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Some Comments on the Right of an Employer to go out of Business: The Darlington Case - The Restriction

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SOME COMMENTS ON THE RIGHT OF AN EMPLOYER TO GO OUT OF BUSINESS: THE *DARLINGTON* CASE

[The following is a discussion of the significance and/or impact of the recently decided *Darlington Mfg. Co.* case as seen by labor and management. Robert M. Segal, Esquire maintains that the decision represents a legitimate restriction on an employer's right to go out of business in the face of union activity. John E. Teagan, Esquire believes that an employer should be allowed to cease operations, even where partially motivated by union demands, where there is separate economic justification for such a decision.

THE EDITORS]

THE RESTRICTION

ROBERT M. SEGAL*

The decision by the National Labor Relations Board in *Darlington Mfg. Co.*,[1] raises some fundamental questions concerning an employer's supposed absolute right to close his plant permanently, discharge his employees and cease doing business. According to the Board, Congress by the Labor-Management Relations Law of 1947[2] has deprived the employer of his right to close his plant and discharge employees for engaging in protected activities. Withdrawal of this right is absolute and unequivocal. Furthermore, the Board has in this case fashioned some interesting remedies to protect the rights of the employees. The case involves the basic issue whether termination of employment in the face of union demands and activities itself violates the employees' rights guaranteed by section 7 and therefore constitutes interference and discrimination proscribed by sections 8(a)(1) and (3) of the act.

The decision was almost six years in the making and involved one intermediate and two supplemental intermediate reports by an NLRB trial examiner, a decision by a federal district court enjoining a remand of the case to the trial examiner, a decision by a federal court of appeals modifying the district court decision and finally three opinions by the five-member Board. Currently, the case is before the court of appeals for review of the NLRB decision.

The facts of the case are relatively simple. At a Board conducted election on September 6, 1956, the union won by a vote of 256 to 248 and was certified as the exclusive collective bargaining agent for the employees on October 24, 1956. In the interim, the stockholders voted to close the mill and liquidate its operations "because of certain developments" (*i.e.*, "the recent election where the majority of the people in the

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1 139 N.L.R.B. No. 23, 51 L.R.R.M. 1278 (1962).

2 61 Stat. 136-58 (1947), 29 U.S.C. §§ 151-87 (1958).

plant . . . [were] . . . for the union"). The liquidation was thereafter carried out, the equipment and plant machinery were sold at auction and approximately 500 employees lost their jobs. In answering the union's unfair labor charges, the company claimed that the closing of the mill was caused by six economic and financial factors, but also contended that "as an employer it had an absolute right to go out of business for whatever reason it may choose and regardless whether union animosity may have contributed to the decision."

The National Labor Relations Board found that the company had violated the act, and held that a plant closing resulting in the discharge of employees that is even *partly* caused by their union activities is an unfair labor practice. This is true, the Board holds, even though there were six genuine economic factors which also motivated the shutdown. As to the employer's absolute right to go out of business, the Board holds that section 8(a)(3) prohibits an employer from closing his plant in retaliation for the employees' selection of a union as bargaining agent. The Board says that if one of the employer's purposes is to avoid dealing with a union certified as the employees' bargaining agent and to retaliate against employees for their union activities, the closing of the plant and the discharges amount to unlawful interference and discrimination under the act.

The Board's remedy in this case is a broad one, for its order applies to both the Darlington Manufacturing Company and the parent Deering Milliken & Co. It finds that common ownership and common control of labor relations and operations make the parent corporation and its mills a "single employer" for the purposes of the act. On the other hand, no individual liability is imposed on the company's president.

Dissents were entered by Board members Rodgers and Leedom. The latter agrees with the unfair labor practice findings of the majority but would limit liability to the Darlington Company, and would allow back pay only from the date of discharge to the date of the plant's closing. Member Rodgers would find a violation of 8(a)(1) against the Darlington Company, based on interrogation of the employees and threatening statements, but would dismiss all other charges on the ground that "there is nothing in the basic Act nor in any amendments thereto which limits an employer's right to go out of business at such time and under such circumstances as he chooses."

Section 8(a)(1) proscribes interference, coercion and restraint of employees in the rights guaranteed by section 7 of the act. Violations of this section can be generally classified as follows:

(1) Any conduct which has no independent business significance and is intended to discourage union organization or influence the employees' choice of representatives violates section 8(a)(1) unless it is privileged as speech under section 8(c).

(2) Conduct which has independent business significance but which is undertaken for the purpose of discouraging unionization or influencing the choice of employees violates section 8(a)(1). Actions such as the granting or timing of a wage increase,[3] the closing of a department or removal of a plant,[4] or the subcontracting of work[5] would be unlawful under 8(a)(1) if undertaken for the purpose of discouraging union activity. Although there seems to be no dispute about the validity of the legal principle involved, courts have been rather quick to reverse findings that given conduct was directed against union activity as a matter of fact.[6]

(3) Conduct which is an undue interference with organizational activities, because the business justification is insufficient, has also been held to be a violation of section 8(a)(1).[7] When discharges are involved in the above cases, section 8(a)(3), which prohibits discrimination against employees because of union activities, is also involved.

In *Darlington* the majority held that section 8(a)(3), not section 8(a)(1), literally proscribed the employer's closing of its business in retaliation for the employees' selection of the union. Further, refusal to bargain with the union violated section 8(a)(5).

Darlington is not the first case to limit sharply the so-called management prerogatives in this area. It has long been settled that it is illegal for an employer to escape his bargaining obligation or to retaliate against his employees for their union activities by shutting down a department of his business completely,[8] contracting out part of his work,[9] moving his plant from one location to another,[10] or shutting down temporarily.[11] In all of these cases, the employers divested themselves only of some of their operations but did not go completely out of business.

A whole series of cases had been decided relative to *temporary shutdowns*. If the Board finds that they are used by an employer to

[3] Hudson Hosiery Co., 72 N.L.R.B. 1434 (1947); May Dept. Stores Co. v. NLRB, 326 U.S. 375 (1945). These may also be per se violations.

[4] Industrial Fabricating Inc., 119 N.L.R.B. 162, 41 L.R.R.M. 1038 (1957).

[5] R. C. Mahon Co., 118 N.L.R.B. 1537, 40 L.R.R.M. 1417 (1957). These may also be per se violations.

[6] Mt. Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954); NLRB v. Houston Chronicle Pub. Co., 211 F.2d 848 (5th Cir. 1954); NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955).

[7] NLRB v. Lake Superior Lumber Co., 167 F.2d 147 (1948); In the Matter of Peyton Packing Co., 49 N.L.R.B. 828, 12 L.R.R.M. 183 (1943).

[8] See, e.g., Williams Motor Co. v. NLRB, 128 F.2d 960 (8th Cir. 1942); NLRB v. Wallick & Schwalam Co., 198 F.2d 477 (3d Cir. 1952).

[9] See, e.g., NLRB v. Brown-Dunkin Co., 287 F.2d 17 (10th Cir. 1961), enforcing 125 N.L.R.B. 1379, 45 L.R.R.M. 1526 (1959).

[10] See, e.g., Rome Prods., 77 N.L.R.B. 1217, 22 L.R.R.M. 1138 (1948); Oxwall Tool Co. v. NLRB, 51 L.R.R.M. 2595 (2d Cir. 1962), enforcing 135 N.L.R.B. No. 87, 49 L.R.R.M. 1485 (1962).

[11] See, e.g., NLRB v. Joseph Stremel, d/b/a Crow Bar Coal Co., 141 F.2d 317 (10th Cir. 1944); NLRB v. Somerset Classics, 193 F.2d 613 (2d Cir.), cert. denied, 344 U.S. 816 (1952); Norma Mining Corp. v. NLRB, 206 F.2d 38 (4th Cir. 1953).

retaliate against union activities (*i.e.*, a strike threat) or to gain a bargaining advantage, it has normally held them to be unlawful and a form of interference under 8(a)(1), and no different from any other form of discrimination violative of section 8(a)(3).[12] However, the "whipsaw" lockout defense has been held valid where the non-struck members of a multi-employer unit temporarily shut down or lockout employees when one of its members is struck "to preserve the multi-employer bargaining basis from the disintegration threatened by the union's strike action."[13] At the same time, the Board has recently held that the non-struck employer could not continue operations by resorting to replacements, and that such a temporary whipsaw lockout of his employees violates sections 8(a)(1) and (3).[14] The circuit courts have split on the issue whether an employer may temporarily lock out his employees in order to enhance his bargaining position.[15] The Board has justified temporary lockouts as valid defensive measures in the following cases: (1) Where the timing of the threatened strike would result in a spoilage of materials;[16] (2) where recurrent work stoppages threaten the employer's ability to plan production schedules;[17] (3) where the union had threatened to strike, had previously engaged in "quickie" strikes, and had refused to give requested assurances preventing substantial loss and serious danger to the health and safety of the public;[18] (4) where the shutdown is necessary to avoid unusual loss or business disruption attendant upon a strike.[19] At the same time multi-employer agreements "or mutual aid pacts" to suspend operations in an association-wide unit have recently been upheld by the Board in the *Publishers Ass'n of N.Y.* case.[20] Similarly, the railroads' strike insurance plan was found lawful under the Railway Labor Act by Judge Ryan in

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12 See Utah Plumbing & Heating Contractors Ass'n v. NLRB, 294 F.2d 165 (10th Cir. 1961); Quaker State Oil Ref. Corp. v. NLRB, 270 F.2d 40 (3d Cir.), cert. denied, 361 U.S. 917 (1959). Compare NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962).

13 NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply Co.), 353 U.S. 87 (1957); see Meltzer, Single Employer and Multi-Employer Lockouts under Taft-Hartley Act, 24 U. Chi. L. Rev. 70 (1955).

14 Brown Food Store, 137 N.L.R.B. No. 6, 50 L.R.R.M. 1046 (1962).

15 The Board was sustained by the Third and Tenth Circuits, Quaker State Oil Ref. Corp. v. NLRB, supra note 12; Utah Plumbing & Heating Contractors Ass'n v. NLRB, supra note 12; but not by the Fifth Circuit, NLRB v. Dalton Brick & Tile Corp., supra note 12. This question was left open in NLRB v. Truck Drivers Local 449, supra note 13.

16 Duluth Bottling Ass'n, 48 N.L.R.B. 1335, 12 L.R.R.M. 151 (1943).

17 International Shoe Co., 93 N.L.R.B. 907, 27 L.R.R.M. 1504 (1951).

18 Building Contractors Ass'n of Rockford, Inc., 138 N.L.R.B. No. 143, 51 L.R.R.M. 1211 (1962). See also Associated Gen. Contractors, Ga. Branch, 138 N.L.R.B. No. 144, 51 L.R.R.M. 1215 (1962).

19 Betts Cadillac-Olds, Inc., 96 N.L.R.B. 268, 128 L.R.R.M. 1509 (1951).

20 139 N.L.R.B. No. 107, 51 L.R.R.M. 1434 (1962). See Clune v. Publishers' Ass'n of N.Y.C., 52 L.R.R.M. 2437 (S.D.N.Y. 1963).

Kennedy v. Long Island R.R. Co.,[21] even though the insurance may have assisted a struck railroad in resisting the union's demands during negotiations.

The *Darlington* case, then, is another in a series of Board and court decisions which definitely restricts management's "rights" of unilateral action. A decision to subcontract work done by employees who are members of a bargaining unit represented by a union has already been held to be a mandatory subject of bargaining. It does not matter that the employer is motivated solely by economic considerations, and it is not necessary for the union to have a contract with the employer.[22] As the Board pointed out in *Town & Country Mfg. Co.*

> 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.[23]

Where there is a union contract in existence, the courts and arbitrators have awarded damages against violations of runaway shop provisions.[24] In addition, an employer's decision to subcontract may well be subject to court ordered arbitration in a section 301 suit under the *Trilogy* decisions of the Supreme Court.[25] In arbitration, the decisions

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[21] 51 L.R.R.M. 2704 (S.D.N.Y. 1962).

[22] Town & Country Mfg. Co., 136 N.L.R.B. No. 111, 49 L.R.R.M. 1918 (1962). The Board reasoned that the most meaningful way to remedy the wrong would be to require the company to reinstitute its trucking operations, to reinstate the discharged drivers with back pay and to bargain with the union. See also Fibreboard Paper Prods., 138 N.L.R.B. No. 67, 51 L.R.R.M. 1101 (1962) and Adams Dairy Inc., 137 N.L.R.B. No. 87 (1962).

[23] The Board has recently applied the *Town & Country* principle to the employer's termination of its entire business in Star Baby Co., 140 N.L.R.B. No. 67, 52 L.R.R.M. 1094 (1963). For an early case requiring bargaining over subcontracting, see Timken Roller Bearing Co., 70 N.L.R.B. 500, 18 L.R.R.M. 1370 (1946).

[24] Shoe Workers v. Brooks Shoe Mfg. Co., 187 F. Supp. 509 (E.D. Pa. 1960), aff'd and rev'd in part, 298 F.2d 277 (3d Cir. 1962); Dubinsky v. Blue Dale Dress Co., 162 Misc. 177, 292 N.Y. Supp. 898 (Sup. Ct. 1936); Sidele Fashions Inc., 36 Lab. Arb. 1364 (Dash. 1961); Address-O-Mat, Inc., 36 Lab. Arb. 1074 (Wolff 1961).

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

on the merits have been diverse, for although some arbitrators have stressed the reserved right of management to subcontract, many have held that this right is not unlimited.[26] Then, a firm can be compelled to arbitrate questions concerning the effect of consolidation on an existing contract and on the rights of its employees under the contract.[27]

After the expiration of a union contract, the employer may still be faced with many legal problems relative to the union and its members. He may not unilaterally change the terms and conditions of employment unless an impasse has in fact been reached.[28] An arbitrator's award for reinstatement and back pay may well be enforced by the court after the contract term,[29] and an employer may have to pay accrued severance pay, vacation and pensions even if he has gone out of business.[30] Furthermore, he may be confronted with employee seniority and job rights after he has moved his plant with no unfair labor practices involved.[31]

During negotiations with a union (or even during a contract term in some cases), the employer must disclose information which the union needs for bargaining purposes[32] and also bargain over merit increases,[33] stock bonuses, insurance[34] and pensions[35] and such other mandatory subjects of bargaining as are encompassed within the general terms "wages, hours and terms and conditions of employment."[36] In spite of the literal language of section 8(e) of the act, the employer must bargain

Mfg. Co., 363 U.S. 564 (1960). See also Montgomery Ward Inc., 137 N.L.R.B. No. 41, 51 L.R.R.M. 1074 (1962).

[26] See Matter of Celanese Corp., 33 Lab. Arb. 925 (1960); Crawford, The Arbitration of Disputes over Subcontracting in Challenges to Arbitration (BNA 1960). At the same time, the courts have enforced arbitration awards ordering the company to bring back its "runaway" shops.

[27] Livingston v. Wiley & Sons, Inc., 52 L.R.R.M. 2223 (2d Cir. 1963).

[28] NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. Insurance Agents, 361 U.S. 477 (1960); Note, 16 Rutgers L. Rev. 416 (1962); Note, 37 N.Y.U.L. Rev. 666 (1962).

[29] United Steelworkers v. Enterprise Wheel & Car Corp., supra note 25.

[30] Brooklyn Eagle Inc., 32 Lab. Arb. 156 (1959); Owens v. Press Publishing Co., 20 N.J. 537, 120 A.2d 442 (1956).

[31] Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961), 52 L.R.R.M. 2764 (1963); cf. Oddie v. Ross Gear & Tool Co., 305 F.2d 143 (6th Cir. 1962); Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962); Note, 38 U. of Det. L.J. 389 (1961); Note, 71 Yale L.J. 563 (1962); Note, 48 Va. L. Rev. 291 (1961). See also Giordano v. Mack Trucks Inc., 49 L.R.R.M. 3082 (D.C. N.J. 1960); System Fed'n No. 59 v. La. & A. Ry., 119 F.2d 509 (5th Cir.), cert. denied, 314 U.S. 656 (1941); Bernstein, Employee Pension Rights When Plants Shut Down, 76 Harv. L. Rev. 952 (1963).

[32] Truitt Mfg. Co., 110 N.L.R.B. 856, 35 L.R.R.M. 1150 (1954), aff'd, 351 U.S. 149 (1956). Limitations have recently been imposed in Hercules Motor Corp., 136 N.L.R.B. No. 145, 50 L.R.R.M. 1061 (1962) and Sinclair Ref. Co. v. NLRB, 132 N.L.R.B. 1660, 48 L.R.R.M. 1544 (1961).

[33] NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir.), cert. denied, 335 U.S. 814 (1948).

[34] NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952).

[35] Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).

[36] See Cox & Dunlop, Regulation of Collective Bargaining by NLRB, 63 Harv. L. Rev. 389 (1950); Cox, Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958).

over the normal subcontract clauses.[37] Under the Railway Labor Act the Supreme Court, by a five to four decision,[38] has held that the carrier must bargain over a union's request that no position in existence on a certain date should be abolished or discontinued except by agreement between the carrier and the union; the Court stated:

> The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment.[39]

Indeed the Board has gone a long way in regulating not only the terms of collective bargaining but also the methods of collective bargaining by the parties.[40] As the General Counsel pointed out in his summary of operations for the calendar year 1962,

> An area of significant development in 1962 affecting OGC practice in investigation and case handling was that relating to the requirement of consultation between labor and management over economic issues which affect employees' job security. Such economic decisions include subcontracting, contracting out, plant removal, termination of facilities, and sale of a business, or the complete going out of business. In times of intensifying market competition and increasing costs, these problems have come to the fore. This is not a matter of NLRB decision alone but has manifested itself in Supreme Court and Appellate Court decisions under the NLRA, the Railway Labor Act, and under general law. It is not confined to any one sector of labor law development, and even private collective bargaining arrangements of national interest have had their relevancy.[41]

The basic principles of the *Darlington* case, therefore, are not new. As the General Counsel also stated in his Annual Report,

> Both the Board and the Courts have long established the illegality of so-called 'run-away plants.' In other words, it is illegal for an employer to move his plant from one location to another and to reopen it there with different employees in order to escape his obligation to bargain with a union which

37 Cox, Landrum-Griffin Amendments to NLRA, 44 Minn. L. Rev. 257, 270 (1959).
38 Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960).
39 Id. at 336.
40 Cox & Dunlop, supra note 36; C.E.D., The Public Interest in National Labor Policy 81-85 (1961).
41 Office of the General Counsel, Summary of Operations 122 (1962).

> has been selected as the bargaining representative by a majority of his employees. Similarly, it has been held illegal for an employer to shut down a department of his business in order to escape his bargaining obligation, or to contract out part of his work for this purpose, whether this is done by subcontracting the work to another employer or by converting the status of his employees to that of independent contractors.[42]

Prior to the *Darlington* case, the decisions involving plant shutdowns under the act had turned primarily on the question whether the shutdown was motivated by economic reasons, or by a desire to avoid bargaining with a union or to retaliate against the employees for their union activities. In the *Mt. Hope Finishing Co.* case,[43] the NLRB found that the company's actions were unlawfully motivated, but the court of appeals found that the shutdown and partial removal were based on economic factors and gave due weight to "the unfavorable economic conditions which for years have confronted the textile industry in New England." In *New Madrid Mfg. Co.*,[44] the court of appeals at St. Louis had refused to extend remedial liability beyond the date of the permanent shutdown of the plant or the sale of the business. There the court stated that nothing in the act deprives an employer of his absolute right to close his plant permanently and cease doing business for whatever reason he may choose.

The majority in *Darlington* recognized that in the *New Madrid* case the court of appeals had said that an employer has "the absolute right, at all times, to permanently close and go out of business, or to actually dispose of his business to another, for whatever reason he may choose, whether union animosity or anything else," and "No one can be required to stay in private business and no one can be prevented from permanently closing or abdicatingly selling such a business."[45] At the same time the Board pointed out that the court in that case actually agreed with the Board's finding that New Madrid's shutdown of the plant for discriminatory reasons violated sections 8(a)(1), (3) and (5) of the act, and that the court merely held that the company's liability for this unfair labor practice did not extend beyond its actual and permanent closing or true and bona fide change in ownership of the business.

In the *Darlington* case, the Board rejected the claim of an "absolute right of an employer to close his plant and discharge his employees for whatever reason he may choose." The Board regards the statements in

[42] Id. at 123.
[43] Mt. Hope Finishing Co. v. NLRB, supra note 6.
[44] NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954).
[45] Id. at 914.

the *New Madrid* case as mere dictum and contrary to the actual holding, for it stated:

> Accordingly, the legal conclusions that the Court reached were contrary to the court's *obiter dictum* that an employer can permanently close a business 'for whatever reason he may choose, whether union animosity or anything else.' The Court found that New Madrid's mill shutdown with its concomitant discharge of employees violated Section 8(a)(3) of the Act. Indeed, the Court issued an order requiring the reinstatement of the discharged employees; such reinstatement order could be made only in the case of unlawful discharge. Moreover, Darlington's interpretation of the Eighth Circuit's decision attributes to the Court the overruling of its own earlier decisions, even though the statutory right of an employer to close a plant permanently was not in issue and was not briefed by any party.
>
> In the circumstances we are loath to accept the Respondent's interpretation of the Circuit Court's intendment in the New Madrid case. We view the above-quoted paragraph as part of the Court's concern with the remedy in a case wherein the Court otherwise found that New Madrid, in a bona fide transaction, sold its plant to Jones. In any event, if Darlington has correctly interpreted the Court's meaning, we respectfully disagree.[46]

In its decision on section 8(a)(3), the Board relied on several court decisions involving violations of the act. It cited the Supreme Court's decision in *NLRB v. Waterman S.S. Corp.*,[47] where it was held that an employer violated section 8(a)(3) by the wholesale discharge of its employees because they were members of a particular union. There the Court stated that "employees . . . have a right guaranteed by the Act that they will not be dismissed because of affiliation with a particular union." It cited a decision of the Fourth Circuit which found that an employer violated sections 8(a)(1) and (3) by shutting its mine after threatening to do so because of his employees' union activities.[48] It noted its own decision relative to subcontracting in *Town & Country*[49] and also noted the *Crow Bar Coal* case,[50] where the court stated, "A shutdown or lock-out of employees for the purpose of discouraging membership in a labor organization constitutes discrimination within Section 8(3) and (1) of the Act." It cited the Third

[46] 51 L.R.R.M. at 1282.
[47] 309 U.S. 206 (1940).
[48] NLRB v. Norma Mining Corp., 206 F.2d 38 (4th Cir. 1953).
[49] Supra note 22.
[50] NLRB v. Joseph Stremel d/b/a Crow Bar Coal Co., supra note 11, at 318.

Circuit's decision[51] which held that an employer which closed one of its plants because of opposition to its employees' union activities violated section 8(a)(1), (3) and (5). It also cited the Eighth Circuit's upholding of the finding that an employer which discontinued one of its departments in retaliation for its employees' activities in behalf of a union violated section 8(a)(3).[52]

The Board concluded that "in summary, Section 8(a)(3) literally proscribes Darlington's closing of its business in retaliation for the employees' selection of the Union as their bargaining representative. . . . Congress has taken from employers the right to discharge employees for engaging in protected activities. The withdrawal of this right is absolute and unequivocal."[53]

Member Rodgers dissented and stated, "For—constitutional issues aside—there is nothing contained in the basic Act nor in any amendment thereto which limits an employer's right to go out of business at such times and under such circumstances as he chooses."

Mention should be made of the broad remedies involved in the case insofar as they bear on the effects of going out of business. In order to restore the situation here as nearly as possible to that which would have obtained but for the illegal discrimination, not only was back pay awarded from the date of the discriminatory discharges to the date when the employees would be able to obtain substantially equivalent employment, but the parent company (which was considered with Darlington as a single employer) was also ordered to offer reemployment to the discharged employees without prejudice to their seniority and other rights and privileges in the event Darlington did not reopen its plant. Further, these discharged employees were ordered placed on a preferential hiring list by the parent company, which was also ordered to pay travel and moving expenses. Precedent for this order was found in previous Board decisions.[54] The Board also ordered the parent company to bargain with the union concerning the preferential hiring lists and the terms and conditions under which the discharged employees of Darlington might obtain employment in the company's other mills in South Carolina and adjacent states. The Board, relying on several prior decisions,[55] also ordered the employer to mail copies of the Board notices to the employees involved, and to publish those notices in the local newspapers

[51] NLRB v. Wallick & Schwalam Co., supra note 8.

[52] Williams Motor Co. v. NLRB, supra note 8.

[53] 51 L.R.R.M. at 1282.

[54] Sidele Fashions, Inc., 133 N.L.R.B. No. 49, 48 L.R.R.M. 1679 (1961), enforced, 305 F.2d 825 (3d Cir. 1962). In this case the employer was found to have violated the act by moving his plant and discharging his employees in order to force the union to accept his bargaining proposals. Among other remedies the Board ordered the employer to offer the discharged employees reinstatement at the new location, and also ordered him to offer to pay their travel and moving expenses.

[55] Southland Mfg. Co., 94 N.L.R.B. 813, 28 L.R.R.M. 1104 (1951); NLRB v. American Laundry Mach. Co., 152 F.2d 400 (2d Cir. 1946).

weekly for eight weeks. Thus the consequences of going out of business may well turn out to be serious for the Darlington Company and its parent corporation.[56]

At the same time, several court decisions may prove troublesome to the Board in enforcing its order in the *Darlington* case. In *Yoseph Bag Co.*,[57] the Court of Appeals for the Third Circuit remanded the case in order to determine, among other factors, whether the employer had decided to go out of business before or after the employees were discharged. The court noted that "if the decision to discontinue operations permanently . . . was made after . . . [the date of the discharges], the Company's acts . . . of refusing to bargain, and discharging its employees were unfair labor practices . . . even if the Company eventually decided to go out of business completely and permanently. . . ." But the court indicated that a different situation might be presented if the decision to close permanently was made before or simultaneously with the discharges; it declined to decide whether such a shutdown would constitute a violation "without more complete findings of fact by the Board and a clearer indication of the precise nature of its decision."[58] In *New Madrid* the court had refused to enforce liability beyond the company's "actual and permanent closing or true and bona fide change in ownership" of the business, and in the *Mt. Hope* case,[59] the court was quick to find economic reasons for the plant removal. Even in subcontracting cases, the principal issue had been the employer's motives in making the change, and in the *Houston Chronicle Publishing* case,[60] the court of appeals reversed the Board after finding that the evidence did not support the Board's holding that the employer changed to an independent-contractor arrangement for discriminatory reasons. In the *Adkins* case,[61] the court in effect said that the Board must prove that the primary or substantial cause of the removal was an anti-union motive. The courts have also refused to enforce Board orders in plant removal cases where some plausible economic reasons can be established.[62]

[56] For slightly modified remedies used by the Board in more recent cases, see Myers Ceramic Co., 140 N.L.R.B. No. 33, 51 L.R.R.M. 1605 (1962); Star Baby Co., 140 N.L.R.B. No. 67, 52 L.R.R.M. 1094 (1963).

[57] M. Yoseph Bag Co. v. NLRB, 294 F.2d 364 (3d Cir. 1962), remanding 128 N.L.R.B. 211, 46 L.R.R.M. 1279 (1962). On remand the Board held that the discharges antedated the employer's decision to discontinue operations and thereby eliminated the *Darlington* issue. M. Yoseph Bag Co., 139 N.L.R.B. No. 108, 51 L.R.R.M. 1472 (1962).

[58] 294 F.2d at 369-70.

[59] Mt. Hope Finishing Co. v. NLRB, supra note 6, setting aside 106 N.L.R.B. 480 (1953).

[60] NLRB v. Houston Chronicle Publishing Co., supra note 6; see also NLRB v. New England Web, Inc., 51 L.R.R.M. 2426 (1st Cir. 1962).

[61] NLRB v. Adkins Transfer Co., supra note 6; NLRB v. R. C. Mahon Co., supra note 5. In many cases, the NLRB's standard has been the employer's "predominant motive"—Rome Prods. Co., supra note 10; Gerity Whitaker Co., 33 N.L.R.B. 393, 8 L.R.R.M. 275 (1941), aff'd as modified, 137 F.2d 198 (6th Cir. 1942), cert. denied, 318 U.S. 763 (1943); Jacob H. Klotz, 13 N.L.R.B. 746, 4 L.R.R.M. 344 (1939).

[62] NLRB v. Rapid Bindery Inc., 293 F.2d 170 (2d Cir. 1960); NLRB v. Lassing,

The *Darlington* case is not the end of the world for private capital, as some persons believe. It merely requires the employer to avoid actions based on anti-union motives. Management's unlimited right to stay in business or to discontinue operations still exists provided it is not exercised in such a way as to violate the Labor-Management Relations Act. As the court of appeals at Richmond[63] pointed out in enforcing a Board order directing resumption of a trucking department, the NLRB normally has no authority to tell an employer how to run his business, and any order that interferes in the business operations of an employer is subject to strict limitation; it also made it clear that its order "shall not be taken to deny the company to abandon the trucking operation at any time in the future if it deems it best for business reasons to do so." Similarly the court of appeals in Boston required the NLRB to reword its order in a subcontract case to indicate that the employer need only resume the subcontracted operations until it makes a genuine business judgment, unrelated to the union's activity, to subcontract the work.[64] Thus *Darlington* merely stands for the basic proposition that plant closings and the discharge of employees by employers cannot be undertaken in order to discourage the employees in the exercise of their rights under section 7 of the act; nor can such means be used to interfere and discriminate against persons because of their union membership or activities. An employer has no more absolute or unlimited right to close his plant for anti-union motives than he has to fire union organizers for protected union activities.[65] If the motive for the plant shutdown (or subcontracting) is to avoid unionization and collective bargaining, there is an 8(a)(3) problem; if it is economic, there is an 8(a)(5) problem unless the employer has in fact bargained with the recognized union.[66] In brief, this entire area requires constant vigilance by the labor-relations practitioner.

284 F.2d 781 (6th Cir. 1960), cert. denied, 366 U.S. 990 (1961). See Note, 53 Mich. L. Rev. 627 (1955). In Phillips v. Burlington Indus., 199 F. Supp. 589 (N.D. Ga. 1961), the court refused to grant the NLRB's regional director an injunction against liquidation pending negotiations with a union which had recently won an election. The court held that an employer who shows economic grounds for discontinuance of operation cannot be required to bargain concerning the decision to liquidate. This is in line with other decisions upholding the right to liquidate completely where the employer has been motivated by economic concern and his decision has been held not to be within the purview of the mandatory provisions of the statute and thus did not require antecedent bargaining. At the same time, this case sets up the rigid standard of economic loss and seems to disregard all evidence of anti-union motive (proscribed by the act) which should be considered as part of a "totality of conduct" in such cases. See Note, 48 Va. L. Rev. 973 (1962).

[63] NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962).

[64] NLRB v. Kelly & Picerne, Inc., 298 F.2d 895 (1st Cir. 1962).

[65] In a speech NLRB Chairman McCulloch has stated, "There is a difference in effect and degree, but little difference in basic principle between the bold discharge of a handful of union adherents to prevent unionization and the discharge of a whole work force to prevent unionization." Speech before American Management Association, Mid-Winter Personnel Conference, Chicago, Ill. (Feb. 15, 1962).

[66] Glushein, Plant Removal, N.Y.U. 15th Conf. on Labor 237 (1962).