Boston College Law Review

Volume 7 | Issue 4 Article 20

7-1-1966

Labor Law—Railway Labor Act, Section 2 First—Employer's Duty to Bargain Decision to Lease.—United Industrial Workers v. Board of Trustees of Galveston Wharves

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tion of married women."[34] It may, therefore, be more profitable to state the dividing line between federal and state law not so much in terms of a vague "overriding federal interest" but rather in terms of the localized penetration and relevance of the federal activity. If, after the local character of the governmental function has been established, it is then decided that the application of the state law will cause substantial commercial inconvenience to the government agency and will impair an important federal policy, the federal interest may be called overriding.

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Labor Law—Railway Labor Act, Section 2 First—Employer's Duty to Bargain Decision to Lease.—*United Industrial Workers v. Board of Trustees of Galveston Wharves.*[1]—Galveston Wharves owned and operated the dock facilities of the Port of Galveston, Texas, including a public grain elevator. The employees at the grain elevator were covered by a collective bargaining contract which their union and Galveston Wharves had executed on October 1, 1960. It provided, in part, that employees be given seven days notice before being laid off and also contained a broad management-prerogatives clause. The contract was dated to expire on September 30, 1963, but the parties subsequently extended its effective date to September 30, 1964. Some time before the expiration of the contract, Galveston Wharves leased the grain elevator to a third party. On July 20, 1964, pursuant to contract terms, the union served notice that it wished to open the agreement for negotiation. On July 23, Galveston Wharves notified the union of the lease, responded that it would not negotiate—presumably because of the lease—and posted notice that, effective July 31, all elevator employees would be permanently laid off. On July 29, in accordance with Section 6 of the Railway Labor Act,[2] the union served notice requesting negotiation on this matter. Galveston Wharves replied that, under the circumstances, such negotiations were impossible. On July 31, the union struck and also instituted an action against Galveston Wharves under the RLA for an injunction prohibiting consummation of the lease and restoring the status quo until RLA machinery[3] had been exhausted. Galveston Wharves claimed that its actions were justified under the lay-off and management-prerogatives clauses. The trial court accepted this argument and found for the carrier. Reversing 2-1, the Court of Appeals for the Fifth Circuit HELD: Galveston Wharves had to bargain with the union over its decision to lease the elevator.[4]

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[34] Id. at 349.

[1] 351 F.2d 183 (5th Cir. 1965).

[2] 44 Stat. 582 (1926), as amended, 45 U.S.C. § 156 (1964).

[3] 44 Stat. 582 (1926), as amended, 45 U.S.C. §§ 156, 157 (1964).

[4] Supra note 1, at 184. The interchangeability of Railway Labor Act major-minor questions with mandatory bargaining questions under the Labor Management Relations Act has been recognized by the Supreme Court. See, e.g., Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960), cited in Fiberboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210 (1964).

The court relied primarily on *Fibreboard Paper Prods. Corp. v. NLRB.*[5] It distinguished *NLRB v. Darlington Mfg. Co.*[6] on the ground that Galveston Wharves did not terminate its business.

In *Fibreboard,* the Supreme Court held that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d)."[7] This case has received two interpretations.

The National Labor Relations Board has maintained, even before *Fibreboard,* 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. . . ."[8] This approach to the section 8(a)(5)[9] problem has continued with the added impetus of *Fibreboard.* In *Westinghouse Elec. Corp.,*[10] perhaps the most prominent Board decision in this area since *Fibreboard,* the Board indicated that it was orienting its thought toward whether the decision by management had a "significant impact on unit employees' job interests."[11]

The practical effect of the theory is not nearly as overpowering as it sounds. This requirement affects only the bargaining of the decision and does not demand capitulation by the employer nor alter his eventual right to proceed with his plans. As the Court in *Fibreboard* said, citing to the language of the court of appeals decision, "it is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints. . . ."[12] Nor was the Court unaware of the possible futility of this requirement, but "national labor policy is founded upon the Congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."[13] Consequently, even a broad reading of *Fibreboard* may be nothing more than an evanescent mandate.

The interpretation given *Fibreboard* by the Board has not been adopted by the federal courts of appeals. In the first three cases[14] decided by the courts of appeals on this issue since *Fibreboard,* the decision has been restrictively read. In all three, two basic points have been raised to distinguish *Fibreboard.* First, the majority in *Fibreboard* specifically limited its decision to those facts;[15] and second, in *Fibreboard,* the economics of the

[5] 379 U.S. 203 (1964).

[6] 380 U.S. 263 (1965).

[7] 379 U.S. at 215.

[8] Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1027 (1962), enforced, 316 F.2d 846 (5th Cir. 1963).

[9] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(5) (1964).

[10] 58 L.R.R.M. 1257 (1965).

[11] Id. at 1258.

[12] 379 U.S. at 214.

[13] Ibid.

[14] NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965); NLRB v. William J. Burns Int'l Detective Agency, Inc., 346 F.2d 897 (8th Cir. 1965); NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963).

[15] 379 U.S. at 215.

decision to subcontract did not amount to a great change in the capital structure of the company.

The courts, therefore, seem to have taken literally the Supreme Court's statement that it was limiting its decision. They view *Fibreboard* as a narrow exception to the general rule that management has a unilateral right to change the economic structure of a company. The NLRB, on the other hand, interprets *Fibreboard* as establishing the rule that any management decision, albeit one that concerns economic organization, is bargainable if jobs will be affected in the change-over.

The problem which the present court faced, however, was not as simple as whether *Fibreboard* required bargaining the decision to lease. It was complicated by *Darlington*, where the Supreme Court stated that "so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases. . . ."[16]

The fifth footnote of the *Darlington* decision, in which the Court said "no argument is made that § 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise,"[17] has become crucial from the Board's point of view; for on this basis, it has declined to broaden *Darlington* to apply to section 8(a)(5) cases. In the Board's rehearing of *Royal Plating & Polishing Co.*,[18] it was faced with the specific question of whether the Supreme Court decision in *Darlington* affected its earlier holding that an economically motivated decision to close down one's business partially must be bargained. The Board held that *Darlington* in no way changed its decision because it was limited to section 8(a)(3) violations and *Royal Plating* involved an alleged section 8(a)(5) violation.[19] Similarly, in *Carmichael Floor Covering Co.*,[20] the Trial Examiner, in an opinion adopted by the Board, said that "in *Darlington* the Court was concerned with an issue of discriminatory motivation and its application, if any, to a complete or partial closing of a plant. The charge in the instant case, however, relates solely to Respondent's statutory duty to bargain."[21]

At least one court has taken the opposite position. In *NLRB v. William J. Burns Int'l Detective Agency, Inc.*,[22] the court, referring to its finding of no anti-union motive and citing to *Darlington*, stated that, "while such finding was made in dealing with a charged § 8(a)(3) violation, the finding as to motive equally applies to the facts relevant to the § 8(a)(5) violation."[23] The court went on to hold that a decision to terminate one division of the agency need not be bargained. The dissent in *Galveston*, speaking more emphatically, stated that *Darlington* "removes cessation of business questions from the realm of mandatory bargaining"[24] and that "Darlington holds that

[16] NLRB v. Darlington Mfg. Co., supra note 6, at 268.

[17] Id. at 267 n.5.

[18] 59 L.R.R.M. 1141, enforcement denied, 350 F.2d 191 (3d Cir. 1965).

[19] Id. at 1142.

[20] 60 L.R.R.M. 1364 (1965).

[21] Id. at 1366.

[22] Supra note 14.

[23] Id. at 902; see concurring opinion of member Jenkins in Royal Plating & Polishing Co., supra note 18, at 1143.

[24] Supra note 1, at 193.

an employer has the right to close a part of its business so long as there is no showing that the closing was for anti-union purposes."[25]

Obviously, therefore, the court in the present case could have resolved the issue either way. Under the Board's interpretation of the *Darlington* and *Fibreboard* cases, the court in *Galveston* was clearly justified in its holding; for the decision to lease did have a "significant impact" on the employees in the bargaining unit.[26] Furthermore, *Darlington* does not apply where the issue is whether management's decision must be bargained. On the other hand, under the court of appeals view of *Fibreboard*, the present decision to lease need not have been bargained. The facts in *Galveston* were different from those in *Fibreboard*. The lease effected a change in the structure of the company; for the grain elevator, previously an operating facility run by Galveston, became a piece of leased property. Also, the new employees were responsible for their work only to the lessee, while in *Fibreboard* the new employees were still ultimately responsible to the same employer. Similarly, under the Eighth Circuit's interpretation of *Darlington*, it is arguable that the lease constituted a termination of a phase of Galveston Wharves' business and therefore did not have to be bargained.

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[25] Ibid.

[26] Compare United Steelworkers v. New Park Mining Co., 273 F.2d 352 (10th Cir. 1959) (pre-*Fibreboard* lease case), with Blue Cab Co., 61 L.R.R.M. 1085 (1965) (post-*Fibreboard* fact situation which arguably involved a lease); see id. at 1087 n.5.