



Spring 3-1-1968

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Recommended Citation

Duty To Bargain On A Decision To Terminate Or Relocate Operations, 25 Wash. & Lee L. Rev. 96 (1968).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol25/iss1/10>

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applicable to the public domain situation by revising it to include both possessors of land and chattels.²⁶ Such a revision would bring most cases involving a child trespassing on personal property in the public domain into uniformity under the *Restatement*. This suggestion, however, was not accepted.

While the majority of courts do reach a just result and allow recovery, it seems that those cases which rely solely on ordinary care principles have adopted an approach less likely to end in a decision such as *Cogswell*. By relying on these principles, as did the court in *Lynch v. Nurdin*,²⁷ there is little likelihood of becoming preoccupied with the attractive nuisance doctrine. The court's preoccupation in *Cogswell* led to a clearly unsupportable rule: that an owner of a dangerous instrumentality located in the public domain owes no duty to the public other than to refrain from wanton, willful, or reckless conduct. In this respect the decision allows an individual to use public property as his own. The court in *Cogswell* could not have intended such an extreme result; it is merely the unfortunate by-product of an unnecessary preoccupation with attractive nuisance concepts.

JOSEPH L. CHURCHILL

DUTY TO BARGAIN ON A DECISION TO TERMINATE OR RELOCATE OPERATIONS

Section 8(d) of the Labor Management Relations Act requires an employer and the representative of the employees to bargain in good faith concerning wages, hours, and "other terms and conditions of employment."¹ If an employer fails to bargain over topics encompassed by section 8(d) it commits an unfair labor practice.² Often management is required by business economics to terminate or relocate a phase of its operations. Since termination or relocation will affect directly the employment status, the question arises whether an employer is required by section 8(d) to bargain when its decision is based solely upon economic reasons. There are conflicting views

²⁶Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 469 (1959).

²⁷1 Q.B. 30, 133 Eng. Rep. 1041 (1841). See text accompanying note 3 *supra*.

¹Labor-Management Relations Act (Taft-Hartley Act) § 8(d), 29 U.S.C. § 158 (1964).

²Labor-Management Relations Act (Taft-Hartley Act) § 8(a)(5), 29 U.S.C. § 158 (1964); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

concerning an employer's obligation to bargain concerning such a decision.

A good illustration of the conflict is found in *NLRB v. Transmarine Navigation Corporation*.³ Transmarine operated as a ship broker and terminal operator in the Los Angeles Harbor. Its principal customer, a Japanese company, was consolidated with other Japanese companies creating a need for larger shipyard facilities to service the new line. Transmarine entered into a joint venture with another company in order to provide expanded facilities and terminated its operations in Los Angeles and relocated in Long Beach. The company did not bargain with the union concerning the decision.

The National Labor Relations Board held that Transmarine violated the LMRA by failing to bargain with the union over the decision to terminate and relocate operations even though the decision was based solely upon economic reasons.⁴ The Board interpreted the phrase "terms and conditions of employment" in section 8(d) to include termination of employment. The members of the Board reasoned that since the Supreme Court has held that subcontracting is a "condition of employment"⁵ then *any* termination of employment necessarily should be considered a condition of employment. The circuit court refused to enforce the Board order and held that the employer's decision, based solely upon economic reasons, to terminate and relocate operations is not a subject for collective bargaining within the meaning of section 8(d) of the LMRA. The court stressed that a decision of fundamental importance to the basic nature of the corporate enterprise is not included within the subject of mandatory bargaining because it would significantly abridge an employer's freedom to manage his business. However, the court did hold that an employer has a duty to bargain concerning the effect of the decision upon the employees. The bargaining should include such topics as severance pay, vacation pay, seniority, pensions, and other relevant topics of concern to the employees.⁶

³2 LAB. REL. REP. (65 L.R.R.M.) 2861 (9th Cir. 1967).

⁴*Transmarine Navigation Corp.*, 152 N.L.R.B. 998 (1965); see *Ozark Trailers, Inc.*, 161 N.L.R.B. No. 48, 63 L.R.R.M. 1264 (1966).

⁵*Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). The Court held that an employer must bargain concerning an economic decision to subcontract work formerly done by his employees under similar conditions of employment. An employer hired an independent contractor to do the maintenance work in the plant which was previously done by his employees.

⁶In order to give the employees an opportunity to bargain over the effect of the decision, the union must be notified of the decision within a reasonable time prior to the termination date. *Transmarine Navigation Corp.*, 2 LAB. REL. REP. (65

There are two tests to determine if an employer must bargain concerning an economic decision to terminate or relocate operations. The test adopted by the NLRB is essentially that any decision which might result in the termination of employment must be bargained.⁷ The test adopted by the federal circuit courts is that if the decision involves a basic change in operations, management does not violate the LMRA by refusing to bargain.⁸

It is only when termination or relocation is motivated purely by economic reasons that application of the two tests produces conflicting results. For example, it is well settled that management violates the LMRA if the decision is based upon a desire to avoid bargaining with a union.⁹ It is also clear that management violates the Act if the decision is motivated partly by anti-union and partly by economic reasons.¹⁰ Some examples of purely economic reasons for a decision

L.R.R.M.) 2861 (9th Cir. 1967). The courts and the Board agree that management must bargain concerning the effect of the decision upon employees. *NLRB v. Cooper Thermometer Co.*, 2 LAB. REL. REP. (65 L.R.R.M.) 2113 (2d Cir. 1967); *NLRB v. Johnson*, 368 F.2d 549 (9th Cir. 1966); *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir. 1965); *NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965); *NLRB v. William J. Burns Int'l Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *A.C. Rochat Co.*, 163 N.L.R.B. No. 49, 64 L.R.R.M. 1321 (1967).

⁷*Dixie Ohio Express Co.*, 2 LAB. REL. REP. (66 L.R.R.M.) 1092 (Sept. 26, 1967); *Ozark Trailers, Inc.*, 161 N.L.R.B. No. 40, 63 L.R.R.M. 1264 (1966); *Transmarine Navigation Corp.*, 152 N.L.R.B. 998 (1965); *Royal Plating & Polishing Co.*, 152 N.L.R.B. 619 (1965); *William J. Burns Int'l Detective Agency, Inc.*, 148 N.L.R.B. 1267 (1964); *Adams Dairy, Inc.*, 137 N.L.R.B. 815 (1962); *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962).

⁸*NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965); *NLRB v. William J. Burns Int'l Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *NLRB v. Rapids Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *Jay Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961); *see NLRB v. Northwest Publishing Co.*, 343 F.2d 521 (7th Cir. 1965); *NLRB v. Johnson*, 368 F.2d 549 (9th Cir. 1966). A typical example is this statement: "[T]here is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products.... [T]here was a change in the capital structure... which resulted in a partial liquidation and a recoup of capital investment. To require Adams to bargain... would significantly abridge its freedom to manage its affairs. Bargaining is not contemplated in this area...." *NLRB v. Adams Dairy, Inc.*, *supra* at 111.

⁹*Textile Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *Town & Country Mfg. Co. v. NLRB*, 316 F.2d 846 (5th Cir. 1963); *Bon Hemmings Logging Co. v. NLRB*, 308 F.2d 548 (9th Cir. 1962); *NLRB v. United States Air Conditioning Co.*, 302 F.2d 280 (1st Cir. 1962); *NLRB v. Brown-Dunkin Co.*, 287 F.2d 17 (10th Cir. 1961); *NLRB v. Missouri Transit Co.*, 250 F.2d 261 (8th Cir. 1957).

¹⁰*Textile Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965); *Town & Country Mfg. Co. v. NLRB*, 316 F.2d 846 (5th Cir. 1963).

to terminate or relocate operations are: a necessity to sell part of the operations,¹¹ a lack of need for management's service in a particular area,¹² and the lack of operating space to fill increased orders for a particular product.¹³ In *NLRB v. William J. Burns Detective Agency*¹⁴ the employer had lost its contracts in Omaha and terminated its branch office in that city; offices in other cities were kept open. This decision to terminate was held to be for an economic reason.

Under both tests an employer has the absolute right to terminate his entire business for any reason without bargaining.¹⁵ However, the termination of the business in one location and the relocation of the same type of operation is not considered a termination of the entire business.¹⁶ In addition, the business is not entirely terminated when one plant is closed but other plants doing the same type of work are still in operation.¹⁷

Under the Board's test, if an employer is contemplating making any decision which would result in the termination of a phase of the operations or relocation, he must immediately notify the union and bargain concerning whether the change should be made.¹⁸ If the change involves closing the operations in one city but keeping those already established in other cities open, management must still bargain.¹⁹ However, both the Board and the courts agree that management's duty to bargain does not include an obligation to reach an agreement.²⁰ Management only has a duty to engage in frank

¹¹*NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).

¹²*NLRB v. William J. Burns Int'l Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965).

¹³*NLRB v. Rapids Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961).

¹⁴346 F.2d 897 (8th Cir. 1965).

¹⁵*Textile Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

¹⁶*Textile Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *NLRB v. Rapids Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961).

¹⁷*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).

¹⁸*Dixie Ohio Express Co.*, 2 LAB. REL. REP. (66 L.R.R.M.) 1092 (Sept. 26, 1967); *Ozark Trailers, Inc.*, 161 N.L.R.B. No. 48, 63 L.R.R.M. 1264 (1966); *Transmarine Navigation Corp.*, 152 N.L.R.B. 998 (1965); *Royal Plating & Polishing Co.*, 152 N.L.R.B. 619 (1965); *William J. Burns Int'l Detective Agency, Inc.*, 148 N.L.R.B. 1267 (1964); *Adams Dairy, Inc.*, 137 N.L.R.B. 815 (1962); *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962).

¹⁹*Royal Plating & Polishing Co.*, 152 N.L.R.B. 619 (1965); *William J. Burns Int'l Detective Agency, Inc.*, 148 N.L.R.B. 1267 (1964).

²⁰*NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965); *NLRB v. Citizens Hotel*, 326 F.2d 501 (5th Cir. 1964); *General Tel. Co. v. NLRB*, 337 F.2d 452 (5th Cir. 1964); *Ozark Trailers, Inc.*, 161 N.L.R.B. No. 48, 63 L.R.R.M. 1266 (1966); *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962).

discussions in a bona fide effort to explore possible alternatives.²¹

It is sometimes difficult when applying the circuit courts' "basic change test" to determine just what is considered a basic change in operations. A decision involving a major investment of capital, such as building a new plant, is definitely considered a basic change.²² It is also clear that the complete termination of operations in one location is considered a basic change even though the operations are still continuing in other locations.²³ However, the difficulty arises when management wishes to terminate a phase of its operations in the same location. In *NLRB v. Johnson*²⁴ the employer was engaged in the marketing and installation of floor coverings. The employer terminated the installation phase of its operations when it ceased using its own employees and hired an independent contractor. The employer received orders and determined where the contractor was to install the floor coverings. The court held that the termination did not constitute a basic change in operations.²⁵ In *NLRB v. Adams Dairy, Incorporated*²⁶ the employer wished to terminate the distribution phase of its dairy operations. The employer sold its products to the distributor, and the distributor determined what route to follow and where the goods would be delivered. The court held that the termination did constitute a basic change in operations.²⁷ Thus, when management terminates a phase of its operations but retains control by determining where the goods will be delivered the courts will not

²¹*NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965); *NLRB v. Citizens Hotel*, 326 F.2d 501 (5th Cir. 1964); *General Tel. Co. v. NLRB*, 337 F.2d 552 (5th Cir. 1964); *Ozark Trailers, Inc.*, 161 N.L.R.B. No. 48, 63 L.R.R.M. 1266 (1966); *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962). If the Board determines that the employer has failed to bargain, it will order back-pay for the displaced employees until one of the following conditions occurs: (1) a mutual agreement concerning the decision, (2) the parties bargain to a bona fide impasse, (3) the union fails to commence negotiations within five days of the receipt of the employer's offer to bargain, or (4) the union fails to bargain in good faith. *Ozark Trailers, Inc.*, 161 N.L.R.B. No. 48, 63 L.R.R.M. 1266 (1966); *Royal Plating & Polishing Co.*, 152 N.L.R.B. 619 (1965); *William J. Burns Int'l Detective Agency, Inc.*, 148 N.L.R.B. 1267 (1964).

²²*NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *NLRB v. Rapids Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *Jay Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961).

²³*NLRB v. William J. Burns Int'l Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).

²⁴368 F.2d 549 (9th Cir. 1966); see *NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965); *NLRB v. Northwest Publishing Co.*, 343 F.2d 521 (7th Cir. 1965).

²⁵*NLRB v. Johnson*, 368 F.2d 549 (9th Cir. 1966).

²⁶350 F.2d 108 (8th Cir. 1965); see *Jay Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961).

²⁷*NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965).

find a basic change. But if management sells the goods and retains no control over the terminated phase, there is a basic change in operations.

Another example of a problem concerning the termination of a phase of operations in the same location is found in *NLRB v. Winn-Dixie Stores, Incorporated*,²⁸ where the employer operated a chain of food markets. The company had been buying bulk cheese and cutting and packaging it in its own warehouse. However, the company terminated this operation when it found it more economical to buy the cheese already packaged from a cheese processor. The court held that this was not a basic change in operations. Thus, it appears that an employer's desire to find a cheaper method of obtaining a particular product will not be considered a basic change in operations. But apparently termination of the sale of a particular product would be considered a basic change. For instance, the Winn-Dixie stores would not have had to bargain if the decision was to terminate the sale of cheese rather than to terminate the cheese cutting and packaging operation.

The difference between the two tests turns upon the interpretation of the phrase "other terms and conditions of employment" in section 8(d). An examination of past decisions interpreting section 8(d) reveals that the basic change test is probably the proper interpretation, as opposed to the Board test. The courts have narrowly interpreted this phrase to include such topics as pensions, vacation pay, insurance benefits, shop rules, health and welfare programs, bonuses, merit increases, and contracting out.²⁹ However, no court has interpreted this phrase to include termination of employment because of an economic decision to terminate or relocate operations.

In addition to the limited area of topics the courts have found to come within the phrase, there is strong language by the Supreme Court indicating that the "basic change in operations" test is the proper interpretation. In *Fibreboard Paper Products Corporation v. NLRB*³⁰ the Court held that management must bargain concerning an economic decision to substitute an independent contractor to do

²⁸361 F.2d 512 (5th Cir. 1966).

²⁹National Licorice Co. v. NLRB, 309 U.S. 350 (1940); General Tel. Co. v. NLRB, 337 F.2d 452 (5th Cir. 1964); McLean v. NLRB, 333 F.2d 84 (6th Cir. 1964); NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); Timken Roller Bearing Co. v. NLRB, 161 F.2d 949 (6th Cir. 1947); Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942).

³⁰379 U.S. 203 (1964).