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civil jury trials,⁹² there is some question as to whether the criminal calendar was plagued as well.⁹³ But, even were this the case, the demands of expediency must never be permitted to displace valuable procedural safeguards. For however desirable and convenient such innovations may at first appear,

let it be again remembered that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more fundamental matters; that . . . though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.⁹⁴

Michael Toomin

CHANGES IN EMPLOYER STRUCTURE AND OPERATIONS AND THEIR EFFECT ON COLLECTIVE BARGAINING RIGHTS

One of the most intriguing areas in the field of labor law deals with what takes place between labor and management when the employer institutes substantial changes in the structure or operation of his business. The types of changes considered by our courts to have significant effect are dissolution or liquidation, reorganization, merger, sale and, more recently, relocation and closing down of part of an operation when done in conjunction with a subcontracting of the operation. The years 1935 to date have seen great changes in this area of labor law. Some of the old common law and statutory solutions were retained and others discarded. This comment will examine these changes and discuss methods of collective bargaining under these conditions.

ORIGINS OF THE CONTRACTUAL RELATIONSHIP

Certain general principles of corporation law have always governed this area. If a corporation is merely a reorganization, a continuation, or a purchaser of a former corporation and has substantially the same stockholders, the new, or surviving corporation is bound by the former's con-

⁹² Even today, after seven years of Rule 24-1, plus the additions to the bench resulting from the Judicial Article, there is still a delay of more than five years. CHICAGO DAILY NEWS, Aug. 10, 1965, p. 10, col. 1.

⁹³ It must be remembered that the constitutional command of a speedy trial, *supra* note 69, has been interpreted by the Legislature to mean that the defendant in a criminal prosecution must be brought to trial within 120 days unless he is responsible for the delay. This provision was formerly known as the Four Term Act, and can be found today in ILL. REV. STAT. ch. 38, § 103-5.

⁹⁴ 4 BLACKSTONE, COMMENTARIES 350 (12th ed. 1794).

tracts.¹ If a parent corporation causes dissolution of its subsidiary, the parent is bound to perform all the outstanding written contracts of the subsidiary.² This varies from the law regarding mergers and acquisitions where the extent to which there is duplication of parties and interests, and also whether there is a voluntary assumption of the obligations, is even more crucial.³

In an employment contract situation, the employment is usually for a specific term. Payment must be given for the whole term notwithstanding merger,⁴ relocation,⁵ destruction of the business or insanity of the owner,⁶ or simple dissolution.⁷ Employment contracts also require notice to be given of changes in the nature of the employer. If this is not done, the former employer can be held liable for money due from the successor to the employees who did not receive such notice.⁸ However, if there was no set term, or if the employee had been notified of the change, the employment could be terminated at will, in the former case, or on good cause for the latter.⁹ An express assumption of the outstanding contracts and obligations by a successor will clearly bind it, while a mere invitation

¹ *Meeks v. Arkansas Light and Power*, 147 Ark. 232, 227 S.W. 405 (1921); *Alden v. Wright*, 175 App. Div. 692, 162 N.Y.S. 668 (1916).

² *Hughes Tool v. Comm'r.*, 147 F.2d 967 (5th Cir. 1945). Cf., *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930, 933 (1st Cir. 1940), *petition for cert. dismissed*, 312 U.S. 710 (1941).

³ *Brabham v. Southern Express Co.*, 124 S.C. 157, 117 S.E. 368, (1923), *cert. denied sub nom. American Ry. Express Co. v. Brabham*, 261 U.S. 614 (1923); *Kentucky Beaver Collieries v. Mellon and Smith*, 200 Ky. 198, 254 S.W. 421 (1923); *Globe Oil Mills v. Van Camp Sea Food*, 52 Cal. App. 781, 199 P. 864 (1921).

⁴ *Chipman v. Turner, Day and Woolworth Mfg. Co.*, 32 Ky. Law Rep. 680, 106 S.W. 852 (1908).

⁵ *Masonite Corp. v. Handshoe*, 44 So. 2d 41 (Miss. 1956).

⁶ *Madden v. Jacobs*, 52 La. Ann. 2107, 28 So. 225 (1900); *Macon Canning Co. v. Roberts*, 26 Ga. App. 147, 105 S.E. 734 (1921); *Sands v. Potter*, 59 Ill. App. 206, 212 (1894), *aff'd.*, 165 Ill. 397, 46 N.E. 282 (1896).

⁷ *Martin v. Star Publishing Co.*, 50 Del. Rep. 181, 126 A.2d 238 (1956); *Parsil v. Emery*, 242 App. Div. 653, 272 N.Y.S. 439 (1934).

⁸ *Marrietta and North Georgia RR. v. Hilburn*, 75 Ga. 379 (1885); *North Chicago Rolling Mill v. Hyland*, 94 Ind. 448 (1883); *Baker v. Appleton and Co.*, 107 App. Div. 358, 95 N.Y.S. 125 (1905) *aff'd.*, 187 N.Y. 548, 80 N.E. 1104 (1907). The question of notice is one for the jury: *Toussignant v. Shafer Iron Co.*, 96 Mich. 87, 55 N.W. 681 (1893). The same extends to "labor contracts" as distinguished from "employment contracts": *Druck v. Antrim Lime Co.*, 177 Mich. 364, 143 N.W. 59 (1913); *Benson v. Lehigh Valley Coal Co.* 124 Minn. 222, 144 N.W. 774 (1914). See *North v. York Metal and Alloys Co.*, 281 Pa. 99, 126 Atl. 207 (1924), as to using the terms of the former contract to regulate what constitutes notice.

⁹ *Trustees of Soldiers' Orphans' Home v. Shaffer*, 63 Ill. 243 (1872); *Watson v. Guigno*, 204 N.Y. 535, 541, 98 N.E. 18, 20 (1913).

to employees to continue in their present positions, whether express or implied, will only apply to the workers' general positions, and they can be discharged at will despite the provisions of the former contract.¹⁰

All of the above employment relations are governed by an employment contract or a labor contract. An employment contract is one between the employer and employee as individual parties, and no two employees need have the same terms. The labor contract is one which covers a group of laborers and provides common rates for similar work. The labor contract is still essentially individual, as each employee is free to enter into secondary agreements with the employer, or the latter may give special benefits to select individuals.¹¹

A collective bargaining contract is quite different and is not individualized at all. The courts have clearly differentiated it from an employment contract by holding that the bargaining agreement merely governs the relationship of employer and employee and confers some benefits on all employees covered as a class; i.e., labor, while each employee still makes an individual employment contract with the employer.¹²

While labor and employment contracts are not binding on an unconsenting successor, a collective bargaining contract is not considered similar and is not subject to the standard rules governing the liabilities and obligations of successor corporations. A collective bargaining contract is a code intended to cover a variety of cases and cannot be expected to anticipate every eventuality.¹³ It is because of the different nature of this contract, from its two predecessors, that the field of labor law emerged. Yet, while the labor statutes have caused much change, it will be seen that some few areas within the field remained virtually unchanged.¹⁴

¹⁰ *Western Union RR. Co. v. Smith*, 75 Ill. 496 (1874); *Morrison v. Ogdensburg and Lake Champlain RR. Co.*, 52 Barbour (N.Y.) 173 (1868); *Aldridge v. Fore River Shipbuilding Co.*, 201 Mass. 131, 87 N.E. 485 (1909).

¹¹ SPENGLER AND KLEIN, *INTRODUCTION TO BUSINESS* 217 *et seq.* (2d ed. 1939).

¹² *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Division No. 1344 v. Tampa Electric Co.*, 47 So. 2d 13 (Fla. 1950).

¹³ *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964).

¹⁴ The pertinent provisions of the National Labor Relations Act (NLRA) are:

§ 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining. . . ." (29 U.S.C. § 157 (1965).)

§ 8(a) (1), (3), and (5): "(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title; . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or

DISSOLUTION, REORGANIZATION AND SHAMS

The area covering dissolution and reorganization was largely unchanged by the advent of the NLRA and related state acts. *Amelotte v. Jacob Dold Packing Co.*¹⁵ made it clear that a collective bargaining agreement only covers wages, hours and general working conditions and, while the contract runs for a stated term, there is no obligation to remain in business for that term or pay wages for the term as there is under an employment contract. While the employing corporation has a right to dissolve, the National Labor Relations Act (hereinafter referred to as the NLRA) has been held to require that this dissolution be in good faith for valid business reasons which may include the inability to pay higher costs and wages at a recently organized plant where the employer is already on the verge of severe financial loss.¹⁶ But where the employer admits that it is opposed to the union, and is in the greatest part motivated by this opposition, the court will not uphold the dissolution and will find an unfair labor practice under section 8(a)(5).¹⁷ The courts will refuse to consider the matter of intent where there is such a substantial financial loss as clearly indicates a valid reason for closing.¹⁸ The termination of the con-

condition of employment to encourage or discourage membership in any labor organization; . . .

"(5) to refuse to bargain collectively with the representatives of his employees, . . ." (29 U.S.C. § 158(a)(1),(3), and (5) (1965).)

§ 8(b)(3): "(b) It shall be an unfair labor practice for a labor organization or its agents—(3) to refuse to bargain collectively with an employer, . . ." (29 U.S.C. § 158(b)-(3) (1965).)

§ 8(d)(1) and (2): "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof . . .

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications; . . ." (29 U.S.C. § 158(d)(1) and (2) (1965).)

All section references in the text are to these NLRA provisions.

¹⁵ 173 Misc. 477, 17 N.Y.S.2d 929 (1940), *Aff'd.*, 260 App. Div. 984, 24 N.Y.S.2d 134 (1940). *Cf.*, *dicta* in *Union Drawn Steel Co. v. NLRB*, 109 F.2d 587, 592, 593 (3d Cir. 1940). *Accord*, *Division No. 1344 v. Tampa Electric Co.*, *supra* note 12.

¹⁶ *NLRB v. New England Web, Inc.*, 309 F.2d 696 (1st Cir. 1962); *Phillips v. Burlington Industries, Inc.*, 199 F. Supp. 589 (N.D.Ga. 1961).

¹⁷ *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

¹⁸ See *supra* note 16. *Cf.*, Note, 15 ALA. L. REV. 195 (1962).

tract must still conform to the requirements of section 8(d)(1) of the NLRA. But, as with many other obligations, the contractual obligation to arbitrate remains and is not ended by dissolution if service of notice of arbitration is made prior to actual dissolution.¹⁹

In considering reorganization, it should be noted that a company being managed by its debtors is no different than any other employer and cannot hide behind a fictitious change in structure at the end of the reorganization proceeding in order to avoid liability for the special debt of back pay.²⁰ In *NLRB v. Richards*,²¹ the corporation had gone through many changes in structure, ownership and location, and there was a three-year hiatus from doing business in a particular city. The court held that the resumption of operations in the old location was not a resumption of the former business so that the former collective bargaining agreement could not be applied.

The requirement of good faith brings up the area of sham changes and alter egos. This appears to be a very common method of attempting to avoid NLRB orders, but it is notoriously fraught with failure despite the many ways of doing it.²²

The first method of avoiding these orders is the shutting down of all or part of the plant, after unionizing, followed by leasing or subcontracting to a dummy corporation. Such actions constitute unfair labor practices under sections 8(a)(1) and (3).²³ Moreover, the refusal to bargain over the shutdown's effect on labor is also an unfair labor practice under section 8(a)(5).²⁴

Secondly, where a successor corporation or company is organized by the original one to take over its operations in order to avoid a union or NLRB order, there is clearly an unfair labor practice.²⁵ The Court set down its rule as to where the question should be determined in the following manner:

Whether there was a bona fide discontinuance and a true change of ownership or merely a disguised continuance of the old employer is a question of fact

¹⁹ Application of Delphi Mfg. Co., 15 Misc. 2d 337, 157 N.Y.S.2d 412 (1956). As to merger, see *supra* note 13.

²⁰ NLRB v. Baldwin Locomotive Works, 128 F.2d 39 (3d Cir. 1942).

²¹ 265 F.2d 855, 859 (3d Cir. 1959).

²² Comment, 19 N.Y.U. INTRA. L. REV. 112, 121-122 (1963).

²³ NLRB v. O'Keefe and Merritt Mfg. Co., 178 F.2d 445 (9th Cir. 1949); *Bon Hennings Lumber Co. v. NLRB*, 308 F.2d 548 (9th Cir. 1962).

²⁴ *Textile Workers v. Darlington Mfg. Co.*, *supra* note 17; *NLRB v. United States Air Conditioning Co.*, 302 F.2d 280 (1st Cir. 1962).

²⁵ *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942); *NLRB v. Hopwood Retinning Co.*, 98 F.2d 97 (2d Cir. 1938), *reaffirmed on contempt hearing*, 104 F.2d 302 (2d Cir. 1939); *De Bardleben v. NLRB*, 135 F.2d 13 (5th Cir. 1943).

properly to be resolved by the Board [NLRB] in direct resort to it, or by the court, if contempt proceedings are instituted.²⁶

In *NLRB v. Deena Artware, Inc.*,²⁷ Artware was one of three Kentucky corporations which were wholly-owned subsidiaries, except for qualifying shares, of Deena Products, Inc., an Illinois corporation. Deena was in turn wholly owned by one Weiner, except for qualifying shares, and all the directors of the various corporations were Weiner, his wife, his son and his secretary. In order to avoid the effect of NLRB orders decreeing back pay and reinstatement for certain employees who were discharged after a strike,²⁸ Weiner used various financial artifices to siphon Artware's assets off to Deena Products and one of the other subsidiaries, including all plants and machinery.²⁹ On certiorari regarding certain contempt proceedings, the Supreme Court stated:

We think the Board [NLRB] is entitled to show that these separate corporations are not what they appear to be, that in truth they are but divisions or departments of a "single enterprise."³⁰

The court then quoted with approval a statement by Justice Cardozo:

Dominion may be so complete, interference so obtrusive, that by the rule of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice.³¹

Thirdly, changes which do not result in any alteration of the financial structure or net income, or where the income is paid to the true owner as rent or in some similar manner, are held to be "disguised continuances" under the rule in the *Southport* case, even where there is some change in product line or a change from a corporation to a partnership.³²

Fourthly, when there is a structural change which generally leaves personnel and practices unaltered, save for the elimination of union members, there is a clear unfair labor practice which violates rights set out in section seven of the NLRA. The effect of the labor legislation can clearly be

²⁶ *Southport Petroleum Co. v. NLRB*, *supra* note 25 at 106 (1942). This case also goes beyond mere financial change to look at the actual personnel exercising control over the company.

²⁷ 361 U.S. 398 (1960).

²⁸ 86 N.L.R.B. 732 (1949), *enforced*, *NLRB v. Deena Artware, Inc.* 198 F.2d 645 (1952); 112 N.L.R.B. 371 (1955), *enforced*, *NLRB v. Deena Artware, Inc.*, 228 F.2d 870.

²⁹ Facts taken from Justice Frankfurter's concurring opinion, *supra* note 27 at 404-09.

³⁰ *Supra* note 27 at 402.

³¹ *Supra* note 27 at 403, citing from *Berkey v. Third Avenue R. Co.*, 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926). For a long list of citations concerning various sham arrangements see cases cited in footnotes 1 through 5, 361 U.S. at 403.

³² *NLRB v. Adel Clay Products*, 134 F.2d 342 (8th Cir. 1943); *NLRB v. E. C. Brown*, 184 F.2d 829 (2d Cir. 1950); *NLRB v. Lunder Shoe Corp.*, 211 F.2d 284, 285, 287 (1st Cir. 1954), where there was a "sale" from father to son; and *NLRB v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir. 1960).

seen in this area. In *Berry v. Old South Engraving Co.*,³³ prior to the NLRA, it was found that an employer had set up a new corporation which performed the same functions as its predecessor except that eleven union employees were replaced by twelve non-union workers. The court held that since the organizing of the new corporation was without fraud, the discharges were valid due to the fact that the requisite one-week notice before discharge was given in accordance with the collective bargaining contract. Thirty years later, the result was just the opposite, the only difference in the facts being that the new company was located one-half mile from the old one.³⁴ The court found obvious violations of sections 8(a)(1) and 8(a)(3). Since there was also a refusal to bargain, the court also found an unfair labor practice in violation of section 8(a)(5), and this is now the general position of the courts in these cases.³⁵

CLOSING DOWN

Closely allied to the problems of shams, alter egos and dissolutions is that of the wrongful closing or threat to close. The prohibition by section 8(a)(1) of any interference with the protected rights of section seven to self-organization and freedom of choice in selecting representatives are the major concerns in this area. The simplest type of case is also the most common in this area, and it lies at one end of a spectrum whose areas of decision become more and more gray as the case becomes more complex. The simple case is one where the employer, prior to an election during an organizing drive, makes a straight forward statement that he would rather close down than accede to the union if the workers voted for it. This type of coercion is uniformly condemned by the courts.³⁶ When this coercion is coupled with the discharge of some suspected union activists, the employer can also be charged with violations of section 8(a)(3) of the NLRA.³⁷ Moreover, it does not matter whether the cause of the threat is a certification election or a demand for a union shop.³⁸

³³ 283 Mass. 441, 186 N.E. 601 (1933).

³⁴ NLRB v. Royal Oak Tool and Machine Co., 320 F.2d 77 (6th Cir. 1963).

³⁵ See also, *Cardinale Trucking Co.*, 5 NLRB 220 (1938); Comment, *supra* note 22 at 122 *et seq.*

³⁶ *Peoples Motor Express, Inc. v. NLRB*, 165 F.2d 903 (4th Cir. 1948); *NLRB v. Ferguson*, 257 F.2d 88, 90 (5th Cir., 1958); *NLRB v. Taitel*, 261 F.2d 1, 3 (7th Cir. 1958), *cert. denied*, 359 U.S. 944; *NLRB v. Hudson Pulp and Paper Corp.*, 273 F.2d 660 (5th Cir. 1960); *NLRB v. Dan River Mills, Inc.*, 274 F.2d 381, 384 (5th Cir. 1960); *NLRB v. Byrds Mfg. Co.*, 324 F.2d 329 (8th Cir. 1963); and *NLRB v. South Rambler Co.*, 324 F.2d 447 (8th Cir. 1963). See also, *Von der Ahe Van Lines*, 1965 C.C.H. N.L.R.B. ¶ 9769, wherein the employer threatened to blow up his plant if the union won bargaining rights.

³⁷ *NLRB v. Marydale Products Co.*, 311 F.2d 890 (5th Cir. 1963).

³⁸ *NLRB v. W. T. Grant Co.*, 199 F.2d 711 (9th Cir. 1952), *cert. den.*, 344 U.S. 928.

Stating the coercive threat in more delicate terms, by not making it as direct, has no effect on the courts' decisions, even where there is another part of the employer's operation to which the work can be transferred.³⁹ Further down into the gray area of the spectrum, the courts still give every benefit of the doubt to the union. The courts will find coercion where the employer's statement is that it is "likely" it will go out of business if the employees vote for a union,⁴⁰ and where the statement is a mere suggestion of the possibility, so long as it is in the face of a certification election.⁴¹ Even in instances where the company was on the margin of loss or already had an unprofitable operation, while going out of business could not be attacked, unfair labor practices were found because the employer's statements as to the seriousness of the financial trouble were stated in such a way as possibly to influence the voting prior to the election.⁴² A very recent decision has also extended this to a case where the election was between a certified union and a rival, and the employer stated that he was barely able to afford one union and would probably have to close one plant if the rival were chosen for that plant.⁴³

In the case of *Order of RR. Telegraphers v. Chicago & N.W.R.R.*,⁴⁴ the railroad wanted to close some of its stations and the union resisted and discussed it with the railroad. The union was found to have bargained with reasonable effort.⁴⁵ Furthermore, since the company had bargained with the union over this issue, it was held that there was a labor dispute within the meaning of the Norris-LaGuardia Act of 1932.⁴⁶ The company was, therefore, powerless to get an injunction to restrain the union from striking in order to win its point.

*Textile Workers v. Darlington Mfg. Co.*⁴⁷ was a case involving a threat to close, and an actual closing, of a subsidiary corporation whose ownership pattern was similar to that in the *Deena Artware* case. The subsidiary was one of a group of seventeen subsidiaries manufacturing textiles which were marketed by a single marketing company, Deering Milliken. This

³⁹ NLRB v. Todd Co., Inc., 173 F.2d 705 (2d Cir. 1949), cert. den., 340 U.S. 864 (1950); NLRB v. West Point Mfg. Co., 245 F.2d 783, 784 (5th Cir. 1957).

⁴⁰ NLRB v. Clearfield Cheese, 322 F.2d 89 (3d Cir. 1963).

⁴¹ NLRB v. Asheville Hosiery Co., 108 F.2d 288, 293 (5th Cir. 1939); NLRB v. Mall Tool Co., 119 F.2d 700 (7th Cir. 1941).

⁴² NLRB v. Hoppes Mfg. Co., 170 F.2d 962 (6th Cir. 1948); NLRB v. Drennon Food Products Co., 272 F.2d 23 (5th Cir. 1959).

⁴³ Majestic Molded Products v. NLRB, 330 F.2d 603 (2d Cir. 1964).

⁴⁴ 362 U.S. 330 (1960).

⁴⁵ 45 U.S.C. §§ 152(1), 156. These provisions are similar to the good faith provisions of section 8(b)(3), supra note 14.

⁴⁶ 29 U.S.C. § 101-115, as amended.

⁴⁷ Supra note 17.

company was in turn controlled by the Milliken family. The president of Darlington, Roger Milliken, threatened to close the mill if the Textile Workers Union won a representational election which was coming up six months later. When the union did win, and Milliken was unsuccessful in getting the employees to sign petitions disavowing the union, the mill was closed. The Court stated:

[i]t is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated. [Citations omitted.] A violation of § 8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive. Whatever may be the limits of § 8(a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 9(a)(1), whether or not they involved sound business judgment, unless they also violated § 8(a)(3). Thus it is not questioned in this case that an employer has the right to terminate his business, whatever the impact of such action on concerted activities, if the decision to close is motivated by other than discriminatory reasons. *But such action, if discriminatorily motivated, is encompassed within the literal language of § 8(a)(3).*⁴⁸

Justice Harlan seemed motivated by a desire to preserve an owner's right to close down his business at any time he may so wish. However, if there had been only the threat to close, and not an actual closing, the court probably would have found a clear violation of section 8(a)(1) of the NLRA.⁴⁹ While Justice Harlan concluded that Darlington, as a single enterprise, had the right to close and would not violate the NLRA in so doing, he held that if Darlington were not viewed as a single enterprise, the result would not be the same. The opinion further held:

By analogy to those cases involving a continuing enterprise we are constrained to hold, . . . , that a partial closing is an unfair labor practice under § 8(a)(3) if motivated by purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.⁵⁰

The Court then remanded the case for further findings regarding the effect of the close on other Deering Milliken plants.

RELOCATION, MERGER AND SALE

The problems involved with relocation are very similar to those found in the closing of an operation. Again, one must be sure that company actions do not interfere with union activity or constitute a refusal to bargain. The NLRB has tried to go further and prohibit employers from relocating in anticipation of union demands or elections, but it failed and,

⁴⁸ *Supra* note 17 at 269 (emphasis added). The NLRB had reasoned that since the closing was a violation of section 8(a)(3), the gradual discharges of all employees constituted violation of section 8(a)(1). *Id.* at 267, n. 6.

⁴⁹ See cases *supra* notes 36-43.

⁵⁰ *Supra* note 17 at 275.

as with closing, any independent economic motive will suffice to void the unfair labor practice charge.⁵¹ A recent series of cases has pointed out that the courts will hold a threat to relocate as much an unfair labor practice under section 8(a)(1) of the NLRA as a threat to close.⁵² While the employer is not permitted to anticipate union demands, once they are made, he is free to accelerate a transfer to a second plant as a result of his ability to foresee the increase in costs, but the refusal to bargain over the effect of the relocation is still an unfair labor practice.⁵³

Relocation is a more refined situation than closing, since the latter's problems usually arise in the heat of the organizing, while the former's are frequently the subject of collective bargaining. This means that employer and union are better able to settle these differences in a manner more acceptable to both, and, therefore, when these problems come to court, they are frequently in the form of a contract action or an enforcement of arbitration proceedings rather than unfair labor practice charges. An early decision held that where the contract provided that the employer should not move his factory outside the city during the life of the agreement, an injunction would lie to prevent the employer from opening up anywhere else in the state, even though the court would not make the employer return and continue to operate at a loss.⁵⁴

A later decision, seemingly *contra*, perhaps hinges on the fact that the business had not yet effected its relocation, and the court felt free to enjoin the change of locale and a closing of the operation.⁵⁵ But, where the contract expressly covered only a certain area, its seniority provisions could not be extended to a new state which was outside the jurisdiction of the contract.⁵⁶ The courts have upheld the extension of union security provisions to new locations and breach of contract actions with extensive damages awarded to the union for dues lost, but only where the parties had freely bargained for such clauses in the contract.⁵⁷ Generally, it may be said that the courts favor the parties coming to their own agreement ei-

⁵¹ Note, 77 HARV. L. REV. 1100, 1101-02 (1964).

⁵² *W. Ralston & Co., Inc.*, 131 NLRB 912 (1961), *enforced*, NLRB v. *W. Ralston & Co., Inc.*, 298 F.2d 927 (2d Cir. 1962) (per curiam); *Ken-Lee, Inc. v. NLRB*, 311 F.2d 608 (5th Cir., 1963); *Marshfield Steel Co. v. NLRB*, 324 F.2d 333 (8th Cir. 1963); and *A. P. Green Fire Brick Co. v. NLRB*, 326 F.2d 910, 913 (8th Cir. 1964).

⁵³ *NLRB v. Rapid Bindery Inc.*, 293 F.2d 170 (2d Cir. 1961).

⁵⁴ *Goldstein v. International Ladies Garment Workers Union*, 328 Pa. 385, 196 Atl. 43 (1938).

⁵⁵ *Application of Pocketbook Workers Union of New York*, 14 Misc. 2d 268, 149 N.Y.S.2d 56 (1956).

⁵⁶ *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143 (6th Cir. 1962).

⁵⁷ *International Union, U.A.W.-C.I.O. v. NLRB*, 231 F.2d 237 (7th Cir. 1956); *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962).

ther by contract or by arbitration and will readily enforce these agreements or results.

The area of merger usually causes little trouble other than questions of appropriate bargaining unit and representation which are better left to a consideration of those topics. It can be noted briefly that the courts will favor the principle of parity as to seniority, as opposed to subordination, and where an accretion to the appropriate unit can be found in lieu of a new unit, the former will be favored.⁵⁸ But the successor must be sure to bargain or arbitrate with the old union as to the effect of the merger.

A merger does not terminate the rights of the disappearing corporation and its local union. Since national labor policy favors arbitration over tests of strength,⁵⁹ if an intention to arbitrate can be found from a fair interpretation of the collective bargaining agreement, it will be favored. In *John Wiley & Sons, Inc., v. Livingston*,⁶⁰ the Court held:

[t]he disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all the rights of the employees covered by the agreement, and that, . . . , the successor employer may be required to arbitrate with the union under the agreement.⁶¹

The case also holds that where union grievances, concerning conditions for which specific provisions had been made in the collective bargaining contract, are not clearly unreasonable, and the contract contains an arbitration clause, they must be arbitrated, notwithstanding the merger. It is of no effect that the union no longer represented a majority of the employees after the merger took place.

Most of the other problems involving merger are similar to many involving liquidation, sale, reorganization, etc., and are properly called "successor problems." These hinge on the interpretation of that part of an NLRB order which extends to a corporation's "successors and assigns." This is an area in itself, since the decision in each case depends very much on the facts of that individual case.

Sale is virtually the same as merger, even to the extent that most of it properly belongs under the head of "successor problems." It should be noted that a sale, unlike merger, works a discharge of employees, and contractual obligations regarding severance pay must be observed even

⁵⁸ *Commercial Telegraphers Union v. Western Union Telegraph Co. Inc.*, 53 F. Supp. 90 (D.D.C. 1943) and *NLRB v. J. W. Rex Co.*, 243 F.2d 356 (3d Cir. 1957).

⁵⁹ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1956); *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960); *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

⁶⁰ 376 U.S. 543 (1964). The Court gave enforcement under section 301 of the Labor Management Relations Act (29 U.S.C. § 185, 1965).

⁶¹ *Id.* at 548.

where workers continue in their former positions without interruption.⁶² Also, in sales, one must look closely at the contract of sale to ascertain what obligations are assumed and note those which are expressly refused by the purchaser.⁶³ In general, a sale of assets will not continue a collective bargaining contract unless there is fraud, alter ego or assumption of obligations in the contract.⁶⁴

REFUSAL TO BARGAIN AND SUBCONTRACTING

In the 1960's, the courts started to wield the weapon of prohibiting the refusal to bargain, coupled with the addition of subcontracting as an added "change in operation." It was in 1952 that the courts first handed down a strong interpretation of the refusal to bargain.⁶⁵ In 1960, it was held that where a business operation was losing money and the entire company was barely profitable, the unprofitable operation could be subcontracted when it was foreseeable that impending unionization of the workers involved would raise costs in the operation.⁶⁶ It was held that there was no unfair practice either in closing the operation without notice or in refusing to bargain. This appeared to be a set-back until, in the case of *Royal Optical Mfg. Co.*,⁶⁷ the NLRB held that the concealing of plans to relocate was not a management privilege and constituted a refusal to bargain in good faith under section 8(a)(5) of the NLRA. This case followed *Zdanok v. Glidden*,⁶⁸ which held that a mere change in location cannot unilaterally end a contract's seniority provisions, and that there is an obligation to maintain prior seniority. It also held, in effect, that management must now spell out in the contract those management rights of which it wanted to be assured as the courts will look to the protection of the workers above all.⁶⁹ Two more cases further indicated the general shift by holding that the failure of the employer even to tell the union

⁶² *Mathews v. Minnesota Tribune Co.*, 215 Minn. 369, 10 N.W.2d 230 (1943). But see *infra*, note 78.

⁶³ *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*, 189 F.2d 177 (9th Cir. 1951); *Erie Coach Co. v. Erie Bus Co.*, 399 Pa. 76, 160 A.2d 405 (1960).

⁶⁴ Comment, *supra* note 22 at 124.

⁶⁵ *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952).

⁶⁶ *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960).

⁶⁷ 135 NLRB 64 (1962).

⁶⁸ 288 F.2d 99 (2d Cir. 1961), *affirmed on other grounds*, 370 U.S. 530 (1962). See Comment, 14 LAB. L.J. 388 (1963).

⁶⁹ Comment, 47 MINN. L. REV. 505, 527, 529 (1963). Cf., Comment, 14 LAB. L.J. 366, 372, 373 (1963), wherein the author seems to accuse the court of writing its own legislation while at the same time he applauds the result reached.

that there was nothing to bargain about in a merger situation,⁷⁰ and that not bargaining about the effect of a shutdown followed by a subcontract, were refusals to bargain.⁷¹ In *Town and Country Mfg. Co., Inc. v. NLRB*⁷² and *Fibreboard Paper Products Corp. v. NLRB*,⁷³ it was held that before subcontracting of a major operation could be undertaken, the decision to subcontract, as well as the effect of the decision, must be the subject of collective bargaining. In each case, the refusal to bargain was found to be a violation of section 8(a)(5). However, *NLRB v. Adams Dairy, Inc.*⁷⁴ held on similar facts that the employer need not bargain as to the decision to subcontract, as this is a management right. It was still considered an unfair labor practice to refuse to bargain collectively as to the effect of the decision.

The Supreme Court granted certiorari in *Fibreboard* to resolve the conflict in the circuits.⁷⁵ In *Fibreboard*, the union gave notice and offered to meet with the corporation pursuant to sections 8(d)(1) and (2) of the NLRA. Four days prior to the termination of the contract, the corporation met with the union and announced its decision to terminate the contract of the plant's maintenance unit and to subcontract the work to an independent concern in an effort to cut costs. The Court held that such a subcontracting arrangement was a "condition of employment" within the scope of section 8(d) and followed its opinion in *Local 24, Teamsters Union v. Oliver*⁷⁶ on the same topic.⁷⁷ The Court then turned to the question of reinstatement and affirmed the order of the NLRB for reinstatement with back pay for the corporation's violation of section 8(a)(5).⁷⁸ Chief Justice Warren spelled out the public policy considerations when he stated:

⁷⁰ *NLRB v. Aluminum Tubular Corp.*, 299 F.2d 595 (2d Cir. 1962).

⁷¹ *NLRB v. United States Air Conditioning Co.*, *supra* note 24. *Contra*, *NLRB v. Lassing*, note 66 *supra*.

⁷² 316 F.2d 846 (5th Cir. 1963), *enforcing*, 136 N.L.R.B. 1022 (1962).

⁷³ 322 F.2d 411 (D.C. Cir. 1963), *enforcing*, 138 N.L.R.B. 550 (1962), *aff'd.*, 379 U.S. 203 (1964).

⁷⁴ 322 F.2d 553 (8th Cir. 1963), *vacated and remanded*, 379 U.S. 644 (1965) (per curiam).

⁷⁵ *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 208-09 (1965). Three other circuits had taken the *Adams Dairy* position prior to the decision in that case. *Id.* at 224, n. 11. See also, Farmer, *Bargaining Requirements In Connection with Subcontracting, Plant Removal, Sale of Business, Merger and Consolidation*, 14 LAB. L.J. 957, 960-1, 963, 966-7 (1963).

⁷⁶ 358 U.S. 283 (1959).

⁷⁷ *Supra* note 7 5at 212-15.

⁷⁸ *Id.* at 215-17. But see *Woody v. Sterling Aluminum Products, Inc.*, 243 F. Supp. 755 (E.D. Mo. 1965), wherein it was held that where a plant was closed at the termination of the contract, severance pay would not be given as the situation was not provided for in the contract.

[o]ne of the primary purposes of the Act [NLRA] is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediating influences of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43. *To hold, as the Board [NLRB] has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act* by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.⁷⁹

PREVENTIVE BARGAINING

Collective bargaining in situations such as those covered in this comment is apt to take place in the face of very bitter attitudes on the part of both management and labor. Management resents having to bargain with labor on an issue or decision which had always been considered one of management's prerogatives.⁸⁰ Labor is sorely distressed by the prospect of unemployment which will face all or part of the workers at the plant. The union also faces a substantial, if not complete, loss of membership and dues. Much of the bitterness may be avoided if these issues were bargained over before they actually arise. Thus, preservation of seniority rights in the event of a sale, merger or relocation is a proper and sensible subject for collective bargaining at the regular contract bargaining time whether or not management is actually contemplating such action.

This type of preventive and prospective bargaining only makes good sense for both sides. It safeguards management from a possible violation of section 8(a)(5) at a time when management may well feel that there is little left to be said. It also can save labor the cost and time of expensive suits for enforcement of its bargaining rights under section 301 of the Labor Management Relations Act.⁸¹ In the event of any inability to agree on some of the specifics, both sides can turn to an arbitration clause similar to the one upheld in the *Wiley* case.⁸² Such solutions help avoid a costly strike which can only bring harm to both management and labor with its resultant animosity, ruinous expense and loss of wages.

In situations involving relocation and subcontracting, bargaining will go best if both sides are willing to sit down and discuss actual facts and figures relating to cost. There is always the possibility that labor can come up with a solution that management had not foreseen with regard to reducing costs and eliminating the need for an action which, absent "anti-

⁷⁹ *Id.* at 211 (emphasis added).

⁸⁰ See text at *supra* note 48.

⁸¹ See *supra* note 60, which discusses this point in relation to 29 U.S.C. § 185 (1965).

⁸² *Supra* note 60.

union animus,"⁸³ neither side particularly desires, but management views as a necessity.

Perhaps this is the place where cost accounting and management financial analysis can aid both sides. It is not proposed that management relinquish its right to make its own decisions. Management should, however, attempt, in good faith, to bargain with the union as to these problems which so vitally concern all the employees. Labor, for its part, must be prepared to devise and advance solutions to problems which are primarily management's. Blind insistence on wage increases, when pressed against a company which is seriously considering liquidation due to operating losses, will serve only to affirm management's tentative decision to close down.⁸⁴ Union resistance to more economical and automated modes of production may have the same result. Yet, too great a concession on labor's part may result in a situation similar to that which exists in some parts of West Virginia and Pennsylvania where a few mine workers are enjoying excellent wages and the companies have high efficiency at the cost of thousands of persons being unemployed. This is probably best avoided by more gradual phasing of the changeovers through attrition, as achieved in the railroad industry, and by more extensive use of federal retraining programs. Both sides must bear these considerations in mind when facing such a situation.

Lastly, preventive bargaining can dispose of many of the technical problems which may arise from any of the actions considered in this comment. A contract can specify whether it continues in effect after a sale, liquidation, or closing down, provide for which solutions to the terminal problems shall govern and whether grievance procedures shall continue.⁸⁵ Such a contract would avoid the need for resort to the courts or to federal administrative boards in lengthy and costly grievance procedures.⁸⁶ Lastly, preventive bargaining would further promote labor peace at a time when it is most needed.

⁸³ *Supra* note 17 at 267. See *N.L.R.B. v. Friedman*, —F.2d —, 52 L.C. 16, 680 (3rd Cir. 1965), wherein there was a refusal to bargain by the company over the contracting out of an operation. The court affirmed a district court order enforcing a subpoena requiring the employer to turn over certain financial records to the union for its expert to analyze for support of charges of unfair labor practices under sections 8(a)(1)(3).

⁸⁴ Labor must take care not to violate section 8(b)(3) of the NLRA under such circumstances.

⁸⁵ This would predispose of some of the problems raised in the *Wiley* case, *supra* note 60; *Republic Steel v. Maddox*, 379 U.S. 650 (1965); and *Fibreboard Paper Products Corp. v. East Bay Union of Machinists*, 344 F.2d 300 (1965), *cert. den.* Oct. 11, 1965. (34 U.S.L. WEEK 3119, Oct. 12, 1965). See also *Woody v. Sterling Aluminum Products, Inc.*, *supra* note 78.

⁸⁶ *Cf.*, *B. of L. F. & E. v. Central of Ga. Ry. Co.*, 341 F.2d 215 (1965), *cert. den.* Oct. 11, 1965. (34 U.S.L. WEEK 3119, Oct. 12, 1965.)