379 U.S. 203 (1964).

43. *Id.* at 213.

44. *Id.* An unusually influential separate concurrence by Justice Stewart, joined by Justices Douglas and Harlan, limited *Fibreboard* to its facts and emphasized that the Court was not deciding that "subcontracting decisions are as a general matter subject to [the] duty [to bargain]." 379 U.S. at 218. Specifically, *Fibreboard* did not involve one of the "managerial decisions . . . which lie at the core of entrepreneurial control." *Id.* at 223.

45. *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 111 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). See also *UAW Local 864 v. NLRB (General Motors Corp.)*, 470 F.2d 422 (D.C. Cir. 1972) (manufacturer's "sale" of dealership); *NLRB v. Transmarine Nav. Corp.*, 380 F.2d 933 (9th Cir. 1967) (relocation); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965) (plant shutdown).

46. *NLRB v. Production Molded Plastics, Inc.*, 604 F.2d 451 (6th Cir. 1979) and

This approach had the attraction of maximizing fairness in individual situations, but it could often lead to uncertainty and unpredictability.

In 1981 the Supreme Court reconsidered the problem, with puzzling results. In *First National Maintenance Corp. v. NLRB*,<sup>47</sup> the Court held that a maintenance firm did not have to bargain when it decided to terminate an unprofitable contract to provide janitorial services to a nursing home. The Court first stated broadly that an employer has no duty to bargain about a decision "to shut down part of its business purely for economic reasons."<sup>48</sup> It then pointed out that in this particular case the operation was not being moved elsewhere and the laid-off employees were not going to be replaced, the employer's dispute with the nursing home concerned the size of a management fee over which the union had no control, and because the union had only recently been certified there was no disruption of an ongoing relationship.<sup>49</sup> The decision thus leaves unanswered many

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Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978) (closing one of several plants); ILGWU v. NLRB (McLoughlin Mfg. Corp.) 463 F.2d 907 (D.C. Cir. 1972) (relocation). Cf. Milwaukee Spring Div. of Illinois Coil Spring Co., 268 N.L.R.B. No. 87, 115 L.R.R.M. 1065, 1066 n.5 (1984) (parties assumed that mid-contract work relocation was mandatory subject of bargaining but Board majority did not consider it necessary to decide the issue); Otis Elevator Co., 269 N.L.R.B. No. 162, 115 L.R.R.M. 1281 (1984), discussed *infra* note 49. See generally Goetz, *The Duty to Bargain About Changes in Operations*, 1964 DUKE L.J. 1; Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982) [hereinafter referred to as HARPER]; Heinsz, *The Partial-Closing Conundrum: The Duty of Employers and Unions to Bargain in Good Faith*, 1981 DUKE L.J. 71; Schwartz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 FORDHAM L. REV. 81 (1979); Comment, *Duty to Bargain About Termination of Operations*, 92 HARV. L. REV. 768 (1979); Note, *Partial Closings: The Scope of an Employer's Duty to Bargain*, 61 B.U.L. Rev. 735 (1981).

47. 452 U.S. 666 (1981). The Court stated, however, that there was "no doubt" the employer had an obligation to bargain about the "results or effects" of its decision to halt the operation. *Id.* at 677 n.15.

48. *Id.* at 686.

49. *Id.* at 687-88. Placing no weight on the possible limiting effects of those facts, the Labor Board gave *First National Maintenance* a broad reading in *Otis Elevator Co.*, 269 N.L.R.B. No. 162, 115 L.R.R.M. 1281 (1984). An employer's decision to terminate its research and development functions at a facility in New Jersey and to relocate and consolidate those functions at another facility in Connecticut was held not to be a mandatory subject of bargaining. The Board majority emphasized that the employer's decision "did not turn upon labor costs" but rather "turned upon a fundamental change in the nature and direction of the business." *Id.*, 115 L.R.R.M. at 1282-83. The decision was thus "not amenable to bargaining," regardless of its "effect on employees [or] a union's ability to offer alternatives." *Id.*

questions regarding the more typical instance of a partial closing or the removal of a plant to a new location.

The problem in such instances is how to reconcile management's interest in running its own business as it sees fit with the workers' claim to a voice in shaping their industrial lives. Before I set forth my own views on how such a reconciliation may be effectuated, one further important technical distinction must be understood. Whether a particular item is a mandatory subject of bargaining may arise in two quite different contexts. First, the union may be seeking a certain provision, either as part of a new labor contract that is open for negotiation or as an addition to an existing agreement in mid-term. Second, an employer may wish to make a unilateral change in its operations, either in the absence of or in the face of a current collective agreement, without first having to bargain with the union about the matter. In both of these contexts the Supreme Court has apparently assumed, with little or no analysis, that the scope or ambit of mandatory subjects is the same.<sup>50</sup> That is to say, if the item in question is one about which the union could demand bargaining, then generically it is the sort of matter that an employer may not unilaterally change at any time without prior notice to the union and good faith efforts to negotiate an agreement concerning it. This doctrine is susceptible of several refinements depending on the terms of the existing agreement, the extent of pre-contract discussions, and the scope of any union waivers or management rights clauses.<sup>51</sup> For our purposes, however, the important point is that in determining the range of mandatory subjects of bargaining, we are not merely deciding what the parties are obligated to deal with at the time a contract is initially negotiated. To a significant degree we are also deciding what limits shall be imposed on the employer's freedom and business flexibility during the two or three years of the contract's life. Let us now turn to the principles and practicalities that should be considered in making that determination.

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50. *E.g.*, *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185-88 (1971).

51. *See, e.g.*, *Leroy Mach. Co.*, 147 N.L.R.B. 1431 (1964) (waiver through management rights clause); *Proctor Mfg. Corp.*, 131 N.L.R.B. 1166, 1169 (1961); *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952). *See also* R. GORMAN, *supra* note 23, at 466-80 (on waiver).

## IV. ACTUAL AND POTENTIAL IMPACT OF COLLECTIVE BARGAINING

Imposing a duty to bargain about managerial decisions such as plant removals, technological innovation, and subcontracting (or "outsourcing," to use the current jargon) would obviously delay transactions, reduce business adaptability, and perhaps interfere with the confidentiality of negotiations with third parties. In some instances bargaining would be doomed in advance as a futile exercise. Nonetheless, the closer we move toward recognizing that employees may have something akin to a property interest in their jobs,<sup>52</sup> the more apparent it may become that not even the employer's legitimate regard for profit-making or the public's justified concern for a productive economy should totally override the workers' claim to a voice in the decisions of ongoing enterprises that will vitally affect their future employment opportunities.<sup>53</sup> A moral value is arguably at stake in determining whether employees may be treated as pawns in management decisions.<sup>54</sup> On a crasser, tactical level, a leading management attorney of my acquaintance once said that long before the Supreme Court's decision on in-plant subcontracting, he "*Fibreboarded*" the unions he dealt with simply as a matter of sound personnel relations.

From the workers' perspective, the opportunity to bargain before a decision is made could be crucial. Unions will lose considerable leverage in bargaining about even the effects of a business change if the employer can present them with a *fait accompli* in the change itself. Oftentimes negotiations may benefit both parties by producing a less drastic solution than a shutdown or a relocation. For example, one of the most dramatic moments during the 1982 Ford-UAW negotiations occurred when a union representative from the plant level and his opposite number from the management side agreed that not once had the two

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52. See, e.g., ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON LABOR AND EMPLOYMENT LAW, *At-Will Employment and the Problem of Unjust Dismissal*, 36 Rec. A.B. City N.Y. 170 (1981) (employer's right to terminate employee at will); Symposium, *Individual Rights in the Workplace: the Employment-at-Will Issue*, 16 U. MICH. J.L. REF. 199 (1983) (same).

53. An employer apparently has no duty to bargain about a decision to go out of business completely. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 267 n.5 (1965).

54. See N. CHAMBERLAIN, *THE UNION CHALLENGE TO MANAGEMENT CONTROL* 8-9 (1948) [hereinafter referred to as N. CHAMBERLAIN].

of them failed to find a way to adjust operations so as to keep work within the shop and not have it contracted out. At the very least, bargaining may serve a therapeutic purpose. As the Supreme Court stated in *Fibreboard*, in words that might sound platitudinous but for the grim historical reality behind them, the NLRA "was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife."<sup>55</sup>

Despite these advantages of collective bargaining, neither organized labor nor collective bargaining has ever enjoyed full acceptance in this country. Unions are feared by many employers and distrusted by much of the public.<sup>56</sup> Their support today even among workers is lower than at any time during the past half century. For several years they have lost over fifty percent of all the representation elections conducted by the NLRB, and their membership has shrunk to only one-fifth of the total labor force, not even half the proportionate strength of unions in most of Western Europe.<sup>57</sup>

There is keen irony here. Ours is the most conservative, least ideological of all labor movements, traditionally committed to the capitalistic system and to the principle that management should have the primary responsibility for managing.<sup>58</sup> Yet employers will pay millions of dollars to experts in "union avoidance" in order to maintain their nonunion status.<sup>59</sup> In part this resistance is attributable to the highly decentralized character of American industrial relations. Because of this decentralization, an employer typically must confront a union on a one-to-one basis, without the protective shield of an association to negotiate on behalf of all or substantially all the firms in a particular indus-

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55. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964).

56. Opinion polls in the 1970's showed that there was no other major institution in our society whose leadership so consistently lacked the confidence of the general public. Ladd, *The Polls: The Question of Confidence*, 40 PUB. OPINION Q. 544, 545 (1977).

57. 45 NLRB ANN. REP. 270-72 (1980). The percentage of unionized workers in the United States has declined rather steadily since 1947, from 23.9 percent of the total labor force in that year (33.7 percent of nonagricultural employment) to 19.7 percent in 1978 (about 23.6 percent of nonagricultural employment). BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, BULL. NO. 2070, HANDBOOK OF LABOR STATISTICS—1980 at 412.

58. See LABOR AND AMERICAN POLITICS 4-5 *passim* (C. Rehmus, D. McLaughlin & F. Nesbitt rev. ed. 1978).

59. See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776-86 (1983).

try, as is true in Western Europe. In part the resistance to union organization here may result, among both employers and workers, from ingrained American attitudes of rugged individualism and the ideal of the classless society.<sup>60</sup>

In any event, it seems plain that aversion to unionism can hardly be supported by a dispassionate analysis of the actual impact of collective bargaining in this country. Indeed, for many years labor economists wrangled over whether *any* significant economic effect could be demonstrated. Today, however, there is an emerging consensus, which was reflected in a volume produced in 1981 by the Industrial Relations Research Association.<sup>61</sup> This volume assessed U.S. industrial relations over the last three decades, during which time collective bargaining could be said to have come of age. To no one's surprise, unionism was not found to have brought about any substantial redistribution of wealth as between labor and capital. It has achieved a wage level that is roughly ten to twenty percent higher for union workers,<sup>62</sup> but that differential is largely offset by increased efficiency and greater productivity in unionized firms. Furthermore, unions have not been an initiating cause of inflation in the post-World War II period, although they may have hampered efforts to combat it.<sup>63</sup> Last, to mention a point that I must concede is at least superficially damaging to my thesis, union workers generally find less satisfaction in their jobs than do similarly situated nonunion workers.<sup>64</sup> On the other hand, union members are more likely to say they would never consider changing jobs. Perhaps the solution to this paradox, as suggested by Richard Freeman and James Medoff, is that "the collective voice of unionism provides workers with a channel for expressing their preferences to management and that this increases their willingness to complain about undesirable conditions."<sup>65</sup>

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60. See Bok, *Reflections on the Distinctive Character of American Labor Law*, 84 HARV. L. REV. 1394, 1458-62 (1971).

61. Freeman & Medoff, *The Impact of Collective Bargaining: Illusion or Reality?* in U.S. INDUSTRIAL RELATIONS, 1950-1980: A CRITICAL ASSESSMENT 50-56, 59-61 (J. Stieber, R. McKersie & D. Mills eds. 1981) [hereinafter referred to as U.S. INDUS. REL.].

62. *Id.* See also A. REES, THE ECONOMICS OF TRADE UNIONS 74, 89-90 (2d ed. 1977) [hereinafter referred to as A. REES].

63. Mitchell, *Collective Bargaining and the Economy*, in U.S. INDUS. REL., *supra* note 61, at 25-26, 33-35.

64. Freeman & Medoff, U.S. INDUS. REL., *supra* note 61, at 58-59.

65. *Id.*

For many observers of the labor scene, the major achievement of collective bargaining has not been economic at all. It has been the creation of the grievance and arbitration system, a formalized procedure whereby labor and management may resolve disputes arising during the term of a collective agreement, either by voluntary settlements between the parties themselves or by reference to an impartial outsider, without resort to economic force or court litigation.<sup>66</sup> The mere existence of a grievance and arbitration system helps to eradicate such former abuses as favoritism, arbitrary or ill-informed decisionmaking, and outright discrimination in the workplace.

My conclusion from these facts is that collective bargaining has promoted both industrial peace and broader worker participation in the governance of the shop, while simultaneously stimulating higher productivity and causing only modest dislocations in the economy generally. At the same time I believe that the true potential of collective bargaining has not been tapped. Because law serves such an important legitimating function in our society, collective bargaining may have been seriously undermined when the courts began to cut back the scope of mandatory bargaining to exclude managerial decisions even though they might have a substantial effect on employees' job security.

Peter Pestillo, Ford Motor Company's able, dynamic vice-president for labor relations, has mused: "U.S. labor relations are too little people-driven and too much law-driven."<sup>67</sup> That may be regrettable, but it seems the reality. Ironically, the legal duty to bargain is now more hindrance than help to a well-entrenched union. Without it, the union could demand bargaining on anything it wished; with it, bargaining is by leave of the employer on everything outside the prescribed list of "wages, hours, and other terms and conditions of employment." Far better, it seems to me, would have been an open-ended mandate that lets the parties themselves decide what their vital interests are.<sup>68</sup>

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66. See, e.g., D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 463-65 (1970); A. REES, *supra* note 62, at 187 (discussing the economic and political benefits of unionism); Freeman & Medoff, *The Two Faces of Unionism*, PUB. INTEREST, Fall 1979, at 69, 70.

67. As quoted in a letter from Malcolm L. Denise, Esq., of Detroit, Michigan to author (March 10, 1982).

68. An excellent, more conventional solution is proposed in Harper, *supra* note 46.



The only exclusions from compulsory bargaining that I would readily admit are matters going to the very existence or identity of the negotiating parties, such as the membership of a corporation's board of directors, and perhaps the integrity of their internal structure and procedure. Those limitations would preserve the holding in *Borg-Warner*,<sup>69</sup> which adopted the mandatory-permissive dichotomy in the first place.

My argument for a more sweeping and wide-open duty to bargain is grounded in two considerations, one a matter of economics and industrial relations policy, and the other a matter of social policy, if not of ethics. I shall deal with them in turn.

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He would exclude from the scope of compulsory bargaining only "product market decisions," which he defines as "all decisions to determine what products are created and sold, in what quantities, for which markets, and at what prices." *Id.* at 1463. He bases this principle on a "social policy allowing consumers, and only consumers, to influence management's product market decisions." *Id.*

There is much merit in Professor Harper's thesis, and he demonstrates its feasibility and conformity to precedent in a variety of contexts. Nonetheless, as he seems to recognize, it may unduly circumscribe bargaining for a class of employees that will become increasingly significant in the post-industrial world—artists and artisans, educators, entertainers, and customer service personnel generally—in short, all those employees "whose identity and behavior . . . define the product." *Id.* at 1467-68. Thus, Professor Harper would not make safety rules a mandatory topic for professional football players, or the scantiness of costume for cocktail waitresses. *Id.* at 1466. The logic here may be impeccable, but it leads one to question the soundness of the premise which so exalts consumer interests over employee interests.

Professor Harper's proposal for a product market principle might also have the theoretical advantage of providing a rational basis for distinguishing between union-employer activity that is and is not subject to the antitrust laws. But the Supreme Court has apparently rejected the notion of such a sharp labor market-product market dichotomy; even an agreement concerning wages may violate the Sherman Act if "predatory intent" is present. *UMW v. Pennington*, 381 U.S. 657 (1965), *on remand sub nom. Lewis v. Pennington*, 257 F. Supp. 815 (E.D. Tenn. 1966), *aff'd in part, rev'd in part*, 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968); *Smitty Baker Coal Co. v. UMW*, 620 F.2d 416 (4th Cir. 1980), *cert. denied*, 449 U.S. 870 (1981). See generally Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459 (1981) (advocating broad formulation of the labor antitrust exemption to include all collectively bargained agreements except those that directly affect the product market); Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980) (court should find antitrust violation only if act is part of a plan to control the product market); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 610 (1976) (antitrust violation exists only when there is a definite plan to injure business competitors). If predatory intent is indeed the key to a union-employer antitrust violation, then of course the particular subject matter of the agreement is not a crucial factor.

69. See *supra* text accompanying note 24. Under my test, however, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (termination of maintenance at nursing home), would have to be overruled or treated as a sport.

## V. INDIVIDUAL VOICE IN THE WORKPLACE

During the late 1960's American management became alarmed by signs of growing alienation, even militancy, on the part of workers. Although this unrest was much exaggerated, it fueled an effort by many companies to enhance the *Quality of Work Life* (QWL) by increasing employee participation in job-centered decisionmaking. The interest in such programs was intensified during the 1970's by glowing accounts of the capacity of Japanese industry to improve both the quantity and quality of production by fostering an almost filial relationship between employee and employer. Altogether, it is estimated that one-third of the companies in the *Fortune 500* have established programs in participative management.<sup>70</sup> Furthermore, in certain countries, such as Sweden and West Germany, worker participation is guaranteed by statute.<sup>71</sup> More and more studies attest that it is simply smart business to heed the voice of the individual employee and to give him or her a stake in the successful operation of the enterprise.<sup>72</sup> Like the student using the library designed by the great architect, the worker on the production line will spot flaws that have escaped the eye of the keenest industrial engineer.

Participative management or QWL programs have undoubtedly been used by some companies to counter the appeal of labor unions.<sup>73</sup> Nevertheless, several major international unions have become involved in such projects. As of 1980 General Motors and the UAW had programs under way in fifty separate plants.<sup>74</sup> Some locations registered remarkable gains in employee morale and performance. In addition, the new contract signed in

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70. Wallace & Driscoll, *Social Issues in Collective Bargaining*, in U.S. INDUS. REL., *supra* note 61, at 199, 241.

71. Bergqvist, *Worker Participation in Decisions Within Undertakings in Sweden*, 5 COMP. LAB. L. 65 (1982); Richardi, *Worker Participation in Decisions Within Undertakings in the Federal Republic of Germany*, 5 COMP. LAB. L. 23, 29-31 (1982).

72. Wallace & Driscoll, *supra* note 70, at 238, 241. For varying appraisals see Goodman, *Quality of Work Life Projects in the 1980s*, 31 LAB. L.J. 487 (1980); Locke & Schweiger, *Participation in Decision-Making: One More Look*, in 1 RESEARCH IN ORGANIZATION BEHAVIOR 271 (B. Staw ed. 1979); Merrifield, *Worker Participation in Decisions Within Undertakings*, 5 COMP. LAB. L. 1 (1982); Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367 (1980); *Workers' Participation in Management: An International Comparison*, 18 INDUS. REL. 247 (1979).

73. Wallace & Driscoll, *supra* note 70, at 242-51.

74. *Id.* at 245.

1982 by Ford Motor Company and the UAW provides for "Mutual Growth Forums," at both national and local levels, consisting of joint union-management committees for the "advance discussion of certain business developments of material interest and significance to the union, the employees, and the company."<sup>75</sup>

The anomaly is that many of these developments, evidently so beneficial to management, might well be classified as "permissive" subjects of bargaining by the NLRB or the courts. A union could not bring them to the bargaining table without the acquiescence of the employer. Of course, as long as the parties are cooperative, that is a moot point. But the law should be structured to deal with the case where regulation is necessary, not where it is superfluous. Even on so-called managerial decisions, such as revising the layout of a trim department in an auto assembly plant, the workers' input has often proved valuable.<sup>76</sup> The law ought not insulate the employer from bargaining merely because he rejects that lesson.

One worrisome objection to my prescription is that it may unduly restrict a company's autonomy after a contract has been agreed upon. If an item is a mandatory subject of bargaining, the employer is not only obligated to negotiate when a contract is executed but may also be precluded from instituting a unilateral change during the life of the agreement.<sup>77</sup> This result would be opposed by those who believe that once an employer has fulfilled its duty to bargain and has signed a contract, it should be entitled to treat all contract terms as settled.<sup>78</sup> Unless restricted by some particular provision, a company should be entirely free, under this view, to act unilaterally without further bargaining. Two answers can be given to this objection. First, an employer can preserve its autonomy by securing a suitably broad "management rights" clause as part of the initial settlement. Second, even if the employer must bargain, there is no obligation to agree. After a good faith effort has been put forth, and the nego-

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75. *Solidarity*, Mar. 1982, at 8.

76. Wallace & Driscoll, *supra* note 70, at 246.

77. See *supra* text accompanying notes 50-51.

78. Cf. Cox & Dunlop, *Duty to Bargain*, *supra* note 11, at 1116-20 (collective bargaining agreement should be construed to require continuance of major terms of employment not included within agreement but which existed at the time of the formulation of the agreement; differing management and union views are discussed).

tiations carried to impasse, the employer may proceed to make the change he desires. The period of bargaining may be short if the circumstances warrant.<sup>79</sup> The union and the employees would have had their say, and the law requires no more.

A quarter century ago a classic study on industrial relations concluded: "An important result of the American system of collective bargaining is the sense of participation that it imparts to workers."<sup>80</sup> More recently, a group of younger scholars, describing themselves as "critical labor law theorists," has expressed the view that "collective bargaining law articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace."<sup>81</sup> Some perspective on these polar positions can be gleaned from surveys indicating that the workers themselves would rather deal with safety and health than with the design of their jobs.<sup>82</sup> Yet perhaps the most richly textured sense of how workers feel about their jobs comes from hearing them speak for themselves. Listen to an auto worker as transcribed by Studs Terkel: "What it drains out of a human being, the car ain't worth it. But I think of a certain area of proudness. You see them on that highway, you don't look and see what model it is or whose car it is. I put my labor in it."<sup>83</sup>

For me, in the end, the issue comes down to the social values, to the human values. It is good to know that giving the individual a voice in the shaping and operation of his job may be

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79. I have examined nine contested NLRB cases during the 1970's in which an employer instituted unilateral changes after bargaining "to impasse." Elapsed times from the employer's initial notification of an impending change or first meeting with the union to the implementation of the change ranged from three weeks to six months. Three cases took three weeks; five took between four and eight weeks; and one took six months. The median was six and one-half weeks, which in the usual situation would hardly seem very onerous. More empirical data on the practical effect of such delays plainly would be desirable.

80. S. SLICHTER, J. HEALY & E. R. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 960 (1960).

81. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 *INDUS. REL. L.J.* 450, 452 (1981). See generally, Dubofsky, *Legal Theory and Workers' Rights: A Historian's Critique*, 4 *INDUS. REL. L.J.* 496 (1981); Kennedy, *Critical Labor Theory: A Comment*, 4 *INDUS. REL. L.J.* 503 (1981); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *MINN. L. REV.* 265 (1978); Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 *INDUS. REL. L.J.* 483 (1981). Cf. J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 143-56 (1983).

82. Wallace & Driscoll, *supra* note 70, at 239-40.

83. S. TERKEL, *WORKING* 177 (1974).

sound industrial relations and may enhance efficiency and productivity. But I think there is considerably more at stake than simple economic concerns. My emphasis on noneconomic factors is neither novel nor quixotic. A generation ago a hard-headed labor expert, Neil Chamberlain, declared that "the workers' struggle for increasing participation in business decisions . . . is highly charged with an ethical content. . . . [L]egal and economic arguments, technological and political considerations must give way before widely held moral convictions."<sup>84</sup> I am little troubled that some workers, in answering the pollsters' canned questions, assigned a "low priority" to involvement in decisions about job content, or that their initial reaction was that a car "ain't worth" the pain. Allowed to elaborate, they still find a "certain area of proudness"; they have put their "labor in it." Really, they have no choice. It is primarily work that defines a man or woman.<sup>85</sup> No amount of leisure time before the television set or on a Florida beach can compensate for that. Ultimately, what any of us says or does about our work may not matter much. What will be important is that we shall have had a voice. The worker deserves no less.

Finally, I cannot accept the romantic notion that individual employees should somehow renounce the social compact and revert to a state of nature, shaking off the shackles of collective bargaining and disowning our orderly, hierarchical grievance-solving mechanisms. The challenge, as I see it, is to provide the individual a voice without producing cacophony, to ensure a civilized confrontation and resolution of issues, by peaceful strikes if necessary, but without the guerrilla warfare of wildcat work stoppages. The modern union may exhibit bureaucratic tendencies that some find distasteful, but the contemporary world is hardly a place for the swashbuckling adventurer or undisciplined marauding band. Whether called a guild, a society of journeymen and apprentices, or a labor union, a settled institutional means has usually afforded working people the fullest expression

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84. N. CHAMBERLAIN, *supra* note 54, at 8-9.

85. Studies have found that "most, if not all, working people tend to describe themselves in terms of the work groups or organizations to which they belong. The question 'Who are you?' often elicits an organizationally related response. . . . Occupational role is usually a part of this response for all classes: 'I'm a steelworker,' or 'I'm a lawyer.'" SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *WORK IN AMERICA* 6 (1973).

of their common goals and their most effective voice.<sup>86</sup> The law would do the worker no favor to ignore that history.

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86. See, e.g., Freeman & Medoff, *supra* note 66, at 71-72 (espousing the model of union as collective voice). See generally S. & B. WEBB, *INDUSTRIAL DEMOCRACY* 840-50 (1920) (unionism and democracy); S. & B. WEBB, *THE HISTORY OF TRADE UNIONISM* 1-63 (1920) (origins of trade unions). Cf. E. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 500-21 (1966) (resistance to the Combination Acts by the artisans and skilled laborers in 19th century England).