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THE "RIGHT" TO GO OUT OF BUSINESS TOGETHER WITH A CONSIDERATION OF PLANT REMOVAL, SUBCONTRACTING, AND THE DUTY TO BARGAIN

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I. THE ISSUE

Both the National Labor Relations Board and the courts have long established the illegality of so-called "run-away plants." In other words, it is an unfair labor practice for an employer to relocate his plant and to reopen it with different employees in order to escape his obligation to bargain with a union which has been selected as their bargaining representative by a majority of his employees.¹ Similarly, it has been held improper for an employer to shut down a department of his business in order to escape his bargaining responsibility² or to contract out part of his work for this purpose, whether this is done by subcontracting the work to another employer³ or by converting the status of his employees to that of independent contractors.⁴

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¹ Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961), enforced, 305 F.2d 825 (3d Cir. 1962); California Footwear Co., 114 N.L.R.B. 765 (1955), enforced as modified, 246 F.2d 886 (9th Cir. 1957); Mount Hope Finishing Co., 106 N.L.R.B. 480 (1953), enforcement denied, 211 F.2d 365 (4th Cir. 1954); Rome Prods. Co., 77 N.L.R.B. 1217 (1948); Hopwood Retinning Co., Inc., 4 N.L.R.B. 922, enforced as modified, 98 F.2d 97 (2d Cir. 1938).

² Kingsford Motor Car Co., 135 N.L.R.B. 711 (1962); St. Cloud Foundry & Mach. Co., 130 N.L.R.B. 911 (1961); Winchester Electronics, Inc., 128 N.L.R.B. 1292 (1960), enforced as modified, 295 F.2d 288 (2d Cir. 1961); Bonnie Lass Knitting Mills, Inc., 126 N.L.R.B. 1396 (1960), order modified upon reconsideration, sub nom. Colfax Indus., 133 N.L.R.B. 722 (1961); Bermuda Knitwear Corp., 120 N.L.R.B. 332 (1958); Diaper Jean Mfg. Co., 109 N.L.R.B. 1045 (1954), enforced, 222 F.2d 719 (5th Cir. 1955); Deena Prods. Co., 93 N.L.R.B. 549 (1951), enforced as modified, 195 F.2d 330 (7th Cir. 1952).

³ American Air Filter Co., Inc., 127 N.L.R.B. 939 (1960); Dearborn Oil & Gas Corp., 125 N.L.R.B. 645 (1959).

⁴ Unanue & Sons, Inc., 132 N.L.R.B. 572, (1961), enforced sub nom. NLRB v. Goya Foods, Inc., 303 F.2d 442 (2d Cir.), cert. denied, 371 U.S. 911 (1962).

Furthermore, even if an employer takes such action for strictly economic reasons, he violates the National Labor Relations Act unless he discusses it first with the bargaining representative of his employees and gives such representative an opportunity to bargain about his decision and its effects on the employees. *Town & Country Mfg. Co.* established this proposition as a definite rule, although that case relied on certain prior decisions as precedents.⁵ In all of these cases, however, the employers involved divested themselves of only some of their operations and did not go completely out of business. Thus, the question remains as to whether and to what extent these decisions apply to a situation where the employer relinquishes his entire business, e.g., where he decides to retire to the sunny beaches of Florida or to confine his future business activities to the clipping of coupons.

On this question numerous truisms have been delivered which in themselves present no real solution to the problem. For example, the Fifth Circuit has declared: "If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out . . ." But the court was careful to add the following limitation: ". . . unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of genuine substance."⁶

Likewise, the Sixth Circuit has stated: "A company may suspend its operations or change its business methods so long as its change in operations is not motivated by the illegal intention to avoid its obligations under the Act,"⁷ while the Fourth Circuit has said, "the Board is without power to interfere with management where the discontinuance of a part of the business is prompted by legitimate business motives and not in order to frustrate the purposes of the Act or interfere with employees in the exercise of the rights conferred upon them by the statute."⁸ Similarly, the Court of Appeals for the First Circuit has declared:

We start with the proposition that a businessman still retains the untrammelled prerogative to close his enterprise when in the exercise of a legitimate and justified business judgment

⁵ 136 N.L.R.B. 1022 (1962). See, e.g. *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), enforcement denied on other grounds, 161 F.2d 949 (6th Cir. 1947). For cases which have applied this rule, see cases cited infra, notes 33 and 38.

⁶ *NLRB v. Houston Chronicle Publishing Co.*, 211 F.2d 848, 855 (5th Cir. 1954), denying enforcement to 101 N.L.R.B. 1208 (1952).

⁷ *NLRB v. Adkins Transfer Co.*, 226 F.2d 324, 327 (6th Cir. 1955), denying enforcement to 109 N.L.R.B. 956 (1954).

⁸ *NLRB v. Preston Feed Corp.*, 309 F.2d 346, 352 (4th Cir. 1962), enforcing 134 N.L.R.B. 629 (1961).

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he concludes that such a step is either economically desirable or economically necessary. This prerogative exists quite apart from whether or not there is a union on the scene.⁹

On the other hand, the Eighth Circuit has stated that "economic interests of an employer are not valid reasons for violation of the Act," and it quoted a statement of the Sixth Circuit that, "when it is once made to appear from the primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives."¹⁰

All of these statements are true enough, but they leave open the question as to just what findings are necessary to establish that the business decision involved is "prompted by legitimate business motives" and "not motivated by the illegal intention to avoid [the] obligations under the Act." Nor do they identify the circumstances under which such a decision by an employer "has violated the express provisions of the Act" so that "the economic interests of [the] employer" and "his motives" become immaterial.

Thus, in order to bring this problem into sharper focus, it may be desirable to consider it in the light of three subsidiary questions, namely: (1) Does the employer violate the Act if he goes out of business for discriminatory reasons? (2) Does he violate the Act if he takes such action for purely economic reasons? (3) If in either case he violates the Act, what remedial action can he be ordered to take?

II. DISCRIMINATORY VERSUS ECONOMIC MOTIVATION

In exploring the first two questions, it may be well to consider first under what circumstances an employer's decision to go out of business is to be regarded as discriminatorily motivated and in what situations his motivation is to be regarded as a purely economic one. Obviously, in those cases where the employer is opposed to labor unions in general, or to a certain union in particular, and shuts down his business in order to punish the employees for their adherence to a union, his reason is a discriminatory one. This discriminatory label would also apply when the employer is unwilling to bargain with a union and terminates his operations to avoid that obligation.

However, suppose the employer's action is prompted by the belief that he cannot afford to pay the increased wages which he expects the union to demand? In its decision in the *Darlington* case,¹¹ which in-

⁹ NLRB v. New England Web, Inc., 309 F.2d 696, 700 (1st Cir.) setting aside 135 N.L.R.B. 1019 (1962).

¹⁰ NLRB v. Gluek Brewing Co., 144 F.2d 847, 853-54 (8th Cir. 1944), affirming as modified, 47 N.L.R.B. 1079 (1943); quotation from NLRB v. Hudson Motor Car Co., 128 F.2d 528, 533 (6th Cir. 1942).

¹¹ *Darlington Mfg. Co.*, 139 N.L.R.B. 241 (1962).

volved a complete shutdown, the Board held that such a motivation is not economic in the sense contemplated by the Act, but discriminatory. Yet, prior holdings by the Board to the same effect in cases involving partial shutdowns have not found universal acceptance in the courts. The Court of Appeals for the Sixth Circuit has set aside the Board's decisions in three such instances,¹² while the Seventh Circuit has set aside one.¹³ In each of these cases the employers had discontinued part of their operations to avoid paying the increased wage rates which they expected their employees' union to demand, and in each of these cases the courts held that this inducement was of a financial or economic nature and thus did not violate the Act.

The First Circuit similarly has held the shutdown of a newly unionized plant to be legal,¹⁴ stating that "the company could reasonably expect the advent of the Union to affect its already precarious cost picture" and quoting another case,¹⁵ added: "The advent of the Union was a new economic factor which necessarily had to be evaluated by the respondent as a part of the overall picture pertaining to costs of operation."¹⁶ Thus, the court set aside the order of the Board which had found the shutdown to have been discriminatorily inspired, even though the court conceded that "there is no evidence in the record that the company had formally considered closing down operations prior to the advent of the Union."¹⁷

In the same vein, the Fourth Circuit reversed a Board finding that the move of a plant from New England to the South was discriminatorily motivated¹⁸ where the company, long before the advent of the union, had encountered economic difficulties and explored a move to the South and where, in the words of the court, "the entrance of the union did not alleviate the trouble but served only to accentuate it."¹⁹ Yet the same court has more recently upheld the Board's *Preston Feed* decision²⁰ and, in so doing, held that, even where an employer has decided for a non-discriminatory reason to discontinue one of his operations, he violates the Act if he speeds up the implementation of that decision because of opposition to an incoming union. And in the

¹² *NLRB v. Lassing*, 284 F.2d 781 (6th Cir.), denying enforcement to 126 N.L.R.B. 1041 (1960); *NLRB v. R. C. Mahon Co.*, 269 F.2d 44 (6th Cir. 1959), denying enforcement to 118 N.L.R.B. 1537 (1957); *NLRB v. Adkins Transfer Co.*, supra note 7.

¹³ *Jays Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961), setting aside, 129 N.L.R.B. 690 (1960).

¹⁴ *NLRB v. New England Web Co.*, supra note 9.

¹⁵ *NLRB v. Lassing*, supra note 12, at 783.

¹⁶ *NLRB v. New England Web, Inc.*, supra note 9, at 701.

¹⁷ *Ibid.*

¹⁸ *Mount Hope Finishing Co. v. NLRB*, 211 F.2d 365 (4th Cir. 1954), setting aside, 106 N.L.R.B. 480 (1953).

¹⁹ *Id.* at 372.

²⁰ *NLRB v. Preston Feed Corp.*, supra note 8.

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Gluek Brewing case,²¹ where the employer contracted out his delivery operations to a transportation company employing Teamsters in order to escape a threatened strike by the Teamsters, the Eighth Circuit found a violation and held that economic interests of an employer are not valid reasons for violation of the Act.

Thus, while the Board will usually find that a termination prompted by the added economic burdens of union activity is nevertheless discriminatory, most courts are reluctant to agree. And the conflicting circuit decisions add further confusion to the variance in views of the courts and the Board concerning the distinction between economic and discriminatory motives.

III. THE LEGALITY OF SHUTDOWNS

A. *Discriminatorily Motivated Shutdowns*

If an employer is opposed to labor unions and terminates his operations solely because of this anti-union animus, his motivation can be classified as discriminatory. Assuming that it can be established that an employer is permanently discontinuing his business for such a reason, does his action violate the Act? In the *Darlington* case, of course, the Board answered that question in the affirmative. The Board noted that, in the *New Madrid* case,²² the Eighth Circuit had said 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."²³ The Board pointed out, however, that the court in that case had 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. Consequently, the Board felt that *New Madrid* merely held that a 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 fact, as we shall see later, this holding by the court is consistent with some of the Board's own decisions.

The Board held in two earlier cases²⁴ that the complete shutdown of a business in order to avoid the employer's duty to bargain with a union was discriminatory and thus violated the Act. In both of these

²¹ NLRB v. *Gluek Brewing Co.*, supra note 10.

²² NLRB v. *New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1954), enforcing as modified, 104 N.L.R.B. 117 (1953).

²³ Id. at 914.

²⁴ *Yoseph Bag Co.*, 128 N.L.R.B. 211 (1960); *Barbers Iron Foundry*, 126 N.L.R.B. 30 (1960).

cases, as well as in the *Darlington* case, one of the Board Members dissented from this holding, asserting that "there is nothing in the Act which limits an employer's right to go out of business at such time and under such circumstances as he chooses, regardless of the reasons therefor."²⁵ In one of these cases, *Yoseph Bag Co.*, the Third Circuit, whom the Board petitioned for the enforcement of its order, agreed that the company's refusal to bargain and its discharge of its employees were unfair labor practices *if* the employer's decision to discontinue operations permanently and to go out of business was made *after* the date of the discharges and of the initial refusal to bargain. However, it noted the existence of a "substantial question" regarding the occurrence of an unfair labor practice if, in fact, the refusal to bargain and the discharges were contemporaneous with, and merely an incident of, the employer's decision to go out of business. The court therefore remanded the case to the Board for the determination of this issue, among others. In the meantime, the Board issued a supplemental decision²⁶ in which it found that the employer's decision to go permanently out of business occurred about two weeks after the discharges and the refusal to bargain, while the actual termination of the business did not take place for another two weeks. Under the Third Circuit's previous opinion, the Board's finding meant that the employer's decision to discontinue operations was a discriminatory one and a violation of the Act.

It is important to remember that a mere claim of financial difficulty is not sufficient to substantiate a defense that a plant or department was closed for economic, rather than discriminatory, reasons. The Board must be persuaded that economic justification existed for such a step and that it was the *actual* reason for the closing down. Thus, in *Star Baby Co.*,²⁷ the Board found that the economic arguments made by the employer were merely a ruse to disguise his anti-union motivation, observing that the season just prior to the advent of the union was one of the most successful in the employer's history, that while pleading inability to afford the terms of a union contract he offered increases to three employees, and that no probative evidence had been offered to support his claim that customers would be unwilling to pay higher prices, necessitated by the union contract. When these factors were placed in a context of union hostility expressed on several occasions, the Board refused to accept the employer's plea of economic motivation for his conduct.

But the Court of Appeals did. Even though it agreed with the Board that the employer had unlawfully refused to bargain with the

²⁵ *Yoseph Bag Co.*, supra note 24, at 223.

²⁶ *M. Yoseph Bag Co.*, 139 N.L.R.B. 1310 (1962).

²⁷ *Star Baby Co.*, 140 N.L.R.B. 678 (1963).

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union in other respects, it nevertheless held that the General Counsel had failed to prove that the closing ". . . was primarily a result of an anti-union motive, or that it was an act of coercion against employees attempting to exercise their statutory rights."²⁸ Note that the court did not reject the legal principle enunciated by the Board, but merely ruled that the evidence was insufficient to sustain the finding of a violation of section 8(a)(3).

Nor did the court reject another legal principle for which the Board's broad language in this case has been cited, that an employer cannot go completely out of business for economic reasons without first discussing the decision to do so with the union. Instead, the court announced explicitly that it reached neither the question whether an employer has an absolute right to terminate his operations without violating the Act, nor the question whether the decision to cease functioning is a mandatory subject of bargaining which must be discussed with the union. Thus, the Board's legal analysis has been left in effect, perhaps to be tested another day.

Judge Kaufman of the Second Circuit, joined by Chief Judge Lumbard and Judge Moore, upheld the Board's rejection of the "economic necessity" argument in a case in which a laundry closed its shirt service when faced with a union's demand for recognition.²⁹ Less than a month before closing the shirt laundry, the employer had made substantial efforts to operate during a strike, thus causing the court "to view its later claims of economic necessity with considerable scepticism."³⁰ This circumstance, when taken together with the employer's frequent expression of anti-union sentiment, the commission of other unfair labor practices, and the attempt to substantiate the unprofitability of the shirt department by use of an accountant's statement which had been prepared long after the decision was made to close down, convinced both the Board and the court that the true reason was something else. As the court stated:

We are saying merely that these economic considerations must be honestly invoked, and that an employer may not attempt to disguise an anti-union motive by speaking the language of economic necessity.³¹

B. *Economically Motivated Shutdowns*

Assuming now that an employer's relinquishment of his business violates the Act if it is "discriminatorily motivated," the question

²⁸ NLRB v. Neiderman, 56 L.R.R.M. 2801 (1964).

²⁹ NLRB v. Savoy Laundry, Inc., 327 F.2d 370 (2d Cir. 1964), enforcing, 137 N.L.R.B. 306 (1962).

³⁰ Id. at 372.

³¹ Ibid.

arises: where such relinquishment is brought about by purely economic considerations, does it violate the Act? In the *Town & Country*³² case the Board held that the *subcontracting* of a part of an employer's operations for economic reasons without affording the bargaining representative an opportunity to bargain thereon constitutes a violation of section 8(a)(5).³³

In *Town & Country*, the Board supported its decision that the subcontracting of unit work must be discussed with the bargaining representative before it is effectuated with the conclusion that "the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of section 8(a)(5) of the Act."³⁴ Since the termination of a business, albeit for economic reasons, also results in the elimination of unit jobs, it could logically be argued that such relinquishment, without prior discussion with the bargaining representative, also constitutes a violation of section 8(a)(5).

Several Board decisions would seem to support this argument. In *Weingarten*,³⁵ where the employer decided to sell five of *his* six retail stores, the Board suggested that if the issue had been properly presented, a majority of the Board panel would have found the *Town & Country* principle applicable. And in *Star Baby*,³⁶ where the employer terminated his entire business, the Board, with one Member dissenting, applied the reasoning of the *Town & Country* case. In fact, the *Star Baby* decision, by reason of its broad language, is often cited for the general proposition that an employer cannot go completely out of business for economic reasons without first discussing the decision to do so with the union.

In *Darlington*,³⁷ the employer shut down his plant completely and

³² *Town & Country Mfg. Co.*, supra note 5.

³³ The *Town & Country* case involved the termination of a trailer hauling department by a trailer manufacturer. The Board has subsequently applied the rationale of this case to various other situations: *Hawaii Meat Co., Ltd.*, 139 N.L.R.B. 966 (1962), where a meat processing company subcontracted its delivery operations to a trucking company; *American Mfg. Co. of Texas*, 139 N.L.R.B. 815 (1962), where a manufacturer of oil field equipment discontinued its trucking operation and utilized a common-carrier for the performance of these operations; *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550 (1962), where a manufacturer of paints and other building materials subcontracted its maintenance work; *Marathon-Clark Co-op. Dairy Ass'n*, 137 N.L.R.B. 882 (1962), where another dairy contracted out its cheese-making operation; *Adams Dairy, Inc.*, 137 N.L.R.B. 815 (1962), where a dairy engaged independent distributors to take over the routes of its driver salesmen; *Renton News Record*, 136 N.L.R.B. 1294 (1962), where a newspaper publisher, together with other newspapers, established an independent company for the performance of printing operations.

³⁴ Supra note 5, at 1027.

³⁵ *Weingarten Food Center of Tenn., Inc.*, 140 N.L.R.B. 256 (1962).

³⁶ Supra note 27.

³⁷ Supra note 11.

dissolved the corporation. The Board, however, found that Darlington, together with certain other commonly owned and controlled companies, constituted a single employer. Thus, it could be said that there was no complete termination of operations in that case. In addition, the crux of the violation was the discriminatory motive of the employer in the shutting down of the mill. Therefore, the Board finding that the employer's refusal to bargain collectively with respect to the employees' tenure of employment was in derogation of the union's status was a more or less peripheral one.

In the *Lori-Ann* case,³⁸ on the other hand, where the employer closed down its only plant and leased its machinery to another company, no discriminatory motive for the shutdown of the plant was found. The Board rejected the contention that the company to which the machinery was leased and of which the principal stockholder of the employer became the manager was an *alter ego* or successor of the employer. Thus, there was a complete cessation of operations by that company. However, it was specifically noted that the company was not dissolved as a corporation and continued to maintain its corporate identity. Moreover, the Board adopted the Trial Examiner's Intermediate Report without substantial comment and neither the Board nor the Trial Examiner specifically mentioned the *Town & Country* case; in fact, the Trial Examiner issued his Intermediate Report before the issuance of the *Town & Country* decision. Consequently, it would seem that the Board's position after *Town & Country* is that even where a complete termination of operations is economically motivated, there is a violation of the Act unless the employer first discusses it with the bargaining representative of his employees.

On the other hand, it must be noted that two Members of the Board dissented from the majority's decision in *Town & Country* that an employer must consult with the bargaining representative regarding even its decision to subcontract. One of the dissenting Members took the position that the determination to terminate the operations is a prerogative of management and is not subject to collective bargaining, either as to the decision itself or as to the effects of that decision. The other dissenting Member did not explicate the basis of his dissent from this part of the Board's decision, but in a subsequent case³⁹ he made it clear that, while he agrees that the employer has a duty to bargain as to the *effect* of a subcontracting decision, he does not recognize any such duty to bargain over the economic decision itself. Furthermore, the Board has held that not all conduct which has an effect on employment opportunities constitutes a mandatory bar-

³⁸ *Lori-Ann of Miami, Inc.*, 137 N.L.R.B. 1099 (1962).

³⁹ *Adams Dairy, Inc.*, supra note 33.

gaining subject.⁴⁰ In addition, the question as to what remedial action can be ordered is a particularly problematic one in situations where the entire business is shut down, because the owner no longer has control over the employees' job opportunities or working conditions.

C. *The Waiver Problem*

Even under existing Board law, it may be possible for an employer to reserve for himself what has always seemed to be the uniquely management prerogative to close a department, or a plant, or to go out of business. This possibility arises through application of the so-called *Jacobs Mfg. Co.* doctrine,⁴¹ which has been recently applied by a Trial Examiner in the case involving the New York Daily Mirror's termination of operations.

This doctrine states that a party may waive his right to negotiate over a bargainable issue during the term of a contract if that issue has been covered in the written agreement, or if it has been so discussed during pre-contract bargaining sessions as to indicate a clear and unmistakable waiver of the right to bargain about it.

In the *New York Daily Mirror* case,⁴² the employer went out of business during the term of the contract without first negotiating with the various unions representing its employees. The General Counsel then issued a complaint, at the behest of the unions, charging a violation of the duty to bargain in good faith. There was no allegation that the closing was motivated by anti-union considerations.

The Trial Examiner first concluded that Board law under the cases we have been discussing would have required a finding of an 8(a)(5) violation and the issuance of a bargaining order, if no other factors had been present. But he then proceeded to analyze the elements which went into the execution of the contract. First of all, he pointed to the following language of the agreement, which he termed the "zipper clause":

The parties hereto agree that they have fully bargained with respect to wages, hours, and other terms and conditions of employment and have settled the same for the term of this agreement in accordance with the terms thereof.⁴³

He next noted that the contract contained provisions for the pay-

⁴⁰ *Mill Floor Covering, Inc.*, 136 N.L.R.B. 769 (1962); see also *McCloskey & Co.*, 137 N.L.R.B. 1583 (1962).

⁴¹ This doctrine was actually developed in a line of cases both preceding and following the *Jacobs* case. *The Press Co.*, 121 N.L.R.B. 976 (1958); *Beacon Piece Dyeing and Finishing Co., Inc.*, 121 N.L.R.B. 953 (1958); *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214 (1951); *Tide Water Assoc. Oil Co.*, 85 N.L.R.B. 1096 (1949).

⁴² *New York Mirror, Div. of the Hearst Corp.*, Case No. 2-CA-9619 (Trial Examiner's Decision issued 4/3/64).

⁴³ *Ibid.*

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ment of compensation to laid-off employees in the event the newspaper went out of business. This indicated an awareness, he thought, of the financial problems faced by the employer and the ever-present possibility that it might go under.

Finally, the Trial Examiner observed the recent trend in the daily newspaper industry in the United States toward closings, consolidations, and mergers, all amply supported by authoritative statistics, by a congressional investigation, and by the circumstances surrounding the 114-day strike among New York City newspapers during 1963. He felt that "sophisticated and powerful" unions such as the Newspaper Guild, the Printing Pressmen, and the other unions involved, would be expected to be fully aware of these conditions and to have them in mind during negotiations. Under these circumstances, the Trial Examiner ruled that execution of the "zipper clause" constituted "a direct, written, and unconditional waiver of the right to notice of or consultation on any decision to suspend publication."⁴⁴

He therefore dismissed the complaint, and that case is now before the Board for decision. If the Trial Examiner's views are accepted by the Board, it will mean that subcontracting, closing of departments or plants, and the closing down of a business, being proper subjects of bargaining, are governed by the same rules that govern other such subjects. Thus, the parties may waive their rights to bargain over them through the adoption of appropriate contract language.⁴⁵

The Board should reconsider its narrow approach to the "waiver rule" in view of its current approach to the question of the duty to bargain in this entire area.

IV. THE REMEDY

A. *Restoration of Status Quo Ante*

Turning now to the remedy which may be ordered in the situations that have been discussed, one will find that this varies, depending on the circumstances of the particular situation. In cases in which an employer merely subcontracts part of his operations or transfers them to another department, the Board generally orders him not only to discharge his collective bargaining obligation, but also to return to the *status quo ante* by resuming that operation and by reinstating the employees, regardless of whether the change was discriminatorily or economically motivated.⁴⁶

⁴⁴ *Ibid.*

⁴⁵ See also *Hartmann Luggage Co.*, 145 N.L.R.B. No. 151 (Feb. 7, 1964).

⁴⁶ *Town & Country Mfg. Co.*, supra note 5; *Adams Dairy, Inc.*, supra note 32; *Marathon-Clark Co-op. Dairy Ass'n*, supra note 33; *Fibreboard Paper Prods. Corp.*, supra note 32; *American Mfg. Co. of Texas*, supra note 33; *Hawaii Meat Co., Ltd.*, supra note 32; *American Air Filter Co.*, supra note 3; *Winchester Electronics, Inc.*, supra note 2; *Kingsford Motor Car Co.*, supra note 2.

But the Board has not applied this remedy indiscriminately. Thus, where it found that an employer was faced with the choice of either changing his method of operations in the manner in which he did or being forced to go out of business, and where it further found that a resumption of the *status quo ante* would have a detrimental impact on other companies who were not parties to the Board proceeding, the Board did not order resumption of the discontinued operation or reinstatement of the affected employees, nor did it order the employer to bargain with the union regarding the change in operations.⁴⁷ For example, in the *Fibreboard* case,⁴⁸ where the Board ordered the employer to reinstitute its discontinued maintenance operation, it noted specifically that this requirement imposed no undue or unfair burden on the company inasmuch as (1) its maintenance operation was still being performed in much the same manner as it was prior to the subcontracting arrangement; (2) it had a continuing need for the services of maintenance employees, and (3) its subcontract was terminable at any time upon 60 days notice.

In *Savoy Laundry*, however, the Board and the Court of Appeals for the Second Circuit split on whether the remedy was too harsh, the Board holding that the wholesale shirt operation which had been terminated should be reopened, and the court rejecting this portion of the order on the ground that:

. . . Savoy has not engaged in this phase of the laundry business for almost three years; since its patronage and goodwill have undoubtedly been lost in the interim, we feel that it would be unduly harsh to require the resumption of the division now.⁴⁹

Moreover, both the Board and the courts have stressed that after an order to resume the operations is carried out and the employees are reinstated, the employer is not prevented from thereafter subcontracting the work for economic or other business reasons, provided that the subcontract is otherwise lawfully motivated and the employer has discharged his statutory obligation to bargain with the union. And, of course, the Board has emphasized in its *Town & Country* decision and in other decisions since then that the obligation to bargain on changes involving terms and conditions of employment does not obligate the employer to yield to a union demand regarding such change but merely requires that such change be discussed with the duly designated bargaining representative before it is effectuated.

In cases where employers have shut down an entire plant, the Board has generally not ordered them to reopen it regardless of

⁴⁷ Renton News Record, supra note 33.

⁴⁸ *Fibreboard Paper Prods. Corp.*, supra note 33.

⁴⁹ *NLRB v. Savoy Laundry, Inc.*, supra note 29, at 372.

whether the shutdown was discriminatorily or economically motivated.⁵⁰ Similarly, resumption of discontinued operations was not ordered where only a department was shut down but the machinery and equipment had been sold or had been out of use for a long time.⁵¹ In these cases, the Board generally ordered reinstatement of the affected employees at the terminated plant only *if* the employer chose to resume that operation. However, where the plant was moved to a new location or where there was a single-employer relationship with other companies, the Board ordered reinstatement of the affected employees at such other locations or by such other companies, or, of course, at the old location if the employer chose to resume operations there. In addition, where the employees would incur moving expenses in accepting such reinstatement at a new location, the Board has ordered the employer to pay these expenses.

Inasmuch as the Board has not ordered the resumption of operations where an employer had shut down one of his plants, it would seem to follow that the Board will not order such resumption in cases where the employer goes out of business completely. As a matter of fact, the Board has refrained from ordering such resumption in at least two cases where it found the employer's action to have been discriminatorily motivated.⁵² Thus, even where the Board has found it a violation for the employer to go out of business completely for personal or economic reasons without prior discussion of such action with the bargaining representative, it has not yet ordered him to resume. Such an order would also seem to be precluded by the dictum of the Supreme Court in an early Labor Board case to the effect that a *bona fide* discontinuance of a business and a true change of ownership would terminate the employer's reinstatement duty.⁵³

The Board, in *Pepsi-Cola Bottling Co. of Beckley, Inc.*,⁵⁴ has hinted that it might order resumption of the operations of a closed plant if the proper circumstances existed. In that case, however, the Board did not find the proper circumstances. There, the employer had transferred his operations from an old, inadequate building to new quarters which had not yet been completed. A strike, having begun in May, dragged on all summer and contractors refused to cross the picket line to complete their work. At the time the strike started, the heat, light, and toilet facilities had not yet been installed, and the union would not remove its pickets long enough to allow such installa-

⁵⁰ Darlington Mfg. Co., *supra* note 11; Lori-Ann of Miami, Inc., *supra* note 38; New England Web, Inc., *supra* note 9; Sidele Fashions, Inc., *supra* note 1.

⁵¹ St. Cloud Foundry & Mach. Co. and Bonnie Lass Knitting Mills, Inc., *supra* note 2.

⁵² Yoseph Bag Co. and Barbers Iron Foundry, *supra* note 24.

⁵³ Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942).

⁵⁴ 145 N.L.R.B. No. 82 (Jan. 3, 1964).

tion. At the end of September, as the cold weather approached, the employer decided to close the plant on the ground that the absence of heat, light, and toilet facilities during the winter would cause freezing of the bottled drinks, danger and expense from broken glass, and discomfort to the employees, all of which would make the plant impossible to operate.

Finding that the plant was closed for economic reasons and rejecting the contentions that a discriminatory motivation entered into the employer's unilateral decision, the Board still found a violation of 8(a)(5). In fashioning a remedy, however, the Board took the above circumstances into consideration and directed merely that the employer bargain with the union and that it offer the discharged employees jobs "in the event that it resumes operations at its Beckley plant."⁵⁵

The Board specifically turned down the General Counsel's request that the employer be required to reopen the closed plant, but it did so on the narrow ground of "the particular circumstances present in the instant case," stating at the same time that "we might agree with these exceptions [of the General Counsel] under other circumstances."⁵⁶ Does this mean that the Board is contemplating the possibility that an employer who has gone out of business entirely (as distinguished from one who has closed down a department) may yet be ordered to re-establish his business? As Judge Bryan declared in his majority opinion reversing *Darlington*:

Consider the consequences of an attempt to punish as contempt a violation of such an order, and its fatal infirmity is revealed: the proprietor would be jailed or otherwise penalized for not reopening a demised business [or] reinstating employees.⁵⁷

B. *Backpay*

As far as backpay is concerned, the Board awards, of course, also vary with the situations. In cases where a resumption of operations and the reinstatement of employees were ordered, the Board, in accordance with its usual practice, granted backpay to the employees until they were offered reemployment by the employer. In circumstances where the Board decreed that those for whom no jobs were immediately available were to be placed on a preferential hiring list, it ordered backpay for them until the date they were put on that list.⁵⁸ When the Board required reinstatement of the employees at a relocated plant or by other companies having a single-employer relationship with the com-

⁵⁵ Pepsi-Cola Bottling Co. of Beckley, Inc., 55 L.R.R.M. 1051, 1053 (1964).

⁵⁶ *Id.* at 1052.

⁵⁷ *Darlington Mfg. Co. v. NLRB*, 325 F.2d 682, 685 (4th Cir. 1963).

⁵⁸ See cases, *supra* note 46.

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pany involved, it ordered backpay until such reinstatement, or in some cases until the employees could find equivalent employment if they did not choose to seek reinstatement in the other location.⁵⁹ Backpay until the time the employees obtained substantially equivalent employment with other employers was also ordered in cases in which employers, for discriminatory reasons, shut down a department, yet were not ordered to reopen these departments because the machinery had been sold or had been out of use for a long time.⁶⁰

The most recent explication of this remedy, backpay until the employee obtains substantially equivalent employment, came in the Board's Supplemental Decision in *Savoy Laundry*,⁶¹ which had been remanded by the Second Circuit for reconsideration of this point in light of the court's striking of the Board's direction to reopen a closed department. The Board explained that this was a remedy which it had used for a long time, that it had been approved specifically by the Third Circuit, and inferentially by the Seventh, and that the fear that such remedy left the employer holding an open-ended obligation which could run forever was ". . . in reality only a matter of academic importance." It illustrated this with a list of circumstances which would end the backpay liability and a great show of confidence that one or the other of these events would occur in almost every case. The Board also held that removal of the "restoration of operations" provision from its order did not affect the appropriateness of the "substantially equivalent employment" clause.

However, in cases where employers went completely out of business, the Board, in divided decisions, ordered no backpay after the date of the complete and permanent shutdown.⁶² The majority of the Board, although finding the shutdowns discriminatorily motivated in those cases, stated that while it did not condone such conduct, it could not agree

that an employer who permanently closes his plant and discontinues business operations should be ordered to continue paying wages to its employees, either for a definite period of time arbitrarily fixed by this Board (for example, six months), or for an indefinite period of time, the duration of which is contingent upon the employees obtaining substantially equivalent employment elsewhere.⁶³

The dissenting Member, who took the position that an employer does

⁵⁹ Darlington Mfg. Co., supra note 11; New England Web, Inc., supra note 9, Sidele Fashions, Inc., supra note 1.

⁶⁰ See cases, supra note 51.

⁶¹ 148 N.L.R.B. No. 5 (July 28, 1964).

⁶² See cases, supra note 24.

⁶³ Barbers Iron Foundry, supra note 24, at 33.

not violate the Act at all by going out of business, stated later (in the *Darlington* case), that he deemed it "an exercise in semantics to indicate, as some have done, that while it constitutes a violation of law to go out of business, such action constitutes a violation for which no remedial order can issue by virtue of the fact that the Respondent 'has gone out of business.'"⁶⁴ But two other Board Members, who agreed that the law was violated, would have awarded backpay to the affected employees until the obtaining of substantially equivalent employment with other employers, *i.e.*, the remedy which the majority of the Board did award when the employer retained a presently functioning business albeit on a substantially reduced basis.⁶⁵

In one of these cases involving a complete shutdown, the Board, upon remand from the Third Circuit, resolved a related issue.⁶⁶ Although the business of Yoseph Bag Co. was assumed by a corporation in which one of the two Yoseph partners had acquired a substantial interest and had become a director and officer, the Board found this corporation not an *alter ego* of Yoseph Bag Co. and rejected the Trial Examiner's recommendation that the corporation should be required to accept responsibility for the reemployment of the discharged employees. The Board concluded that, "while the transfer and relationship in question are significant as a part of the process by which [Yoseph Bag Co.] . . . violated the Act, they are . . . not controlling insofar as the remedy is concerned."⁶⁷

A similar issue was involved in the *New Madrid* case⁶⁸ before the Eighth Circuit. In that case, the company closed its plant and sold its machinery and equipment to its former plant manager. The Board found that the company retained substantial control over the operations of its ex-manager and that the latter became a successor of the company; therefore, it held them jointly and severally liable for backpay to the employees until the date on which they were offered reinstatement by the ex-manager's business or by the company itself if it resumed operations. The court, however, refused to accept the Board's findings that the company retained such control over the ex-manager's business so as to make the latter a successor. It concluded that the company had permanently closed its plant, sold its equipment, and in effect had gone completely out of business. Therefore, it awarded backpay only to the time of the sale of the equipment to the ex-manager.

In this connection, it might be mentioned, though, that in a case which involved the sale of a shuttle-bus line, the same court affirmed the award of backpay for a period beyond that sale. However, in that

⁶⁴ *Darlington Mfg. Co.*, supra note 11, at 263, n.56.

⁶⁵ See cases, supra note 51.

⁶⁶ *M. Yoseph Bag Co.*, supra note 26.

⁶⁷ *Id.* at 1314.

⁶⁸ *NLRB v. New Madrid Mfg. Co.*, supra note 22.

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case the backpay award did not run against the buyer of the shuttle-bus lines but against the company itself, since the company continued to operate another part of its business.⁶⁹

In the *Lori-Ann* case,⁷⁰ where the company closed its plant and completely ceased operations but the corporation was not dissolved as such, the Board not only refrained from ordering resumption of the operations but also did not award any backpay. The Board's order did not even compel the employer to bargain on the shutdown or its effects on the employees but only required bargaining with the union "if and when" the company resumed its operations. But, the *Lori-Ann* case is, in a sense, *sui generis*, as the Board simply adopted the Trial Examiner's Intermediate Report which had been issued before the Board's decision in *Town & Country*.

As noted previously, these holdings were made by a divided Board. In the meantime, the membership of the Board has changed. And the *Darlington* decision indicates that the view of the present majority of the Board has changed from the majority view expressed in past cases. Without relying on *Darlington's* single-employer relationship with the surviving companies, the majority ordered *Darlington* to provide backpay to its discharged employees until they were able to obtain substantially equivalent employment, *i.e.*, beyond the date on which *Darlington* discontinued its business. The Board stated that "Darlington's discontinuance of its business does not terminate the Board's authority in . . . [directing a backpay award]. 'The mere fact that an employer may cease to do business certainly does not end the public interest involved in seeing that a backpay award under the Act is satisfied.'"⁷¹

Another aspect of the backpay issue is also worth mentioning. Until recently the Board has never awarded backpay against an employer who closed a plant or went out of business entirely and has been charged simply with a violation of section 8(a)(5). It had awarded backpay if part of the employer's operation was still functioning so that employees might be reinstated. It had likewise awarded backpay if the employer were shown to have closed his business for discriminatory reasons in violation of section 8(a)(3) of the Act. In such a case, the Board held, in *Star Baby*,⁷² reversing *Yoseph Bag*, that the backpay obligation continues past the complete cessation of operations until the employees get other jobs. However, the Board had not been faced with the issue of whether to award backpay against

⁶⁹ NLRB v. Missouri Transit Co., 250 F.2d 261 (8th Cir. 1957), enforcing 116 N.L.R.B. 587 (1956).

⁷⁰ *Lori-Ann of Miami, Inc.*, supra note 38.

⁷¹ *Darlington Mfg. Co.*, supra note 11, at 254-55. The quote used by the Board is from NLRB v. Killoren, 122 F.2d 609 (8th Cir. 1941).

⁷² *Star Baby Co.*, supra note 27.

an employer who had gone out of business for economic reasons alone and unlawfully failed to discuss the shutdown with the union. That precise issue came before the Board in a case in which the Trial Examiner rejected the General Counsel's request for a backpay award on the ground that "in such circumstances an award of backpay would appear to be punitive rather than remedial."⁷³

The Board disagreed with this view and reversed the Trial Examiner. It pointed out that in a case like this, where the employer has gone completely out of business and the Board does not order him to re-open, no adequate remedy is available for the relief of the discharged employees except backpay. Of course, the Board did not forget that even an employer who violates the Act may legitimately go out of business and that the employer in this case had agreed with the city authorities to vacate his premises in six months. For that reason, the Board limited the backpay remedy to the date when the employees would otherwise have been laid off because the employer was required by his contract with the city to vacate the premises.⁷⁴

An allied question is presented by the Second Circuit's remand of *Savoy Laundry, Inc.*,⁷⁵ where the court upheld all of the Board's findings of violations of both sections 8(a)(3) and 8(a)(5). The court was troubled, however, by the Board's order that the employer resume operation of a closed department on a "reasonable and business-like" basis and that he reinstate the employees with backpay. The court struck the "resumption of business" provision from the order and directed the Board to reconsider the backpay problem in light of the fact that the employer was no longer required to reopen the department. But the Board could see no difference and merely reaffirmed its earlier backpay order.⁷⁶

V. CONCLUSION

The Board's *Darlington* decision appears to be a landmark case with respect to the existence or non-existence of an employer's right to go out of business and the legal consequences of such action. But as far as the Board is concerned, the case merely establishes its position that an employer does not have the absolute right to go out of business, at least where his reasons are discriminatory. It may also indicate the Board view that an employer commits an unfair labor practice by going out of business, even if his reasons are of an economic nature, unless he gives the bargaining representative an opportunity to bargain with respect to the employees' tenure of employment. And it

⁷³ Royal Plating & Polishing Co., Inc., Case No. 22-CA-1640 (Trial Examiner's Decision issued 2/5/64).

⁷⁴ Royal Plating & Polishing Co., Inc., 148 N.L.R.B. No. 59 (1964).

⁷⁵ NLRB v. Savoy Laundry, Inc., supra note 29.

⁷⁶ Savoy Laundry, Inc., supra note 61.

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may further indicate that the Board will hold such an employer liable for backpay to his ex-employees even after the date of the shutdown of his business, although it will not order him to resume his business.

Obviously, the Board does not have the last word on issues such as those involved in *Town & Country*, *Fibreboard*, and *Darlington*. All three cases have already been reviewed by various Courts of Appeals and certiorari has been granted in both *Fibreboard*⁷⁷ and *Darlington*⁷⁸ by the United States Supreme Court. The Fifth Circuit enforced *Town & Country*, without dissent, ruling only on one issue.⁷⁹ It found that the employer's subcontracting of hauling work and discharge of drivers resulted "in part, at least" from a determination to get rid of the union. This was sufficient ground, the court thought, on which to base a violation of both 8(a)(3) and 8(a)(5), thereby justifying the Board's order.

Fibreboard was likewise enforced, by the District of Columbia Circuit.⁸⁰ The court there approved the Board finding that no discriminatory motive was involved in the subcontracting, but held that the employer nevertheless violated its bargaining obligation by failing to negotiate with the union concerning the matter. It specifically rejected the employer's argument that a violation can be found only if the employer's anti-union motive is demonstrated. Again, the decision was without dissent.

Darlington was another matter.⁸¹ Having split the Board three ways, this case then proceeded to split an en banc court. The three majority judges faced the most basic issues in the case. They assumed *arguendo* that the employer did not act for economic reasons and that the plant was sold because of the entry of the union into the picture. Nevertheless, the court made the following statement of the law:

To go out of business in toto, or to discontinue it in part permanently at any time, we think was *Darlington's* absolute prerogative It [the Act] does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity (sic), so long as the obligations of any employment contract have been met.⁸²

The court was careful to point out that it was not dealing with a case in which subterfuge had been charged. The discontinuance of the

⁷⁷ *Fibreboard Paper Prods. Corp. v. NLRB*, 375 U.S. 963 (1964).

⁷⁸ *NLRB v. Darlington Mfg. Co.*, 377 U.S. 903 (1964).

⁷⁹ *Town & Country Mfg. Co. v. NLRB*, 316 F.2d 846 (5th Cir. 1963).

⁸⁰ *Fibreboard Paper Prods. Corp. v. NLRB*, 322 F.2d 411 (D.C. Cir. 1963).

⁸¹ *Darlington Mfg. Co. v. NLRB*, supra note 57.

⁸² *Id.* at 685.

business was complete and in good faith. That is all the court requires of an employer. It expressed itself this way:

The predominant element of the principle we maintain is that the business is no longer extant and the owner has forfeited the penalty for withdrawing, that is, he has foregone the privilege of further pursuit of his business.⁸³

The majority then vacated the Board's order.

The two dissenters completely disagreed with the majority view. They would have found there was a "single-employer" relationship, an issue not necessary to the majority's dismissal. Nevertheless, the court found that this relationship did not exist. They did not approve of the majority's holding that a complete shutdown must be distinguished from the partial or departmental closings of the earlier cases in this and other circuits. And they would find that the Act is violated when an employer closes down his business in order to avoid collective bargaining. There is nothing in the minority opinion to indicate the judges' views on the question whether, absent an anti-union motive, an employer may close down his business without first negotiating with the union.

As a final point, in the celebrated *Fibreboard* case now pending before the Supreme Court, the employer's decision to subcontract for economic reasons came at the very close of the contract term and was actually made after the contract had ended but while the bargaining relationship with the unions continued. When an employer's decision to make a business change for economic reasons is made during the term of an agreement, the problem becomes much more explicit and complicated. The Board itself in a very recent decision, *Cloverleaf Division of Adams Dairy Co.*,⁸⁴ has earnestly grappled with the problem of the weight and priority that should be given to arbitration clauses and other relevant matters pertaining to negotiating history. The difficulties involved in the Board's attempting to divine the parties' intentions during negotiation was undoubtedly among the factors that led the Congress to reject proposals to make a breach of a collective agreement an unfair labor practice.

It is a simple matter to find a breach of contract and convert that conclusion into unfair labor practice language. Because of these intricate problems of interpretation with which the Board is seeking to cope, there are reliable spokesmen, such as the special committee created by the Committee for Economic Development in 1960, which recommend that the National Labor Relations Board be relieved altogether of responsibility to determine whether or not parties have

⁸³ Id. at 687.

⁸⁴ 147 N.L.R.B. No. 133 (July 8, 1964).

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discharged their duty to bargain in good faith. While such a recommendation, seriously advanced by such responsible experts, is, arguably, too drastic, administering agencies and the courts must exercise increasing self-restraint against encroachment into areas not contemplated and even negated by the Congress. Such restraint can be achieved by increasingly deferring action where contracts contain arbitration clauses and where bargaining history shows that the parties considered the problem themselves. And even though the resolution of the matter may have been left in doubt, such doubts should be resolved by the courts as a matter of contract interpretation for breach of contract and not by the Board as unfair labor practices.