LABOR LAW PROBLEMS ARISING FROM CHANGES IN BUSINESS OPERATIONS—A RE-EVALUATION

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INTRODUCTION

In an article published in the April 1963 *The Business Lawyer,*[1] entitled "Labor Law Implications in the Sale, Transfer or Discontinuance of All or Part of a Business Operation", the rapidly developing area of labor law arising out of changes in an employer's business operations was discussed, and it was pointed out that because the developments in this area were so recent, many employers and their attorneys might be unaware of the new concepts and problems created by such changes. Numerous additional developments since the publication of the prior article prompts its updating. Many questions previously raised have now been answered by judicial and administrative decisions, while new questions have come out of them. This discussion may be facilitated by dividing the problems discussed into three general categories. (a) The duties and obligations imposed upon the employer by the Labor Management Relations Act, as amended, and applicable decisions of the National Labor Relations Board and the Courts; (b) Civil actions which may be brought against an employer by its employees or by labor organizations affected by a change in business operations; and (c) Court decisions compelling or confirming arbitration proceedings which may arise from grievances concerning a change in business operations initiated pursuant to arbitration provisions in collective bargaining agreements between an employer and a labor organization.

FROM THE STANDPOINT OF THE LABOR MANAGEMENT RELATIONS ACT—"THE DUTY TO BARGAIN"

One of the principal questions posed in the prior article was whether or not an employer owed a duty to bargain with the bargaining representative of its employees with respect to whether or not to make a change in its business operations. At that time the National Labor Relations Board had committed itself to the principle that an employer did owe such a duty to bargain.[2] On the other hand there were a number of decisions of the United States Courts of Appeal holding that decisions to subcontract or otherwise

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1. 18 BUS. LAW. 819.
2. Town & Country Mfg. Co., 136 N. L. R. B. No. 111 (1962).

discontinue all or a part of an employer's business operations were within the realm of managerial discretion and not mandatory subjects for collective bargaining.[3]

Since the publication of the prior article, the United States Supreme Court has considered this subject, and the National Labor Relations Board has decided a number of cases involving the duty to bargain with respect to various managerial decisions. Thus the following analysis is appropriate.

Duties Imposed Upon the Employer Initiating the Change

In *Fibreboard Paper Products Corp.* v. *NLRB,*[4] the United States Supreme Court held that an employer violated *Section* 8(a)(5) of the National Labor Relations Act by contracting out to an independent contractor certain maintenance operations formerly performed by its own employees, and by terminating its own employees assigned to this work, without bargaining with the bargaining representative of these employees about whether or not the maintenance work should have been contracted out.

In deciding *Fibreboard,* the United States Supreme Court "backed in" to its decision. It did so by relying on *Local 24 Teamster Union* v. *Oliver,*[5] where the Court had held that the subject of collective bargaining agreement provisions placing limitations upon the contracting out of work to prevent possible curtailment of jobs, constituted a mandatory subject of collective bargaining. Thus, the Court reasoned that since an employer was obligated to bargain with the union about contract provisions pertaining to contracting work out, the law also required the employer to bargain with the union about the very decision of whether or not to contract work out. In its holding the Court pointed out:

> We are thus not expanding the scope of mandatory bargain to hold, as we do now, that the type of 'contracting out' involved in this case—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 *Section*

3. N. L. R. B. v. Rapid Bindery Inc., 293 F. 2d 170, 176 (2d Cir. 1961); Jays Foods, Inc. v. N. L. R. B., 292 F. 2d 317, 320 (7th Cir. 1960) which expressly affirmed the Board's holding in the First Fibreboard and its reasoning in rejecting Railroad Telegraphers. See N. L. R. B. v. Lassing, 284 F. 2d 781, 783 (6th Cir. 1960); N. L. R. B. v. Adkins Transfer Co., 226 F. 2d 324, 327-28 (6th Cir. 1955); N. L. R. B. v. Houston Chronicle Pub. Co., 211 F. 2d 848 (5th Cir. 1954); N. L. R. B. v. New Madrid Manufacturing Company, 215 F. 2d 908, 914 (8th Cir. 1954).

4. 13 L Ed. 2d 233 (official volume not printed). (In this connection it is also significant that in NLRB v. Adams Dairy, 33 U. S. L. WEEK 3244 the Supreme Court vacated the decision of the Eighth Circuit holding that the employer was not required to bargain with the union over changing its transportation operations to an independent contractor arrangement, and remanded it to the Eighth Circuit for reconsideration in light of *Fibreboard.*)

5. 358 U. S. 283 (1959).

> 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy.[6]

A number of questions are raised by the United States Supreme Court's decision in *Fibreboard*. Perhaps they are best revealed by the following language from the concurring opinion of Mr. Justice Stewart:

> Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.

Yet the fears of Mr. Justice Stewart are the realities of every-day life for employers subject to the National Labor Relations Act. This is so because, in a number of recent decisions, the National Labor Relations Board has held the employer to be under a duty to bargain with respect to the very type of managerial decisions which Mr. Justice Stewart argues should not be subject to such a duty to bargain. Thus, these holdings of the National Labor Relations Board has imposed a duty upon employers to bargain about managerial decisions in the following areas:

Contracting Out Bargaining Unit Work

In *Jersey Farms Milk Service, Inc.*,[7] the Board found that the employer contracted out the work previously performed by its transportation division to an independent contractor. Three of the employees formerly employed in this division went with the independent contractor and two were laid off but not hired by the independent contractor. The Board held that the employer violated *Section* 8(a)(5) by contracting out work of his transport division without first notifying and bargaining with the union.

National Food Stores, Inc.,[8] involved a retail food store. At one of the negotiating meetings during which negotiations were being held with respect to a new collective bargaining agreement, the employers' industrial relations director announced that the employer was going to contract out its inventory taking work. When one of the union agents inquired if the decision had already been made, the

6. 13 L Ed. 2d at p. 241.
7. 148 NLRB No. 139 (1964).
8. 142 NLRB No. 38 (1963).

employers' industrial relations director replied that it had. The employer offered the affected employees jobs elsewhere in the store, which they rejected. The Board held that the contracting out of the inventory work was for discriminatory reasons in that the inventory clerks had recently selected the union to represent them. Thus the Board ordered that the employer cancel the contractual agreement with the independent inventory service and reinstate the inventory clerks who had been terminated, with back pay.

Plant Closure

The employer, in *Royal Plating and Polishing Co.*,[9] decided that he would sell his premises to the housing authority of the City of New York and close down his operations. During the period when the negotiations for the sale of property were in progress, the employer was engaged in negotiating with the union for the renewal of his collective bargaining agreement. An agreement was reached with the union and shortly after the execution of the agreement, the employer turned away orders destined for the plant. About a month after negotiations with the union were concluded, the employer notified the Union for the first time that he had sold his property and that he was closing down all his operations, and that all remaining employees would be laid off. The employer thereafter closed his operations and sold all of his machinery and equipment by public auction. The Board held that the employer violated *Section* 8(a)(5) of the Act by failing to advise the Union of his intentions and failing to negotiate with the Union on whether or not to terminate his business. Furthermore, the Board held that the employer should place each terminated employee on a preferential hiring list in the event operations were ever resumed. The Board also ordered the employer to pay back wages to each employee from the date of his termination until the employee secured employment elsewhere, but in no event past the date on which the employer was required to vacate his premises under the agreement with the housing authority.

Another decision involving an employer's termination of operations arose in *William J. Burns International Detective Agency.*[10] There the employer had contracts to provide guard service to a number of employers in the Omaha, Nebraska area. After a number of customers terminated these contracts, the employer undertook a cost analysis and decided it would be unprofitable to continue operations in Omaha on the basis of the one remaining contract with Creighton University. The employer canceled this contract. The employer did not notify the union representing its employees of this

9. 148 NLRB No. 59 (1964).
10. 148 NLRB No. 113 (1964).

decision. The Board held that in so doing the employer violated *Section* 8(a)(5) of the Act. The Board's order was as follows:

> Respondent shall make the discharged employees whole for any loss of pay they may have suffered as a result of the respondent's unfair labor practice. The liability for such back pay shall cease upon the occurrence of any of the following conditions: 1. Reach a mutual agreement with the union relating to the subjects which respondent is therein required to bargain about; 2. Bargaining to a *bone fide* impasse; 3. The failure of the union to commence negotiations within five days of the receipt of the respondent's offer to bargain with the union; or 4. The failure of the union to bargain thereafter in good faith.[11]

In *Pepsi-Cola Bottling Company of Beckley,*[12] the Board held the employer in violation of *Section* 8(a)(5) of the Act by refusing to bargain with the Union about whether or not to close its bottling plant where the motivation for the closure was economic considerations caused by the Union's picketing and other economic activity directed at the employer.

Transfer Or Discontinuance of a Portion of Operations

In *R. C. Can Co.,*[13] the Board held that the employer violated *Section* 8(a)(5) of the Act when he decided for economic reasons to move a segment of his production facilities from one plant to another.

Winn-Dixie Stores, Inc.,[14] involved a situation where the employer discontinued its cheese process packaging operations and used pre-packaged cheese. The employer was not under a current collective bargaining agreement with the Union, however there was a union which was the majority representative of its employees. In this case the Board decided not to require the employer to resume its discontinued operations. However, it ordered the employer to bargain with the union concerning resumption of the discontinued operation, and if no agreement was reached, to bargain with the union concerning effects of the discontinued operation on employees in the unit, and to pay back pay to the employees under the circumstances discussed above in *William J. Burns.*

Contracting Out in Strike Situations

There have been two recent decisions of the National Labor Relations Board which have dealt squarely with the right of an employer to contract work out during a strike of his operations in order to keep his business operating. In *Hawaii Meat Co.,* the

11. 57 LRRM at 1163 (official volume not printed).
12. 145 NLRB No. 82 (1964).
13. 144 NLRB No. 26 (1963).
14. 147 NLRB No. 89 (1964).

employer, during the course of a strike, contracted out his delivery operations. The employer advised the strikers who were replaced by the subcontracted operation that positions as drivers or helpers were no longer available. The employer did not notify the union of his intentions to subcontract the work. The Board[15] held that the employer violated *Section* 8(a)(5) by failing to give the union notice in advance of its decision to subcontract the work out and an opportunity to bargain on the subject. The United States Court of Appeals for the Ninth Circuit denied enforcement of this decision, setting it aside, and posed the question as one of whether a decision to subcontract, made at a time an economic strike occurs and made for the sole purpose of keeping the plant operating, constitutes a refusal to bargain in violation of the Act, when, after the strike begins, the employer does not, on its own motion, offer the union an opportunity to bargain about the decision to subcontract. In holding that the employer owed no duty to bargain under these circumstances, the court pointed out at page 400:

> We think that a requirement that, upon the occurrence of a strike, and before putting into effect a subcontracting arrangement designed to keep the struck business operating, the employer must offer to bargain about the decision to subcontract, would effectively deprive the employer of this method of meeting the strike. A mere naked offer to bargain would not end the matter. The union could, by accepting the offer, deprive the employer of an effective means of meeting the strike for a period of time that might render it valueless to the struck employer.[16]

The Board has also held that an employer who permanently contracts out the work of unfair labor practice strikers violates *Section* 8(a)(5) of the Act. The Board so held in *Abbott Publishing Co.*,[17] and again the Board met with defeat when it attempted court enforcement of its decree in this case. In *NLRB* v. *Abbott Publishing Co.*,[18] the Seventh Circuit rejected the Board's holding that the employer had violated *Section* 8(a)(5) by subcontracting during the course of the strike, stating:

> We are not called upon in this case to decide whether, in a situation where no strike has been called and the bargaining table remains accessible to both parties, the question of contracting out work by an employer is a subject of collective bargaining. Instead we have a case where the union has turned its back on collective bargaining and has, by calling a strike, placed the employer suddenly in a position made precarious by the inexorable demands of newspaper publication. If publication may be interrupted while bargaining drags on over matters which have to do with what means the publisher may use in getting his paper on the streets and in mail, the paper may cease to exist. It would be a startling doctrine

15. 139 NLRB No. 75 (1963).
16. 321 F. 2d 397 (9th Cir. 1963).
17. 139 NLRB 1228 (1962).
18. 331 F. 2d 209 (7th Cir. 1964).

> indeed if this court were to tell companies and employers faced with extinction because of a strike, that before they can make economic business decisions to contract out work in order to continue operations, they must first consult the union that caused the threat of extinction.[19]

Needless to say the Supreme Court's decision in *Fibreboard,* raises the interesting question as to whether the Seventh and Ninth Circuit decisions are still good law.

Certainly the express language of the court in *Abbott* indicates an attempt to limit the holding of the court to *strike* situations. What the Supreme Court may ultimately do in strike situations and the numerous other situations arising from the various Board decisions discussed above is subject to speculation.

Duties Imposed Upon an Employer Acquiring a Business—the Successor Employer

In the prior article consideration was given to the circumstances under which an employer who acquires all or some part of a business operation, or the physical plant or facilities, or employees thereof may be under a duty to bargain with the union which was the bargaining representative of the selling employer.

The principles discussed at that time are clearly still applicable, and there have been no significant changes. One recent decision has applied these principles. It is *NLRB* v. *Stepps Friendly Ford, Inc.,*[20] in which the Ninth Circuit denied enforcement of a Board order finding Stepps Friendly Ford, Inc. guilty of refusing to bargain with the certified bargaining representative of the employees of Westward Motors, Inc., a predecessor of Stepps. In this case, the owner of Westward Motors retired from business, resigned his franchise and terminated his employees. Stepps, which was already in the automobile business, secured the franchise of the Ford Motor Company and continued the business at the same location. However, Stepps did not hire all of its predecessor's employees but interviewed some of them and hired selectively, also bringing in other employees employed by Stepps at its other automobile dealerships. Thus, only three of Westward's twelve salesmen were ultimately hired by Stepps.

Some Practical Problems and Some Practical Solutions

The prior article raised some of the practical problems facing an employer attempting to comply with his duty to bargain and yet retain relative freedom of his business operations.[21]

19. 331 F. 2d at 213.
20. 338 F. 2d 833 (9th Cir. 1964).
21 *Op. cit. supra* Note 1 at 837-838.

A number of very recent decisions of the National Labor Relations Board have provided a further series of guide posts under which employers may operate to solve these problems. In *Shell Oil Co.*,[22] the collective bargaining contract between the employer and the union, provided, among other things, as follows: "In the event the employer subcontracts work within the refinery which could be performed by employees covered by this agreement, the company will . . . [require] the contractor to pay not less than the rates of pay provided in this agreement for the same character of work."

The employer had, from time to time subcontracted miscellaneous construction and maintenance work which could be performed by the employer's own employees. These subcontracts were let without notification to the union. The issue of the employer's right to do so had been raised in previous negotiations, at which time the union sought contract privisions which would limit the employer's right to subcontract. The employer contended that under the quoted clause it had the right to subcontract at all times and refused to agree to any diminution of this right. Following lengthy negotiations, the union struck. Thereafter, the strike was settled, and a new contract entered into containing a provision substantially identical to the one quoted above. During the course of the negotiations, both before and during the strike, and after the new contract was signed the employer continued its practice of entering into subcontracts for miscellaneous construction and maintenance work, without notifying the union. The union charged such conduct was in violation of *Section* 8(a)(5) of the Act. The Board held that under the circumstances of this case the subcontracts entered into; during the course of negotiations; during the strike; and after negotiations had resulted in a signed agreement did not violate *Section* 8(a)(5) of the Act. The Board purported to limit its decision to the circumstances of this case. It is also most interesting to note that the Board, perhaps in a bit of a retreat as a result of adverse decisions in the Seventh and Ninth Circuits in the *Hawaii Meat Co.* and *Abbot Publishing Co.* cases had this to say about contracting out during the course of a strike:

> Obviously, an employer who intends to maintain operations by subcontracting projects of temporary duration has no precise basis for determining the length of the strike, and thus normally is in no position to ascertain whether work to be contracted out will be completed before or after the cessation of strike action. If such a contract is of a reasonable duration and dictated by exigencies of the strike, there is no justification for finding unilateral action, otherwise privileged as an incident of the right to maintain operations during the strike, to be unlawful simply because the strike is ended before performance of the subcontract has been completed. To avoid imposition of the statute, an employer would be required to bargain over all temporary contracts awarded during the strike

22. 149 NLRB No. 22 (1964).

> or risk violating the act should such a contract extend beyond the strike. We shall not impose such alternatives upon an employer.[23]

In *General Motors Corp.*,[24] the collective bargaining agreement contained a management rights clause which provided for a procedure for the transfer of employees who would otherwise be laid off by changes in methods, products or policies. In addition, exclusive management rights in this regard were provided for, by a provision which stated that the transferring of employees is the sole responsibility of management, subject to such factors as seniority.

The employer made certain changes in its operations at its South Gate plant which necessitated the transfer of employees who had driven unlicensed cars away from the assembly line, to other jobs within the bargaining unit. Although the employer did not negotiate with the union about whether or not to make this change, certain grievances were processed and discussed on behalf of the displaced employees and they were later withdrawn. The general counsel did not contend that the employer had refused to bargain about the grievance, but argued that he had refused to bargain about making the change in operations. Of further significance was the fact that the changes did not result in the loss of bargaining unit jobs for any of the employees involved. Here the Board held that under all of the circumstances the employer did not violate *Section* 8(a)(5) of the Act by the transfer of the employees pursuant to its managerial rights clause of the collective bargaining agreement.

In *Shell Oil Co.*,[25] the employer decided to transfer certain service station delivery operations to a plant outside of the bargaining unit. The employer gave the union approximately two days notice of the effectiveness of this transfer. The employer assured the union that no unit jobs would be lost over the transfer. The union took the position that it would file a grievance; file an unfair labor practice charge; and complain to the Interstate Commerce Commission. Although the employer took the position that the transfer was a management prerogative and that it was not a proper subject for the grievance procedure, the employer nevertheless discussed the transfer with the union both before and after it became effective. No employees in fact lost their jobs as a result of transfer. In holding that the employer did not violate *Section* 8(a)(5) of the Act by its transfer, the Board stated:

> The principles of these earlier cases, [*Town and Country and Fibreboard*] however, are not meant to be hard and fast rules to be mechanically applied irrespective of the circumstances of the case. In applying these principles, we are mindful that the permissibility of unilateral subcontracting will be

23. 57 LRRM at 1274 (official volume not published).
24. 149 NLRB No. 40 (1964).
25. 149 NLRB No. 26 (1964).

> determined by a consideration of the setting of each case. Thus, the amount of time and discussion required to satisfy the statutory obligations 'to meet at reasonable time and confer in good faith' may vary with the character of the subcontracting, the impact on employees, the exigencies of the particular business situation involved. In short, the principles in this area are not, nor are they intended to be, inflexibly rigid in application.[26]

Kennecott Copper Corp.,[27] involved a situation where the employer had in the past accomplished rebuilding operations on equipment at its plant through the use of bargaining unit employees. In 1963, the employer, without notice to the union, unilaterally subcontracted the rebuilding of a piece of equipment. No jobs were lost as a result of the decision. The collective bargaining agreement contained a broad management rights clause which provided as follows:

> Nothing in this agreement shall be construed to limit or impair the rights of the company to exercise its own discretion in determining whom to employ, and nothing in this agreement shall be interpreted as interfering in any way with the company right to alter, rearrange or change, extend, limit or curtail its operations or any part thereof, to decide upon the number of employees that may be assigned to work any shift or the equipment to be employed in the performance of such work, or to shut down completely, whatever may be the effect upon employment, within its sole discretion and may deem it advisable to do all or any of said things.

The Board held that the employer did not violate the Act by its decision. However, the Board based its decision not only on the existence of the management rights clause, but also on the fact that the employees did not lose their jobs as a result of the decision and the fact that the employer did bargain about its action when the union requested it to do so.

The foregoing decisions raise some question as to exactly when, and under what circumstances an employer can legally make changes in his operations, without bargaining with the Union. Thus, what if the employer makes changes in his operations which result in the loss of bargaining unit jobs, where the employer predicates his action upon a broad management rights clause giving the employer express authority to make the very change made, without notifying the union. It would appear that since the Board still holds that the employer has the right to insist upon such clause during the course of collective bargaining negotiations,[28] that once such a clause has been obtained by bargaining the employer has discharged his entire duty to bargain. Yet the language of the Board in *Shell Oil, supra,* is not so reassuring. When the uncertainty of the Board is coupled with the uncertainty of how far the Supreme Court will go in up-

26. 57 LRRM at 1280 (official volume not published).

27. 148 NLRB No. 169 (1964).

28. Peerless Distributing Co., 144 NLRB No. 142 (1963) (subcontracting clause).

holding the Board in *other* than the precise question considered in Fibreboard, the conclusion can only be that it will continue to be most difficult to advise clients on problems of this type with any degree of precision.

FROM THE STANDPOINT OF CIVIL LIABILITY

The discussion of civil litigation involving claims by employees or unions that their rights have been violated by employers initating changes in business operations divides itself into two logical categories. One pertains to whether the employer has the unilateral right to make such a change in operations affecting his employees. The second pertains to the effect the change may have upon the incidents of employment and employees right thereto.

Questions Concerning Whether Or Not the Employer Has the Right to Make the Change

In *Fraser* v. *Magic Chef-Food Giant Markets,*[29] the employer and the union were parties to a collective bargaining agreement which had an expiration date of October 1, 1959. On September 9, 1957, the employer notified the union and the employees covered by the collective bargaining agreement that it was going to close the plant covered by the agreement on October 31, 1957 because of its inability to "obtain adequate profits". The employer did in fact close its plant, terminate the agreement, and terminate the employment of its employees. This action was brought by one employee on behalf of himself and fellow employees to recover wages in excess of $1,000,000.00. The employees contended that under the terms of the collective bargaining agreement the employer was under an affirmative duty to remain in business, maintain operations and continue the employment of members of the union for the full term of the contract. They argued that closing the plant and terminating the contract was a breach of the contract and that damages should be awarded equal to the wages that the employees would have earned had they remained in the employ of the employer. The Sixth Circuit cited a number of decisions which were discussed in the prior article[30] and determined that the collective bargaining agreement itself did not create an employer-employee relationship, nor did it guarantee the continuance of one. Further it was pointed out that the employees' rights under such contract do not survive a discontinuance of the business and a termination of operations.

In *Coulon* v. *Cary Cadillac Renting Co.,*[31] the plaintiffs were the chairman of the grievance committee and officials of the union which

29. 324 F. 2d 853 (6th Cir. 1963).
30. *Op. cit. supra* Note 20 at pp. 840-847.
31. 50 LRRM 2888 (S. D. N. Y. 1962).

sued on its own right and as representative of the employees of the defendant company. The collective bargaining agreement provided that the union be the exclusive bargaining representative of employees and that all operations of any and all vehicles used in the company's business for production of revenue should be under the jurisdiction of the union. The agreement also contained a union shop clause. The complaint alleges that the employer violated the agreement by "farming out" part of its business to competitive non-union operators. The plaintiffs asked for declaratory relief and an order requiring the defendant to cancel the arrangements with other employers. The issues were raised by the employer's motion to dismiss the complaint. The motion to dismiss was denied with the District Court relying upon *United Auto Workers* v. *Webster Electric Co.*[32]

There appear to have been no further decisions of the Courts which affect employer's rights in matters other than that discussed in the prior article. Thus, it would appear safe to conclude that an employer may be able to cease his business operations without incurring civil liability for having *decided* to do so.

Questions Pertaining to the Effect the Changes May Have Upon the Incidents of Employment

Recent decisions in this area of the law are few. In another *"Glidden"* case,[33] the Second Circuit was presented with an opportunity to reconsider its controversial decision in the previous case.[34] The decision of the court in the second *Glidden* was substantially based upon the "law of the case doctrine". The court pointed out that "mere doubt" as to the wisdom of its previous decision was not enough to open up the point for full reconsideration. Among the "doubt" creating factors which the court had in mind was the decision of the Sixth Circuit in *Oddie* v. *Ross Gear and Tool Co.*,[35] which the Second Circuit in the latest *Glidden* characterized as "not fairly [distinguishable] despite the Sixth Circuit's politeness in calling Glidden's agreement 'materially different'." Further "doubts" had been raised by numerous critical comments and discussions in law review.[36]

Thus, it would appear as though employees' seniority rights are going to survive a transfer of operations in the Second Circuit and be severed by a transfer of operations in the Sixth Circuit. The Supreme Court has elected to remain silent in both situations.

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32. 299 F. 2d 195 (1962).

33. Zdanok v. Glidden Co., 327 F. 2d 944 (2nd Cir. 1964).

34. Zdanok v. Glidden, 288 F. 2d 99 (2nd Cir. 1961) *cert. grant.* 368 U. S. 314. affirmed on another issue.

35. 305 F. 2d 143 (6th Cir. 1962) *cert den.* 371 U. S. 941 (1962).

36 327 F. 2d 952 n. 11.

Also in point is *Slenczka* v. *Hoover Ball and Bearing Co.*[37] This case involved a situation where the employer shifted its manufacturing operations from Bedford, Ohio to a new plant site in Georgetown, Kentucky. The collective bargaining agreement provided, "this agreement is also binding if any existing operation is moved within a sixty mile radius." In December of 1960 the defendant employer moved its operations to the new plant, which was more than sixty miles from the former plant. In this action the employees sought damages arising out of the failure of the employer to reemploy them at the new plant with their full seniority rights. Judgment was for the defendant, with the District Court relying upon *Oddie* v. *Ross Gear and Tool Co., supra,* and reasoning that the contract clearly limited the employees' seniority rights to a sixty mile radius.

FROM THE STANDPOINT OF THE ARBITRATION CLAUSE

Questions arising under arbitration provisions in a collective bargaining agreement as applied to an employer attempting to make some change in his business operations may logically be divided into four general areas for ease of discussion. They are: (A) Whether the employer has the right to make the change; (B) the successor employer's duty to arbitrate; (C) injunctive relief as an aid to enforcement; (D) the role of bargaining history in determining arbitrability. In the prior article it was concluded that there was little question but that both questions pertaining to whether or not the employer could make a change in his operations and questions arising by reason of the affect of a change in operations on the incidents of the employment relationship are arbitrable.[38] It was further concluded that unless the specific conduct of the employer which is claimed to violate the collective bargaining agreement, is, by the terms of that agreement, expressly excluded from the coverage of the arbitration clause, it will probably be held to create an arbitrable dispute.

Some more recent decisions have born out this conclusion. In *Warehousemen* v. *Hardware Supply Co.*,[39] the union filed a grievance and sought arbitration of its claim that the employer had violated the collective bargaining agreement by transferring a substantial portion of its warehousing operations to another county, without giving its employees the right to follow the work. The contract contained a management rights clause providing the employer with the right to introduce, alter or abolish methods and maintain rules of operations and working practices, and also providing "should any

37. 215 F. Supp 761 (N. D. Ohio 1963).
38. 18 Bus. Law 819, at pp. 857, 858, 861.
39. 329 F. 2d 789 (3rd Cir. 1964), *cert. den.* 13 L. ed 2d 37 (1964).

dispute arise concerning this article, it shall be processed through the grievance procedure." The agreement contained an arbitration provision providing for arbitration of "disputes and differences . . . as to the meaning and application of, or compliance with the provisions of this agreement". The agreement further provided that when, in the judgment of the company, it decided to discontinue operations of any portion of its warehouse, a severance allowance was payable to an employee permanently terminated unless the employer offered, and the employee affected elected to accept, a job in a job classification to which his seniority and ability qualified him.

In 1961 the employer notified the union that it was planning to remove its warehouse to another county. The union sought arbitration and the employer refused. Thereafter the employer terminated the employment of approximately 68 of its employees and presented each employee a check, including, in addition to his weekly pay, pro rata vacation pay and a severance allowance. Many of the employees applied for employment at the new warehouse but were refused. The union brought this action seeking a court order that the employer proceed with arbitration.

The third Circuit affirmed the District Court's opinion directing arbitration, relying upon the "triology".[40] Here the court reasoned that the union's contention that the employer was violating the contract in certain respects and the employer's contention that it was not created a dispute between the parties as to the "meaning, and application of, or compliance with" the contract.

Another decision by the Second Circuit in *I.U.E.* v. *General Electric Co.*,[41] reveals the difficulties faced by an employer in attempting to support a position that grievances arising from such changes in business operations as contracting outwork, are not arbitrable. Here the grievance at issue arose when the company decided to use an independent construction firm in relocating within its manufacturing plant certain manufacturing facilities. The project involved the purchase and insulation of new machinery and equipment. The union contended that this decision to subcontract by the employer gave rise to an arbitrable question of whether in doing so the company violated the union recognition, job description, and seniority provisions of its collective bargaining agreement. The collective bargaining agreement contained a standard type arbitration clause. The court concluded that it was clear that the arbitration clause was sufficiently broad to require arbitration of the claimed grievance. The court

40. United Steelworkers of America v. American Mfg. Co., 363 U. S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co.; 363 U. S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U. S. 593 (1960).

41. 332 F. 2d 485 (2nd Cir. 1964), *cert. den.* 13 L. ed 2d 341 (1964).

further termed the type of grievance here involved as a "garden variety" grievance.

The employer contended, however, that a provision in the collective bargaining agreement which provided that the agreements were "intended to be and shall be in full settlement of all issues which were, or which the union, the locals or the company have by law the right to make, the subject of collective bargaining and negotiations between them proceeding the execution of this agreement" required a different result. The company then noted that the union tried several times unsuccessfully to obtain provisions of the agreement limiting the employer's right to subcontract. The employer then argued, (1) the arbitration clause covers only a grievance involving the interpretation or application of "a provision" of the agreement; (2) the bargaining history and the clause quoted indicate that no "provision" of the contract restricts the right of the company to subcontract; and (3) therefore, the arbitration clause does not cover subcontracting since there is no substantive provision of the contract upon which it can operate.

The court rejected the company's claims and relied strongly upon the principles that:

> Every grievance is arbitrable, unless the provisions of the collective bargaining agreement concerning grievances and arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond per adventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure set forth in the agreement.[42]

An excellent example of the operation of an express exclusion clause in excluding a dispute from arbitration is found in *Boeing Company* v. *UAW*.[43] There, the collective bargaining agreement contained a management prerogatives clause which provided: "the company has the right to subcontract and designate the work to be performed by the company and the places where it is to be performed, which rights shall not be subject to arbitration." In the instant case the employer sought to transfer work from its plant at Morton, Pennsylvania to its Wichita, Kansas plant. The union sought arbitration and the employer refused. The union brought the instant action to compel arbitration. The court noted that the arbitration provisions also contained a clause to the effect that the "arbitrator. . . shall have no authority . . . to rule upon . . . management prerogatives." The court considered the "express exclusion" language of *Warrior and Gulf* and concluded that the employer had simply not obligated itself to arbitrate a dispute over the location of production work.

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42. *Id.* at 488.
43. 234 F. Supp 404 (E. D. Penn. 1964).

Injunction In Aid of Enforcement

One of the most recent innovations to arise in the area of arbitration concerns the question of injunctive relief to restrain an employer from making a change in his operations pending arbitration of the dispute over his right to make the change. There are two United States District Court decisions which have considered this very point.

In *Motor Coach Employees* v. *Greyhound Lines,*[44] the union sought a preliminary injunction to restrain the employer from moving its maintenance and repair operations from Washington, D.C. to Chicago, Illinois, until the completion of an arbitration proceeding between the parties determining whether under the collective bargaining agreement between them, the employer had the right to make the move.

The court granted the preliminary injunction and rested its ruling upon a balancing of conveniences. The Court pointed out that employees would be forced to move to Chicago in order to maintain their employment on one hand; while the inconvenience which would be sustained by the employer in remaining in Washington the short time until the completion of the arbitration proceedings was slight. The court relied upon the decision of the Supreme Court in *Textile Workers Union of America* v. *Lincoln Mills,*[45] as standing for the proposition that injunctive relief is available to the court as a collateral power to its authority to compel the parties to arbitrate. Thus, the court reasoned that since it had the power to order arbiration in the first place, it also had the power to take steps that would prevent rendering the result of the arbitration futile and ineffective.

The same questions arose in *Auto Workers* v. *Seagrave Division,*[46] where the union filed an action seeking to restrain the employer from moving its operations from Columbus, Ohio to Clintonville, Wisconsin, pending the arbitration of a grievance arising out of the move. The court appears to rely upon the reasoning of Judge Holtsoff in *Greyhound Lines,* in holding that an injunction would be proper. However, the court determined that the employer would sustain great monetary losses in remaining at the Columbus plant, along with the possible inability to fill existing contracts, and the attendant losses that go with the loss of such contracts. Thus the court determined that if the employer would furnish a "proper bond" in the amount of $400,000.00 to guarantee and secure an award to the plaintiff should the arbitrator find in its favor, the court would deny the issuance of injunctive relief sought.

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44. 225 F. Supp 28 (D. C. D. C. 1963).
45. 353 U. S. 448 (1956).
46. 56 LRRM 2874 (E. D. Ohio 1964).

This decision raises a number of unanswered questions. Among them are the questions of exactly what type of award by an arbitrator would be satisfied by the bond in question. Furthermore the question arises as to exactly who would be entitled to claim the proceeds of the bond, the union, or the affected employees. The further practical question is raised as to whether any surety company would ever agree to write such an undertaking where the scope of the risk guaranteed by bond might be unlimited.

It would appear to be substantially certain that unions will make more use of injunctive relief as a means of preserving the status quo pending the completion of arbitration proceeding involving the propriety of an employer's change in business operations.

The Role of Bargaining History in Determining Arbitrability

Two courts have considered the effect of attempts, during the course of negotiations, by one of the parties to obtain provisions of the contract either giving the right to the employer to make such changes or limiting such rights.[47] In *Petroleum Workers* v. *American Oil Co.*,[48] the union brought an action to require the employer to submit to arbitration a grievance that the employer breached the collective bargaining agreement by contracting out crane work to an independent contractor. Among the pertinent provisions of the collective bargaining agreement was the following:

> The company will bargain with the union with respect to matters relating to the rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in section 2 of article XIII of this agreement shall be suspended, but solely with respect to the issue concerning which either party shall have so refused to arbitrate.

The court correctly articulated the question presented to it as one of whether the parties had obligated themselves by contract to submit the grievance in dispute to arbitration. The court turned to the bargaining history and noted that the union had proposed limitations on the right to contract work out and that the employer had consistently refused to agree to any such limitations. The court thus concluded that the employer fulfilled its contractual obligations under the clause quoted, and that the dispute was not arbitrable. The court also held in the alternative that its prior decision in *Independent Petroleum Workers of America* v. *Standard Oil Co.*,[49] operated as a bar or estoppel to reach any different result.

47. *Op. cit. supra.* Note 1, at 863-865.
48. 324 F. 2d 903 (7th Cir. 1963). Affirmed 13 L. ed 2d 333 (1964).
49. 275 F. 2d 706 (7th Cir. 1960).

The second case, *O'Malley* v. *Wilshire Oil Co.*,[50] the California Supreme Court was faced with a question pertaining to the arbitrability of a grievance arising out of the employer's practice of contracting out transportation work. The collective bargaining agreement provided for the processing and arbitration of "grievances relating to the application and interpretation of this agreement." The clause also provided that "under no circumstances may an arbitration decision in any manner nullify, amend, modify, extend, reduce or otherwise change any of the terms or conditions of this agreement." A further provision of the collective bargaining agreement provided "except for office janitorial services or in case of an emergency, the company shall not employ or otherwise engage contract labor to perform upkeep and repair work normally performed by employees covered by this agreement, until all laid off employees who still retained their rehiring rights . . . shall or have been offered re-employment with the company. . . ."

The employer argued that the grievance was not arbitrable and further argued that any decision of the arbitrator with respect to the grievance of contracting out would necessarily have the effect of "modifying" the agreement.

The court concluded that the language of the agreement relied upon did not constitute an express exclusion of this particular issue from arbitration. The court then considered the effect of bargaining history upon the question. In this connection, the employer presented evidence that the union had sought to modify Article 15 in order to include more explicit and stringent limitations upon the employer's right to contract out work. These proposals were repeatedly rejected at the bargaining table by the employer. The California Supreme Court answered this argument by pointing out that the collective bargaining history relied upon by the employer pertained to the construction of the clause pertaining to subcontracting and not to the construction of the agreement to arbitrate. Thus, the court concluded that it related to the "merits" of the dispute, something which the court could not consider. The court then concluded that "consideration of the bargaining history in the present case, is therefore, patently improper."

One wonders whether the nicely articulated distinction drawn by the court between bargaining history to show the parties intent to exclude from the agreement any limitations upon the contracting out of work (which the court concludes is evidence going to the "merits" of this dispute), and bargaining history to show whether the parties did or did not agree to arbitrate this particular type of dispute, is a distinction which really exists. Thus, doesn't the greater, include the lesser? If the parties, through the language of their

50. 59 Cal. 2d 482 (1963).

agreement and the history of negotiations have clearly evidenced an intention to preserve the employer's right to contract out in all but certain express areas, doesn't this necessarily include an intention of the parties not to arbitrate about the employer's contracting out in all but the express areas?

Thus, the question remains as to exactly what weight will be given to bargaining history in determining arbitrability in these situations.

Problems of the Successor Employer

The cornerstone of the developments in this area was set by the decision of the United States Supreme Court in *John Wiley and Sons* v. *Livingston*.[51] The facts in that case involve a union which had a collective bargaining agreement with Inter-Science Publishing, Inc., for a term expiring on January 31, 1962. The agreement did not contain any provisions making it binding on any successor. On October 2, 1961, Inter-Science merged with John Wiley and Sons, Inc., another publishing firm, and ceased to do business as a separate entity. At the time of the merger, approximately 40 of the 80 employees of Inter-Science were represented by the union. Wiley was a larger concern, having separate office facilities and about 300 employees. A number of the Inter-Science employees were employed by Wiley. A number of disputes arose out of the effect of the merger upon the incidents of the employee relationship.[52] The instant action arose in the context of the union seeking to compel John Wiley and Sons, Inc. to submit these grievances to arbitration. The holding of the court with respect to the effect of merger on the issue of arbitrability is concisely stated:

> We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances present here, the successor employer may be required to arbitrate with the union under the agreement.[53]

51. 376 U. S. 543 (1964).

52. The issues which the union sought to arbitrate are as follows: "(a) Whether the seniority rights built up by the Inter-science employees must be accorded to said employees now and after January 30, 1962. (b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65, Security Plan Pension Fund now and after January 30, 1962. (c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect. (d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract. (e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract." 376 U. S. at 552.

53. *Id.* at 548.

The court qualified its holding, however, as follows:

> We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed that the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved. So too, we do not rule out the possibility that a union might abandon its claims to arbitration by failing to make its claims known.[54]

It is pertinent to note that John Wiley and Sons, Inc. did not assume the collective bargaining obligations of Inter-Science. It is further significant to note that a number of grievances involved contentions as to the rights of employees, not only after the merger, but after the expiration of the contract by its express terms on January 31, 1962. Neither fact precluded the holding of arbitrability. The court also held that the question of whether the arbitration provisions survived the merger was one for the Court and not the arbitrator. The court further held that the determination of whether the procedural steps provided for in the collective bargaining agreement as conditions to arbitration had been met is one for the arbitrator and not for the court.

The principles evolved in *John Wiley and Sons* have been applied more recently in two United States Circuit Court of Appeals decisions. One involved the sale of a going business, *Wackenhut Corp.* v. *Plant Guards.*[55] Here the union had a collective bargaining agreement with General Plant Protection Co. Wackenhut Co. purchased the assets of General Plant. General Plant had been in the business of providing guard service for industrial plants. Wackenhut was also engaged in this business. As part of the sale Wackenhut assumed substantially all of the monetary liabilities of General Plant, but did not expressly assume General Plant's existing labor agreements. Among the assets acquired by Wackenhut were General Plant's leaseholds in various properties, all of its contracts with customers and all of its contracts with customers and all customer lists, all assignable permits and licenses, General Plant's trade names and trademarks, the company's detailed records sufficient to identify the described assets, and the name 'General Plant Protection Company.' General Plant also covenanted not to compete. After the sale Wackenhut rendered the same services for the same employes, wearing the same uniforms as General Plant. Wackenhut refused to adhere to any obligations of the collective bargaining agreement, claiming it was not bound thereto. The union brought the instant action to enforce the arbitration provisions of the agreement. The court held Wackenhut bound by the entire agreement.

54. *Id.* at 551.
55. 332 F. 2d 954 (9th Cir. 1964).

A substantially identical situation arose in *Steelworkers* v. *Reliance Universal Inc.*[56] This case arose out of a sale by Martin Marietta Corporation of its concrete pipe plant located in Bridgeville, Pennsylvania, to Reliance Universal Inc. Since the sale Reliance has continued the Bridgeville operation without significant change, employing substantially all of the operating, supervisory and managerial personnel who were formerly employed by Martin Marietta. However, Martin Marietta and Reliance incorporated in the contract of sale a provision that that "Buyer shall not assume any obligation of the . . . [seller] under any collective bargaining agreement. . . ."

Thereafter, the union demanded that Reliance honor the outstanding collective bargaining agreement. Reliance refused and the union struck the plant. The union then brought this suit under *Section* 301 of the Labor-Management Relations Act, 29 U.S.C. 185, for a declaratory judgment that the collective bargaining agreement in controversy is binding upon Reliance and for an order directing arbitration of claimed violations of that agreement.

The third Circuit held that Reliance Universal was obligated to arbitrate the grievances asserted by the union. However, it was careful not to hold the prior contract applicable in its entirety to the purchaser. And it is doubtful that the Court's limitations upon the application of the contract will be of any comfort to the employer, in view of an arbitrator's broad powers to decide—even erroneously.

From the foregoing analysis of developments in the area of arbitration law, it is apparent that it will be increasingly difficult for employers to preserve for themselves the right to make their own decisions instead of being required to submit to the decisions of an arbitrator. While express exclusionary clauses are probably still sufficient to keep specific grievances from arbitration, great difficulty is presented in anticipating all possibilities. Furthermore, the conclusions of the prior article, to the effect that purchasers of a business who do not assume the seller's collective bargaining agreement may not be held liable thereon, would seem presently incorrect in light of the decisions in *Reliance* and *Wackenhut.*

56. 335 F. 2d 891 (3rd Cir. 1964).