MANAGEMENT PREROGATIVES, PLANT CLOSINGS, AND THE NLRA*

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Decisions in many areas of labor law turn not on the common wisdom, *i.e.*, that legal results are based upon an analysis of the text, legislative history, and the asserted policies of the National Labor Relations Act, but on a set of underlying values and assumptions. These implicitly assumed values help explain what is an incoherent body of labor relations law. Many of these implicit values can be found in common law decisions; this suggests that as far as judges are concerned, the revolution of the 1930's, which led to the passage of the Taft-Hartley Act, accomplished much less than is usually believed.

The following discussion is only a portion of a longer analysis of the scope of the obligation to bargain, the substantive area where the Court has generally been clearer about the implicit values with which their analysis begins and sometimes ends. All authors, no doubt, believe that the whole is greater than the sum of the parts, so the reader should be aware that this section supports a series of propositions based upon an analysis of a number of substantive areas which appear in other portions of my book.

What is the goal of legislation regulating labor-management relations? The answer to this question varies with the view of the respondent:

> Even where collective bargaining exists, the promise of industrial democracy has only been partially fulfilled, for neither the law nor the practice has accepted employees as full partners in the enterprise.[1]

> This Court has spent many hours searching for a way to cut to the heart of the economic reality—that obsolescence and market forces demand the close of the Mahoning Valley plants, and yet the lives of 3500 workers and their families and the supporting Youngstown community cannot be dismissed as inconsequential. United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the community for so many years.

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1. Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEVE. ST. L. REV. 29, 41 (1979).

> Unfortunately, the mechanism to reach this ideal settlement, to recognize this new property right, is not now in existence in the code of laws of our nation.[2]
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> . . . [I]n establishing what issues must be submitted to the process of bargaining, Congress has no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed.[3]

The most commonly expressed goal of the National Labor Relations Act (NLRA or Wagner Act) was the goal of achieving industrial peace.[4] Thus the Senate report on the Wagner Act cited the large number of strikes, the number of employees involved and the estimated cost of these disputes. The report stressed that the Act would attempt to eliminate neither all causes of disputes nor the exercise of economic force since "disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces . . . ."[5] There was an attempt to eliminate disputes caused by the failure of employers to recognize unions and to utilize the process of collective bargaining. The Act was designed to prevent a large proportion of bitter disputes by giving legal status to the procedure of collective bargaining and by setting up machinery to facilitate it.[6] Moreover, the very process of negotiation, presumably leading to information sharing and creating mutual respect, was thought to lessen the incidence of strife.

The institution of collective bargaining, leading to mutually respected trade agreements, had long been the goal of certain employers, who were seeking industrial order, and of many unions. During the Progressive Era, a major source of economic unpredictability and instability involved the organization of production.[7] For example, attempts to control competition, especially in wage rates, led to interstate compacts in bituminous coal production in 1885. These compacts collapsed four years later due in part to

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2. United Steelworkers of America, Local 1330 v. U.S. Steel Corp., 103 L.R.R.M. (BNA) 2925, 2931-32 (N.D. Ohio, 1980).

3. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 676 (1981).

4. S. REP. No. 573, 7th Cong., 1st Sess. (1935).

5. *Id.* at 2.

6. Thus the Act in its statement of policy was designed to "eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and the designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 49 Stat. 449; *see generally* H. MILLIS AND E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICIES AND NATIONAL LABOR RELATIONS (1950).

7. *See generally* B. RAMIREZ, WHEN WORKERS FIGHT: THE POLITICS OF INDUSTRIAL RELATIONS IN THE PROGRESSIVE ERA, 1898-1916 (1978).

the absence of a strong mine workers union capable of keeping recalcitrant operators in line.[8]

In response to this instability, collective bargaining was favorably regarded by entrepreneurs such as Marc Hanna, who led the National Civil Federation in an attempt to foster labor-management cooperation. Hanna believed that the recognition of labor unions would introduce much needed stability into labor-management relations, defusing the perceived threat flowing from the current confrontation.[9] Hanna wanted labor "Americanized in the best sense, and thoroughly educated to an understanding of its responsibilities, and in this way to make it the ally of the capitalist, rather than a foe with which to grapple."[10] The use of collective bargaining to secure a "depoliticalization" of industrial relations was also widely recognized by many reformers, including John Commons.[11]

The second major objective of the Act was to encourage through collective bargaining the creation of equality of bargaining power between employers and employees. The aim was to increase the bargaining strength of employees and thus increase their wages. The low level of employee wages contributed to the inability of consumers to relieve the market of an ever-increasing flow of goods. Increasing wages, therefore, would serve to counteract depressions. The Senate report on the Act thus stressed the need to eliminate the long-standing disparity between "production and consumption."[12] The report also expressly referred to minimum wage and maximum hour legislation as an attempt to stabilize competitive conditions and create adequate consumer purchasing power throughout the nation. The scope of bargaining, however, was never made clear. Moreover, it was perhaps obvious to the drafters of the legislation that bargaining itself—even though statutorily required—could not necessarily usher in a period of "equal bargaining power."

Despite the extensive goals and potentially broad scope of the Act, early judicial opinions which favored unions generally stressed the limitations of the Act. As long ago as *NLRB v. Jones & Laughlin Steel Corp.*,[13] the Supreme Court held that although the Act required bargaining, it did not require or "compel" agreement; nor would the Act interfere with "the normal exercise of the right of the employer to select its employees or to discharge them" so long as the employer's actions did not violate the

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8. *Id.* at 21. Ramirez suggests that some operators favored the rise of the UMW and looked upon some early strikes as necessary to relieve the market of coal and consequently increase coal prices.

9. *See generally id.* at 49-84. Ramirez cites to M. GREEN, THE NATIONAL CIVIL FEDERATION AND THE AMERICAN LABOR MOVEMENT, 1900-1925 43-50 (1956).

10. M. HANNA, MARC HANNA, HIS BOOK 32 (1904); *see* RAMIREZ, *supra* note 7, at 65-84; J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1918 (1968).

11. J. COMMONS, MYSELF 169-70 (1934) (Commons discusses his inability to typify labor relations in political terms).

12. *See also* 79 CONG. REC. S7567 (daily ed. May 15, 1935) (statement of Sen. Wagner).

13. 301 U.S. 1 (1937).

statute.[14] The Court clearly needed to assuage hostile industrialists in 1937; however, the continued use of such language suggests that something more is at stake than temporary appeasement. Do not fear—it seems to say—private ordering is still the order of the day except for the narrow incursions required by the NLRA. The Act does not herald the development of a new "legal consciousness," rather, the dominant views of the past will limit the scope of change. Moreover, the Supreme Court's tendency to mask "the unavoidably ideological content of judicial action"[15] is merely a reflection of a commonly observable tendency of judges, clearly recognized long ago by Judge Oliver Wendell Holmes in labor cases such as *Plant v. Woods*[16] and *Vegelahn v. Gunter.*[17]

Some historians argue that the New Deal "effected a veritable revolution in American Government."[18] They see the Wagner Act as "one of the most drastic legislative innovations of the decade."[19] Leuchtenburg noted that while most employers fought the bill no one "fully understood why Congress passed so radical a law with so little opposition and by such overwhelming margins."[20]

The Wagner Act was presented and passed at a very propitious time. The debate went rapidly, opposition in Congress was feeble and even the Senate vote (63-12) surprised Senator Wagner. Indeed, 1935 may have been the "apogee of the New Deal as a progressive domestic reform movement. The influence of labor was at its height . . . ."[21]

Many of the judicial interpretations of the Wagner Act, however, seem inconsistent with this commonly expressed perception of the New Deal.[22] Perhaps the Act now seems more radical than it really was in 1935. One of its expressed goals, after all, was to contain radical labor elements and to institutionalize labor disputes within the confines of the capitalistic order.[23]

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14. *Id.* at 45.

15. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941*, 62 MINN. L. REV. 265, 302 (1978).

16. Plant v. Woods, 176 Mass. 492, 504, 57 N.E. 1011, 1015 (1899) (Holmes, C.J., dissenting).

17. Vegelahn v. Gunter, 167 Mass. 92, 44 N.E. 1077, 1079 (1896) (Holmes, J. dissenting).

18. Perlman, *Labor and the New Deal in Historical Perspective*, in LABOR AND THE NEW DEAL 367 (Derber & Young eds. 1957).

19. W.E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 151 (1963) [hereinafter cited as Leuchtenburg].

20. *Id.* at 151.

21. I. BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 116 (1950). Irving Bernstein also suggests, however, that many legislators, convinced of the Act's unconstitutionality, were willing to shift the onus of defeat to the Supreme Court. *Id.*

22. LEUCHTENBURG, *supra* note 19, at 336.

23. As noted in an earlier chapter, the Wagner Act was not actually a part of the New Deal because Roosevelt did not really support it. He did not seem to understand or to sympathize with organized labor's problems, nor did he seem to recognize the possible political dividends in sponsoring pro-labor legislation. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in TOWARDS A NEW PAST: DISSENTING ESSAYS IN

Thus, the views of the old National Civic Federation and John Commons were reflected in the debates (although their weight should not be overestimated). It is also true that neither the AFL nor the CIO, founded only after the Act's passage, challenged capitalistic norms. Others have argued that the New Deal, rather than breaking sharply with American traditions, created institutions which protected American capitalism from the potential damage created by major business cycles. Although the codification of labor dispute resolution provided "procedural restraints," Paul Conkin and other commentators have argued that these were "necessary for security and ordered growth."[24] The courts equated private property with the private right to manage the means of production, and this equation seems to have carried over in the interpretation of the Wagner Act.[25] Like other legislation in the 1930's, the Wagner Act was partially supported because of its presumed Keynesian effect: unions would avoid depressionary wage spirals.

Assessments of the original purposes of legislation often appear at odds with the Act's consequences. The following materials will reveal the extent to which certain goals of the Wagner Act, such as those of industrial democracy and equality of bargaining power, are routinely ignored by the courts. Instead, most pronounced in the bargaining area is the never-stated goal of protecting inherent managerial prerogatives *from* collective bargaining.

AMERICAN HISTORY 203 (B. Bernstein ed. 1968) [hereinafter referred to as B. Bernstein]. FDR supported Wagner's bill only when passage was assured. *See id.* at 274; W. LEUCHTENBURG, *supra* note 19, at 150-51. Secretary of Labor Frances Perkins admitted that she had "little sympathy with the bill." Columbia Oral History Collection, VII, 138, 147, *quoted in* LEUCHTENBURG, *supra* note 19, at 151.

24. *See, e.g.*, P. CONKIN, THE NEW DEAL (1967).

25. *Id.* at 55. William Bremer has argued that the New Deal relief programs reflected traditional cultural norms such as self-help and individual initiative. Innovations, he argues, tended to be restricted to the "confines of the capitalistic order." Bremer, *Along the "American Way": The New Deal's Work Relief Program for the Unemployed*, 62 J. AM. HISTORY 636-68 (1975).

Conkin argues that a type of "welfare" capitalism has become the established system in America, a system which sounds—but is not—daring and progressive. CONKIN, *supra* note 24, at 54. Private property and free enterprise—meaning the private right to manage the means of production—were indispensible components of the faith. Everyone should have the right to own and manage or at least to share in the ownership and management of productive property. As a result, the "faith survived but not the sustaining environment." *Id.* at 55. An "ersatz type of opportunity—to work for other men, to sell one's labor to those who did own and manage property—replaced an earlier dream of farm or shop, along with an ersatz type of property—common stock, or claims on profits but no real role in management." *Id.* The depression, of course, wiped out even these substitutes.

Conkin argues that the "meager benefits of Social Security were insignificant in comparison to the building system of security for large, established businesses." *Id.* at 75. The New Deal tried to frame institutions to protect capitalism from major business cycles. "Although some tax bills were aimed at high profits, there was no attack on fair profits or even on large profits." Therefore, there was no significant redistribution of wealth by taxes. Labor laws, he argues, provided "procedural restraints"—but even these were "necessary for security and ordered growth." *Id.* at 75-76. Many corporations were rationalizing business process

I

THE SCOPE OF BARGAINING: SEEING THE "CORE OF MANAGERIAL PREROGATIVES"

Unlike the National Industrial Recovery Act (NIRA), the NLRA explicitly recognized and protected the status of organized labor as a partner in the bargaining process. This section will investigate an area in which the Court has presented its values in stronger and more precise terms than in other areas. The focus is the extent to which the legal system regulates the bargaining agenda items specified in the mandatory bargaining provisions of the Act.[26]

The underlying values of courts have become most explicit in cases concerning bargaining provisions. The Wagner Act made it an unfair labor practice to refuse to bargain collectively with the authorized representative of the relevant group of employees,[27] subject to the provisions of section 9(a). This section sets out various provisions dealing with the selection of authorized representatives and NLRB-sponsored elections. Section 9(a) provides that the representative who has been either designated or selected by employees is the authorized representative "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."[28] This phrase has long been interpreted to be a limitation on the scope of a party's (generally the employer's) obligation to bargain. That is, terms falling within the scope of the obligation are deemed to be "mandatory," while those outside of its scope are referred to as "permissive."[29]

This dichotomy is significant, although the practical effect of these rules are unclear. The doctrinal framework is easy to express. First, any party may insist on bargaining over a mandatory term of employment until an impasse has been reached, and neither party may legally refuse to discuss such a term. On the other hand, neither party may insist upon discussing a permissive term, or demand that it be considered by the other party.[30] The most important rule is perhaps that which bars an employer's unilateral change of terms or its imposition of a mandatory term without bargaining.[31]

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and "[s]ecurity demanded procedural rules, a degree of uniformity in practice, and even a formalized relationship with organized labor." *Id.* at 76.

26. 29 U.S.C. §§ 158(a)(5), 159(a) (1976); *see supra* text accompanying notes 13-17.

27. Ch. 372, § 8(5), 49 Stat. 449 (1935) (current version at 29 U.S.C. § 158(a)(5) (1976)).

28. 29 U.S.C. § 159(a) (1970). The obligation to bargain in good faith over "wages, hours, and other terms and conditions of employment" is also provided in section 8(d) added in 1947, 29 U.S.C. § 158(d) (1976). There seems to be no meaningful difference between the scope of the two phases.

29. *See, e.g.*, NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

30. *Id.*

31. *See, e.g.*, NLRB v. George P. Pilling & Son Co., 119 F.2d 32, 38 (3d Cir. 1941) (issue of number of working hours is "peculiarly a subject for collective bargaining," and employer's attempt to unilaterally settle the issue was a violation of section 8(5) of the National Labor Relations Act).

Importantly, there is a vague outer boundary beyond which the attempts of unions to enlarge the scope of bargaining intrude into the area of "managerial prerogatives," a phrase also employed in other circumstances to restrict the scope of the Act.

I must add at the outset, heretical though it may be for a law professor to admit, that these basic rules may not actually affect bargaining. For instance, a relatively strong union or employer may find some way to induce the other side to discuss a "permissive" term. Whatever the term's designation, a weak union, unable to exert pressure upon an employer, gains little power from a Board determination that the employer's refusal to discuss one of its terms violates section 8(a)(5) of the NLRA. Nevertheless, considerable legal, judicial and professorial effort has been expended in the attempt to categorize particular items as "permissive" or "mandatory" or to delineate the boundaries between these categories. I will not add to this effort, but I do want to stress that the positions taken by various commentators on this issue are reflective of their underlying value judgments about labor relations.

Initially, the generally accepted notion that the phrase "wages, hours and other working conditions" is a phrase of limitation was hardly a necessary conclusion. The phrase may have been designed simply to clearly state those items whose inclusion was necessary to best effectuate the bargaining duty.[32] The most obvious function of section 9(a) was to adopt the principle of majority rule and exclusive representation, a principle that the predecessor agency, the National Labor Board, had accepted after considerable debate.[33]

Much of the early commentary on the NLRA focused not on the terms included within the scope of mandatory bargaining, but on whether the section empowered the NLRB to determine that some terms were included at all! Cox and Dunlop, for instance, asserted that 9(a) was included "for the purpose of defining the area from which the union preferred by the minority should be excluded, not to define the subjects on which the employer and majority representative must bargain."[34] By 1940, however, the NLRB had assumed the power to determine what subjects were included in mandatory

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32. This is the explanation given by Senator Wagner for the inclusion of specific unfair labor practices sections 8(2)-8(5) (now sections 8(a)(2)-(a)(5)) following the all-inclusive generic section 8(1) (now section 8(a)(1)) of the NLRA.

33. Houde Engineering Co., 42 N.L.R.B. 713 (1934).

34. Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board,* 63 HARV. L. REV. 389, 396 (1950). The language of both the original 8(5)—"subject to the provisions of Section 9(a)"—and the use of "or" in the key phrase in 9(a) is "more consistent with the notion that the employer is not to bargain with minority unions about any of the listed subjects of bargaining than it is with the conclusion that he must bargain with the majority union about each and every subject embraced within the phrase." *Id.* at 396-97. Moreover, "[t]here was not a word in the hearings, in the committee reports, or in the debates to suggest that the Act would define the subjects of collective bargaining and give the Board power to resolve the issue in disputed cases." *Id.* at 395.

bargaining.[35] Congress seems to have affirmed this assumption in section 8(d) of the Taft-Hartley amendments of 1947.[36]

The assumption that the phrase "rates of pay, wages, hours of employment, or other conditions of employment" may have been intended to have a limiting function is suggestive in itself. Congress may have wished to narrow its interference with what had previously been regarded as unilateral managerial power, although this intention was not expressed. The phrase "other conditions of employment" in section 9(a) could be read broadly even if some limiting function for the phrase is acknowledged. Would there be areas of union interest which did not affect "conditions of employment"? There is little indication that these questions were well considered—or even considered at all—in 1935. There is no evidence that Congress feared that the new obligation would open up for bargaining areas which employers thought should be left to unilateral managerial control, although employers could well have been concerned over such a possibility. Given the undeveloped state of labor organization in the 1930's and the nonradical stance of most American unions, it is understandable that Congress would not have devoted much attention to this matter.[37]

The first National Labor Relations Board, created by executive order in 1934 and operated under the National Industrial Recovery Act, endorsed a broad reading of the duty to bargain by expanding interpretations of its predecessor, the National Labor Board.[38] Decisions made it clear that employers must "match unacceptable proposals with counterproposals and . . . exert every reasonable effort to reach an agreement binding it for an appropriate term."[39] The young Board repeatedly stressed the existence of an affirmative obligation to bargain on the employer's part, not simply a prohibition against intentionally thwarting any agreement.[40] In addition,

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35. *See* Singer Mfg. Co., 24 N.L.R.B. 444 (1940); Wilson & Co., 19 N.L.R.B. 990 (1940). *See also* J.H. Allison & Co., 70 N.L.R.B. 377 (1946).

36. National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1947), *as amended by* Taft-Hartley Act, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 185(a) (1976)).

37. The Railway Labor Act provided that carriers make "every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . ." 45 U.S.C. § 152 (First) (1976). This phrase is somewhat similar to the language of the Wagner Act, but it is even less likely to be read as a phrase of limitation. In the National Industrial Recovery Act, which provided for codes of fair competition, the President had the authority to prescribe "the maximum hours of labor, minimum rates of pay, and other conditions of employment . . . necessary to effectuate the policy of this title . . . ." National Industrial Recovery Act, ch. 90, § 7(c), 48 Stat. 195 (1933). Nevertheless, the similarity was noted. 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1938, at 256 (1948) (Testimony of Mr. Beyer). Section 7(b) of the NIRA authorized the President to give every opportunity to employers and employees to contract for hours, pay and other working conditions.

38. *See, e.g.*, Houde Engineering, 42 N.L.R.B. 713 (1934).

39. Eagle Rubber Co., 1 N.L.R.B. 157; *see also* LABOR & GOVERNMENT 217-19 (Bernheim & Van Doren eds. 1935).

40. *See* P. ROSS, THE GOVERNMENT AS A SOURCE OF UNION POWER 64-71, 96-100 (1965).

employers were ordered to bargain over a wide range of matters which had an impact upon terms and conditions of employment, including plant relocation and "the introduction of a new line of products."[41] This history, as will be noted, would subsequently be ignored by scholars and members of the Supreme Court.

When Senator Wagner submitted his second labor bill in 1935, it did not contain an explicit duty to bargain. However, section 8(5) (now section 8(a)(5)) was not merely an afterthought; Senator Wagner made it clear that the duty, although not stated explicitly, was nevertheless "implicit in the bill."[42] Witnesses also argued for the inclusion of an explicit statement of the duty.[43] Since the duty was not explicit in the initial bill, it may not be surprising that no witness commented directly in opposition to the duty.[44] The final bill was enacted with an explicit duty to bargain, but there is little on which to base any conclusions about the range of subjects included in the duty.[45]

Most decision makers and commentators who assert that the Board has no authority to regulate the subjects of bargaining do not advocate widening the scope of mandatory bargaining.[46] Professors Cox and Dunlop argue, for example, that regulation of bargaining subjects should be avoided completely.[47] This suggests that either party can avoid bargaining over any matter by simply refusing to discuss it.

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41. Claire Knitting Mills, Inc., 2 N.L.R.B. 469 at 472 (1935). The case involves the all too common situation of employer concealment and misrepresentation in cases of termination. Employee and union representatives were told that the company was "merely disposing of some surplus machinery" when in fact it planned to relocate the plant. *Id.* at 470. The Board had no difficulty in finding that the employer's decision to move the plant in order to evade its duty to bargain was improper. The question of the inclusion of such items as the power to move a plant in bargaining seems not to have arisen.

42. *Hearings on S. 1958 Before the Senate Committee on Education and Labor,* 74th Cong., 1st Sess. 43 (1935) (statement of Hon. Robert F. Wagner).

43. *See, e.g.,* 1 NLRB LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1938, *supra* note 37, at 1455 (Chairman Biddle of NLRB); at 1517 (Garrison, first Chairman of NLRB); at 1612 (Handler, former General Counsel, NLRB).

44. Ross, *supra* note 40, at 77-78.

45. Professor Ross's book convincingly undercuts the arguments used by important scholars, such as Professors Smith, Cox, and Fleming, that the legislative history was so indifferent to the duty that it should be narrowly construed. Ross's analysis is flawed, however, by several unsupported assertions. Among them is his criticism of Cox's argument that the Board was not to have the power to resolve issues over the scope of bargaining. The evidence, as reviewed by Ross, does show support for a broad reading of "good faith." However, the legislative history indicates that there was little if any discussion about the subjects within the area of compulsory bargaining or no guidelines as to how lines were to be drawn. One could read the legislative history, as Professor Ross perhaps does, to mean that the absence of discussion over subjects implies that all subjects raised must be given equal respect. Professor Ross, however, strongly supports the distinction between mandatory and nonmandatory subjects. *Id.*

46. *See, e.g.,* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 352 (Harlan, J., dissenting); *Borg-Warner,* 113 N.L.R.B. 1288, 1306 (Chairman Farmer, dissenting).

47. *See* Cox & Dunlop, *supra* note 34.

This view obviously emphasizes economic force and reflects the revival of notions of contractualism.[48] Cox and Dunlop have argued that so long as collective bargaining occurs, the substantive contents of the parties' agreement are of no public concern.[49] Indeed, stressing only the existence of collective bargaining and not the subject matter suggests that unions could, through bargaining, waive the right to bargain about specific mandatory matters.[50] Fearing governmental intervention, Professor Cox argues elsewhere that the obligation to avoid bad faith bargaining should not include an affirmative obligation to seek agreement.[51] Such an affirmative obligation, according to Cox, would ultimately lead to Board review of the substantive positions of the parties.[52]

Most judicial and Board decisions, however, have attempted to place restraints on the unlimited use of economic power by mapping out areas in which mandatory bargaining is to occur. Such a view rejects the notion that 8(a)(5) provides only a narrow procedural requirement and comports with the Congressional understanding that a vast disparity in bargaining power existed. In *Borg-Warner,*[53] for example, the Supreme Court relied on the elusive concept of labor peace, rather than the free use of economic power, to hold that parties—in this case management—may not insist upon including nonmandatory items in an agreement. The obvious assumption was that such a doctrine will actually affect the balance of power between management and labor.

Justice Harlan, the lone dissent in *Borg-Warner,* argued that all legal matters were subject to bargaining, implying that both sides had the power to insist on bargaining over *any* matter even to the point of creating a bargaining impasse. It follows from his argument that section 8(a)(5) should only require an obligation to bargain in good faith.

A third possible approach is that *all* proposed subjects should be considered mandatory, but this has been neither suggested nor discussed by the courts. Such an approach would not only give parties the right to insist that any matter be discussed but would also require an unwilling party to discuss any subject. This view of mandatory bargaining strikes closer to the heart of managerial prerogatives than any other.[54] It is unclear whether this last view

48. Klare, *supra* note 15, at 293-310.

49. Cox & Dunlop, *supra* note 34, at 397.

50. *Id.* at 405-07, 418-25. *See also* Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox and David Feller,* 4 IND. REL. L.J. 483 (1981). Lynd views Cox as reversing the normal paradigm of government as the protector of rights. Cox and Dunlop stated that the "purpose of the original Wagner Act was to facilitate the organization of unions and the establishment of collective bargaining relationships." Cox & Dunlop, *supra* note 34, at 389. Unions and bargaining, therefore, become ends in themselves; employee rights are only means to these ends. Presumably, these rights are also dispensable once the governmental structure is established.

51. *See* Cox, *The Duty to Bargain in Good Faith,* 71 HARV. L. REV. 1401 (1958).

52. *Id.*

53. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

54. The argument for a broader reading of mandatory subjects is presented by Professor Wellington, in H. WELLINGTON, LABOR AND THE LEGAL PROCESS, ch.2 (1968).

is harmful to goals of industrial peace, because the actual effect of the three possible approaches on labor-management relations is simply unknown.

Two points must be stressed. First, as already noted, a party needing Board assistance just to open up a particular matter for bargaining is hardly in a position to achieve notable bargaining success. An employer, for instance, may be forced by legal doctrine to discuss subcontracting, but a union which needed the Board's aid to open the discussion in the first place might not be aided by its intervention.

Second, the inclusion of some subjects within mandatory bargaining in the name of labor peace has resulted in the exclusion of others. The *Borg-Warner* rule that insistence upon hard bargaining over a nonmandatory subject is itself an unfair labor practice has been strongly criticized because it interferes with "free" collective bargaining and is based on an inherently vague distinction.[55] Theoretically, a decision that a matter is not mandatory limits the extent to which it can be resolved through collective bargaining and economic struggle and affects the content of any agreement ultimately reached.

In addition, since the bounds of mandatory bargaining are far from precise, one party may unintentionally commit an unfair labor practice by failing to discuss a crucial item. In *Fibreboard Paper Prod. v. NLRB,*[56] management's miscalculation was quite costly. The Court held that the subcontracting of maintenance work and the resulting destruction of the entire bargaining unit were mandatory items for bargaining, and the employer was forced to reinstate all its maintenance employees with substantial back pay.

Whether the current approach to bargaining helps or hinders either negotiation or industrial peace is far from clear. *Borg-Warner* may indeed limit the use of economic force, commonly called "bargaining power," by restricting the items upon which a party can insist. However, this may not actually interfere with the bargaining process. Philip Ross, in defending *Borg-Warner,* notes that it is rarely the basis of an unfair labor practice charge.[57] But this may only mean that these disputes are resolved short of Board adjudication. One way to obtain a nonmandatory item, after all, is to surrender a mandatory one.

However the bargaining process now operates, guidelines currently exist to determine where the mandatory/permissive line should be drawn. This leads to the most serious objection to the dichotomy. My concern here is not that some subjects are included as mandatory, but that some are excluded. If a subject is excluded, a party can refuse to discuss it, thus effectively wielding the kind of economic force which the Act supposedly restricts to mandatory subjects. The only difference between the two areas is

55. *Id.* at 76. *But see* P. Moss, THE GOVERNMENT AS A SOURCE OF UNION POWER (1965).
56. 379 U.S. 203 (1964).
57. Ross, *supra* note 37, at 281.

a legal determination that one is legislatively prescribed by the Act and one is not. It is in this critical area that certain notions of "core" management prerogatives arise, a fact virtually ignored in the early legal scholarship of the NLRA.

As a result of economic pressure and mutual labor-management self-interest, the phrase "wages, hours and working conditions" has been read rather broadly notwithstanding judicial statements that it is a phrase of limitation. The phrase has not been restricted to matters which were subject to collective bargaining at the time the NLRA was enacted.[58] Generally, courts analogize a disputed term to another matter clearly within the statutory phrase or look for a clear effect of the item on an included interest.[59] It is common for the court or agency to find the disputed matter mandatory while carefully noting that not all matters affecting wages, for instance, are within the obligation; often adding that as the decisionmaker, it is not required to "mark the outer boundaries" of the phrase.[60]

Interestingly, mandatory subjects for bargaining under section 8(a)(5) and section 8(d) parallel to some degree the rights guaranteed employees under section 7. Thus, illegal proposals under the NLRA may not be mandatory subjects for bargaining[61]; nor are those which are inconsistent with other obligations imposed by the Act.[62] Other matters are nonmandatory items because they are illegal under other federal statutes.[63] Finally, other matters are considered outside the scope of the Act, i.e., nonmandatory, even though they are neither illegal nor violative of federal policy.

Some of these matters would be considered "peripheral," although it is not clear why unions would bargain to impasse or file charges over an employer's refusal to bargain over peripheral matters. Some matters are clearly not peripheral to employee interests but are nevertheless excluded from the obligation to bargain because of other interests. As under the common law, the courts' reference to matters as "peripheral" or of only "indirect" interest to employers masks the use of hidden judicial values.

The adoption of a "legal" as opposed to a "factual" definition of protected activities has virtually the same effect as the adoption of a restric-

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58. *See generally,* Annot., 12 A.L.R. 2d 265 (1950); R. GORMAN, BASIC TEXT ON LABOR LAW, ch. XXI (1976).

59. *See, e.g.,* W.W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949) (health insurance is within the meaning of "wages"); Inland Steel v. NLRB, 77 N.L.R.B. 1 (1948) (pensions are a mandatory subject).

60. *See, e.g.,* W.W. Cross & Co. v. NLRB, 174 F.2d at 878.

61. *See, e.g.,* Penello v. UMW, 88 F. Supp. 935 (D.D.C. 1950) (insistence on closed shop provision was an unfair labor practice); Douds v. ILA, 241 F.2d 278 (2d Cir. 1957) (bargaining for an inappropriate unit was an unfair labor practice); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 360 (1958) (Harlan, J., concurring) (employer cannot insist upon clause illegal under Act). *But see* NLRB v. Sunrise Lumber & Trim Corp., 241 F.2d 620, 624-25 (2d Cir. 1959) (employer not excused from bargaining with union when one of union's demands is a closed shop provision).

62. R. GORMAN, *supra* note 58, at 531.

63. *Id.*

tive view of mandatory terms of bargaining. This approach creates a middle ground with no clear or inherent boundaries and serves to refocus attention away from underlying policy issues and towards the detailed, case by case analysis required by traditional legal scholarship. This result, however unintentional, is tolerated because it conforms to the "balancing" model so commonly found in modern jurisprudence. The appearance of evenhandedness masks the fact that this approach itself represents a value choice. Throughout this paper I have argued that decisions in specific cases are often based upon hidden assumptions or values; I also wish to emphasize that the choice of an analytic framework may itself reflect such assumptions.

The concept of inherent managerial prerogatives necessarily implies a timeless historical imperative. The language in NLRB and judicial opinions, not to mention arbitration opinions where the characteristic is most pronounced, often reflects a Genesis view of labor-management relations: In the beginning there was management and labor. Management alone directed the enterprise until restrained by law and collective bargaining agreements. Management, however, still retains all those powers which have not been expressly or implicitly restricted by agreements. The power of an employer is analogized to that of a state, which retains powers not expressly denied or prohibited by the state's constitution. Moreover, management understandably contends that these limitations on its powers should be narrowly interpreted and limited to the express terms of the written agreement.

Arbitral awards commonly refer to "reserved" or "residual" rights of management, although arbitrators have found implicit restrictions in a wide variety of cases. The starting point for many arbitrators is that reflected in the following quotations:

> It is axiomatic that an employer retains all managerial rights not expressly forbidden by statutory law in the absence of a collective bargaining agreement. When a collective bargaining agreement is entered into, these managerial rights are given up only to the extent evidenced in the agreement.[64]
>
> Initially, before unions came into the picture, all power and responsibility in all aspects of personnel management were vested in the company and its officials. [T]he original power and authority of the company is modified only to the extent that it voluntarily and specifically relinquishes facets of its power and authority.[65]

These glib justifications of management prerogatives are neither logically nor historically supportable. The views they reflect overlook the worker-controlled production processes with which many industries, such as

64. Cleveland Newspaper Publishers Ass'n., 51 Lab. Arb. (BNA) 1174, 1181 (1969) (Dworkin, Arb.).

65. National Lead Co., 43 Lab. Arb. (BNA) 1025, 1027-28 (1964) (Larkin, Arb.). *See generally* E. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 412-550 (3d ed. 1973).

steel, began. They reflect management's victory in wresting control of the production processes from skilled employees.[66]

The doctrine of reserved rights is rooted in the belief that a certain bundle of rights exists which "management must have in order successfully to carry out its function of managing the enterprise."[67] This belief either reflects the unexplained assumption that certain rights are necessarily vested exclusively in management or is based upon an economic value judgment about the necessary locus of decision making power. In either case, a state of affairs that has not always existed and whose development is not necessarily technologically or scientifically determined is accepted unquestioningly. Viewed in this light, the ideological character of commonplace observations quoted above becomes readily apparent.

For some years after the passage of the Wagner Act, questions involving the regulation of the subject matter of collective bargaining did not arise. Professors Cox and Dunlop believe that

> older craft unions strong enough to present broader demands were content to bargain about such traditional subjects as wages, hours of work, seniority, and union status. Others expanded the scope of their demands until they came into conflict with management's reluctance to surrender its 'prerogatives,' and sharp controversies resulted over the proper functions of management and union. But the issues were settled by negotiations resulting in an endless variety of arrangements—with or without the resort to economic sanctions—and there was little disposition to seek government intervention.[68]

Newly formed industrial unions which were in the process of consolidating their position had little reason initially to press management to bargain about matters other than wages and hours. Professors Cox and Dunlop may be correct in their assertion that as they grew stronger, the industrial unions attempted to broaden the scope of joint responsibility "into areas for which management had had exclusive responsibility—not only pensions and merit increases but also the scheduling of shifts, subcontracting, and technological change."[69] No doubt unions seeking governmental intervention, particularly under section 8(a)(5), are motivated to do so because they lack the clout to achieve their objectives independently through the exercise of economic pressure. Yet the Cox-Dunlop stress on areas of exclusive managerial authority begins any analysis with a distinct bias; and the courts, in adopting the Cox-Dunlop approach, have incorporated that bias into their analysis.

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66. *See, e.g.*, Stone, *The Origins of Job Structures in the Steel Industry,* in LABOR MARKET SEGMENTATION (R. Edwards, M. Reich, and D. Gordon eds. 1975).

67. L. HILL & C. HOOK, MANAGEMENT AT THE BARGAINING TABLE 56 (1945).

68. Cox & Dunlop, *supra* note 34, at 391.

69. *Id.*

This bias is illustrated by the fact that the courts have unaccountably ignored decisions of the first NLRB, that placed plant location and even product line questions within the regime of mandatory bargaining.

Traditionally, in the mass production industries all matters—wages, hours, and everything else—had been areas of exclusive managerial authority, in the limited sense that bargaining over these topics, except perhaps in a few, brief instances, had not previously occurred. The "limitation" notion, which is either explicit or implicit in the cases, creates a core of managerial authority or responsibility which is to remain untouched by governmental intervention. These matters are termed nonmandatory despite their clear impact upon wages, hours and working conditions. Thus, unions, and to a lesser extent employers, are precluded from legally mandating bargaining over matters vital to their interests.

One of the most important and frequently cited decisions of the Supreme Court in this area is *Fibreboard Paper Prod. v. NLRB,*[70] a Warren Court decision noteworthy for the broad approach of the majority and the cautionary, often-cited concurrence of Justice Stewart.[71] The employer, Fibreboard, which had sought to reduce the high cost of maintenance work by subcontracting the work to an independent firm, contended that it had no duty to bargain for a new agreement with the union representing the maintenance employees. The Court, however, sustained the Board's finding that both the decision to subcontract work and the effects of such action upon employees were mandatory terms of bargaining.[72] The employer's unilateral action thus constituted a violation of section 8(a)(5). In typical Warren Court fashion, the Court adopted a broad, policy-oriented approach to these issues, but then narrowed its holding to the precise facts of the case. The Court's expansive approach to the scope of mandatory bargaining, however, seems to have had less effect on subsequent decisions than the cautionary admonitions of Justice Stewart.

The majority first noted that the subject of subcontracting is "well within" the literal meaning of the phrase "terms and conditions of employment." The phrase seems "plainly" to apply to the termination of employment issue in *Fibreboard.*[73] Second, the Court stressed that including "contracting out" within the scope of bargaining brings "a problem of vital concern to labor and management" within the Act's framework and "seems well designed to effectuate the purposes of the National Labor Relations Act" which was designed to promote the peaceful resolution of disputes.[74] The conclusion that contracting out was a matter of "vital concern" was "reinforced" by industrial practice which demonstrated that subcontracting

70. 379 U.S. 203 (1964).
71. *Id.* at 217.
72. *Id.* at 209-15.
73. *Id.* at 210.
74. *Id.* at 211.

had often been a subject of collective bargaining.[75] This experience presumably demonstrated that subcontracting was amenable to the bargaining process.

Finally, the "facts" of the case illustrated the "propriety of submitting the dispute to collective negotiation."[76] At this point, the Court hinted at implicit limits to the scope of mandatory bargaining. It noted that the Company's decision "did not alter the company's basic operation. The maintenance work still had to be performed in the plant."[77] In addition, "[n]o capital investment was contemplated," since the company was merely replacing its employees with others. Therefore, the Court's decision to require the employer to bargain with the union would not "significantly abridge his freedom to manage the business."[78]

The stress on the absence of "capital investment" and the lack of impact upon the employer's "freedom to manage" significantly limits the impact of the broad language preceding it. Moreover, the Court proceeded to hold that only the type of "contracting out" or "subcontracting" 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"—falls within section 8(d).[79]

The Court's narrow holding substantially limits the impact of the decision and the broad policy approach with which the decision begins. One implication of the Court's language, made explicit by later decisions of appellate courts and the Board, is that management decisions which affect capital expenditures and those which produce significant changes in the enterprise are beyond the scope of mandatory bargaining.

Justice Stewart, concurring, stressed that the Court did not decide that "every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain."[80] Thus, while job security is a "condition of employment," some decisions which clearly affect it are exempted from this bargaining requirement.[81] Justice Stewart listed "[d]ecisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales"[82] as being outside the scope of mandatory bargaining. He noted that some of these decisions may have an

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75. *Id.*
76. *Id.* at 213.
77. *Id.*
78. *Id.*
79. *Id.* at 215.
80. *Id.* at 218.
81. *Id.* at 223. Justice Stewart stresses that the language of section 9(a), and after 1947, section 8(d), are words of limitation. The House bill in 1947 did contain a list of subjects to be included within the scope of bargaining, but this bill was rejected in favor of the Senate version which continues the original meaning of 9(a). Justice Stewart's evidence does not support his contention that the legislative history would not support the inclusion of "any subject which is insisted upon as a prerequisite for continued employment." *Id.* at 221.
82. *Id.* at 223.

"indirect" or "uncertain" effect upon job security and may be excluded on that ground alone.[83] Many of these matters, however, are unlikely to be of much union interest. In addition, Justice Stewart's notion that job impact is the linchpin of *Fibreboard,* although stressed by subsequent decisions, is not necessarily supported by the majority's language.

The key portion of Justice Stewart's concurrence involves employer decisions which "may quite clearly imperil job security, or indeed terminate employment"[84] yet which are not within the scope of mandatory bargaining. Here Justice Stewart cites examples: management's decision to "invest in labor-saving machinery" or to "liquidate its assets and go out of business."[85] Such decisions, Justice Stewart argues, "lie at the core of entrepreneurial control."[86] The phrase tells us little more than that Justice Stewart knows a nonmandatory item when he sees one. His explanation follows: "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."[87] Thus, matters "fundamental to the basic direction of a corporate enterprise" should be excluded from mandatory bargaining.[88]

Justice Stewart's stress on capital investment and the scope or "basic direction of the enterprise" echo the Court's reasons for finding bargaining appropriate in *Fibreboard,* although the majority at no point suggested that the presence of a capital change necessarily makes a decision "unamenable" to the bargaining process. Nevertheless, Justice Stewart's discussion may accurately reflect implicit limitations in the majority's opinion; other decision makers have so read the holding.[89]

Although his exemption of capital investment decisions from the scope of mandatory bargaining is unique, Justice Stewart fails to justify this distinction which is by no means intuitively obvious. If certain capital decisions are not in themselves "primarily about conditions of employment," the same could be said for decisions involving work schedules, wages, and the speed of the production process, all of which have been held subject to mandatory bargaining. Generally, such decisions are motivated by concerns over efficiency, productivity and cost effectiveness. Decisions to automate, merge or terminate part of an enterprise may be "about" the same matters. The fact that unions have not traditionally bargained about such matters provides no theoretical basis for their exclusion from mandatory bargaining. The Taft-Hartley Act should not be frozen by union prac-

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83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW, *supra* note 58, at 509-23 (decision to subcontract work or shut down a plant or business).

tices of the 1930's. In addition, the legislative history does not tell us that this is so.

The legislative history of the Taft-Hartley Act supports a broad reading of the scope of bargaining. The House bill attempted to limit mandatory bargaining to specified items relating to wages and benefits, layoffs, discharges, working conditions, and vacations, thus implicitly excluding other matters.[90] This attempt to specify the scope of bargaining was rejected in favor of the broader language now found in the Act, which is designed so that parties are not forced to make concessions.[91] The appropriate scope of bargaining, said the House Committee on Education & Labor Minority Report, "will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors."[92] The statement is revealing since it clearly recognizes that the scope of bargaining will depend upon the parties' relative strength and, if federal adjudication is sought, upon social and political factors.

Justice Stewart's analysis is reminiscent of similar equally problematic distinctions drawn by pre-Act common law courts. Although conservative courts—such as the Massachusetts Supreme Judicial Court—recognized and refused to enjoin work assignments and jurisdictional disputes, courts in New York and other more liberal jurisdictions prohibited strikes against the introduction or use of job terminating machines as late as 1941.[93] Both situations involve job loss or work acquisition, which are essentially identical employee interests. A possible basis for the distinction is that the latter cases involved a more vital employer prerogative, the making of a capital decision. Yet the basis for distinguishing decisions involving work assignment from those substituting machines for labor is far from clear.

My students respond: "Well, that's capitalism." Perhaps so, but this explanation is not particularly illuminating. The common law decisions were often explained by the presumed advantage and public benefit of modernization and automation.[94] Justice Stewart may believe that the public bene-

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90. H.R. 3020, 80th Cong. 1st Sess. § 2(11) (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, *supra* note 37, at 39-40.

91. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 34-35 (1947).

92. H.R. REP. No. 245, 80th Cong., 1st Sess. 71 (1947) (minority report), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, *supra* note 37 at 292, 297.

93. *See generally* J. ATLESON, COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT 36-37 (1978).

94. "Another object of the conspiracy, which was no less harmful, was to deprive the public at large of the advantages to be derived from the use of an invention which was not only designed to diminish the cost of making certain necessary articles, but to lessen the labor of human hands." Hopkins v. Oxley Stove Co., 83 F. 912, 917 (8th Cir. 1897). The coopers' conception of the value of machines which lessened the labor of their own hands differed substantially from that of the courts. The coopers' concern with labor-saving machinery is discussed in I. YELLOWITZ, INDUSTRIALISM AND THE AMERICAN LABOR MOVEMENT 71-74 (1977).

fits from exclusive managerial control over key capital decisions. Not everyone would agree that such control necessarily benefits the public or that such an assumption is inherent in the Act.

What explains the premise that, even when wages, hours, and working conditions are affected, there is a "core" of managerial prerogatives which lies outside the scope of mandatory bargaining? Post-*Fibreboard* adjudication shows that this premise, however vague, is the basis for many decisions. The NLRB has held, for example, that a decision to terminate a portion of a business enterprise is a mandatory term of bargaining.[95] Most appellate courts, however, have consistently refused to extend *Fibreboard* to situations involving the partial termination of an enterprise.[96]

The NLRB's position generally stresses the impact of managerial action upon employees:

> [W]e see no reason why employees should be denied the right to bargain about a decision [a partial termination of the business] directly affecting terms and conditions of employment which is of profound significance for them solely because that decision is also a significant one for management.[97]

The position of most appellate courts in partial termination cases is reflected in the following extract from the Eighth Circuit's opinion in *Adams Dairy,* where the dispute focused upon "a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment. To require Adams to bargain about its decision . . . would significantly abridge its freedom to manage its own affairs."[98]

Like the proverbial two ships in the night, the Board and courts seem to pass each other in applying *Fibreboard.* The NLRB, however, has at least attempted to reconcile to the extent possible the managerial interest with the obvious concern of employees. Surely a "partial termination" involves more than the concerns of management; nevertheless, the Eighth Circuit held that such decisions are management's own (read "exclusive") affair.

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95. *See, e.g.,* Ozark Trailers, Inc., 161 N.L.R.B. 561, 567 (1966); Royal Plating & Polishing Co., 152 N.L.R.B. 619, 622, *remanded,* 350 F.2d 191 (1965); Morrison Cafeterias Consol., Inc. v. NLRB, 177 N.L.R.B. 591 (1969), *aff'd,* 431 F.2d 254 (8th Cir. 1970); *see generally* R. Rabin, Fibreboard *and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of Duty to Bargain,* 71 COLUM. L. REV. 803, 810-16 (1971) [hereinafter cited as Rabin, Fibreboard *and the Temination of Bargaining Unit Work*]; R. Rabin, *The Decline and Fall of* Fibreboard, 24 N.Y.U. ANN. CONF. ON LABOR 237 (1972) (suggesting an improved definition of scope of bargaining).

96. Local 864, UAW v. NLRB, 470 F.2d 422, 423 (D.C. Cir. 1972) [hereinafter cited as *UAW*].

97. Ozark Trailers, Inc., 161 N.L.R.B. at 567.

98. N.L.R.B. v. Adams Dairy, Inc., 350 F.2d 108, 111 (8th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966).

This vague notion of a "managerial core" is operative in the doctrines mentioned in the first part of this paper and this vagueness explains the continuing number of disputes and litigation seeking further definition.

The legal issue is whether management must first notify the union and be willing to bargain about these critical decisions prior to acting. In most cases, if there is no alternative, unions will reluctantly shift their concern to the "effects" of such decisions—a matter clearly within the duty to bargain.[99] However, as the Court noted in *Fibreboard,* solutions can often be reached which ease the impact upon employees or provide an alternative course of action.[100]

Because management must bargain over a certain decision, however, hardly means that it is barred from acting. It is hornbook law that management can act once an impasse is reached. Such a situation will usually occur and is often expeditious. Moreover, exceptions can be made if managerial decisions must be made with unusual dispatch. In other words, the impact of section 8(a)(5) on these decisions has been grossly exaggerated by the courts. Yet, the symbolic significance must be great, for judicial opinions are replete with Sturm and Drang.

United Auto Workers v. NLRB[101] illustrates court approval of management's circumvention of section 8(a)(5). General Motors converted a self-owned and operated retail outlet into an independently owned and operated franchise. General Motors sold the outlet's personal property to Trucks of Texas, Inc. (Trucks), subleased the premises, and awarded Trucks a dealership franchise. The sublease could be immediately terminated if Trucks' dealership was cancelled. Three days later Trucks advised former General Motors employees at the outlet that none would be retained.[102]

As is often the case, the union was neither consulted nor informed about the conversion prior to the firing of the employees. The union filed a charge with the NLRB, alleging failure to bargain.[103] The NLRB, however, labeled the arrangement a "sale" and therefore beyond the scope of mandatory bargaining terms, thus distinguishing it from the *Fibreboard* situation. The Board relied upon Justice Stewart's "core" of managerial prerogatives and other appellate court decisions—presumably the decisions which had overruled the Board on partial terminations—and rejected the charge.[104]

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99. Although there is some doubt whether *Fibreboard* really hinders managerial freedom, we are here concerned with the underpinnings of the doctrine. In most of these cases involving actions such as terminations or mergers, the union is not informed of the planned change or is actually misled. To the extent that one believes bargaining can reach unexpected results or fresh approaches, bargaining can conceivably alter the outcome.

100. *See generally* Rabin, Fibreboard *and Termination of Bargaining Unit Work, supra* note 95, at 803.

101. 191 N.L.R.B. 951, *aff'd,* 470 F.2d 422 (D.C. Cir. 1972).

102. *UAW,* 470 F.2d at 423.

103. *Id.*

104. *Id.* at 424.

The Court of Appeals for the District of Columbia upheld the Board's decision, noting the change in the company's operation. Although the UAW termed the transaction a "classical contracting out situation," a not unreasonable characterization, Judge Clark thought the decision was "fundamental to the basic direction" of General Motors and was thus at the "core of entrepreneurial control."[105] Presumably, this minor General Motors transaction was "fundamental" because it was part of GM's national policy to transfer ownership of retail outlets to independent dealers. Judge Clark noted revealingly, "What the UAW would have us do would turn over the management to it."[106] This statement is startling indeed, as this is hardly likely to have been what the UAW had in mind.

The Board's analysis was more extensive than Judge Clark's, but as Justice Bazelon asserted in his dissent, it was based upon "broad, and purely speculative, assertions."[107] The Board, Justice Bazelon properly noted, had held that since the transaction was a "sale," no bargaining was required.[108] The Board neither weighed the interest of GM in avoiding bargaining over its decision or its general policy nor considered employee interests.[109] The formal characterization of the transaction as a "sale" has little to do with the importance of the interests involved.

Rather than recognize these interests, the Board has chosen to determine the limits of mandatory bargaining by invoking a doctrine of managerial decision making. Certain decisions or transactions, whether sales, mergers, or partial terminations, seem to be given considerable symbolic significance. It is otherwise difficult to determine what lies at the "core of managerial authority." As the Board noted:

> [D]ecisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control and are not the types of subjects which Congress intended to encompass within "rates of pay, wages, hours of employement [sic], or other conditions of employment." Such managerial decisions ofttimes require secrecy as well as the freedom to act quickly and decisively. They also involve subject areas as to which the determinative financial and operational considerations are likely to be unfamiliar to the employees and their representatives.[110]

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105. *Id.* at 424-25.
106. *Id.*
107. *Id.* at 427 (Bazelon, J., dissenting).
108. *Id.*
109. *Id.* at 424 (citing NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 195 (3d Cir. 1965)), 426 (Bazelon, J., dissenting).
110. *UAW,* 191 N.L.R.B. at 952. *See also* Summit Tooling Co., 195 N.L.R.B. 479, 480 (1972). *Cf.* Royal Typewriter Co., 209 N.L.R.B. 1006 (1974), enforced, 533 F.2d 1030 (8th Cir. 1976).

All decisions made initially by management could conceivably be deemed managerial in nature, yet this fact does not determine the scope of section 8(a)(5). Furthermore, management's desire for speed and secrecy may also be involved in many decisions which are concededly within the area of mandatory bargaining. Moreover, these "expenses" of bargaining do not necessarily increase because the transaction is labeled a "sale." Such labelling is based more on the form of the transaction (and on legal advice) than its content.

The last sentence in the NLRB's statement quoted above suggests another partial rationale, i.e., employee unfamiliarity with certain types of "financial and operational considerations." But the scope and complexity of current collective bargaining, as well as the foresight of many unions and union leaders, casts doubt upon the proposition that unions are insufficiently equipped to deal with such complex and weighty matters. Financial and capital considerations, after all, are a routine part of management's bargaining stance at bargaining sessions. Most bargaining does not involve capital withdrawal or movement, but this is not to say that such matters are beyond the ken or interest of union representatives. Surely the employment effects of such decisions lie at the "core of *union* concern." The language of the Board really means, rather, that unions can have no legally protected interest in such matters unless, of course, management voluntarily decides to share knowledge or decision making with the union.

It is true that some decisions involve different levels of union expertise. As Professor Rabin has noted, where the employer is considering the introduction of labor-displacing machines, the union could argue for machines with less of an impact upon job opportunities, could stress the operational advantages of various types of machines, or could make work concessions which might make some machines preferable to others. Rabin, however, feels that the union "has no special expertise that would enable it to suggest that as a technological matter one machine is preferable to another."[111] This may be so, but it is not invariably true. Management is often surprised by the technical and production lessons it learns from employees involved in production. Industrial relations literature contains many examples of productivity increases based upon the often belated recognition of employee suggestions. But, even if it is true that the matter is not beyond union experience or knowledge, the bargaining process is likely to end fairly expeditiously in the implementation of the company's decision.[112]

An implicit assumption by the Board and the courts seems to be that technological change (and perhaps all capital decisions) is predominantly a scientific or technical matter and, as such, should be left to the experts. Yet,

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111. Rabin, Fibreboard *and Termination of Bargaining Unit Work, supra* note 95, at 827.

112. *See* Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act,* 79 YALE L.J. 571 (1970).

as many have noted, technology does not necessarily travel in one direction or call for a particular set of processes or consequences; variations are always possible depending upon the results and effects desired.[113] It has been commonly assumed that technology is an

> independent variable which effects changes in social relations; it has its own immanent dynamic and unilinear path of development. Further, it is an irreducible first cause from which social effects automatically follow . . . .
>
> Social analysts have recently begun to acknowledge that the technology and the social changes it seems to bring about are in reality interdependent . . . .
>
> [T]echnology is not an autonomous force impinging upon human affairs from the 'outside' but is the product of a social process, a historically specific activity carried on by some people, and not others, for particular purposes . . . . Technology thus does not develop in a unilinear fashion; there is always a range of possibilities or alternatives that are delimited over time—as some are selected and others denied—by the social choices of those with the power to choose, choices which reflect their intentions, ideology, social position, and relations with other people in society. In short, technology bears the social 'imprint' of its authors. It follows that 'social impacts' issue not so much from the technology of production as from the social choices that technology embodies.[114]

The practical effect of vague rules or even case by case adjudication in this area lies in the area of remedies. If employers are motivated to act and not bargain, little can be done when a year or two later the employer has been found remiss in failing to bargain. Equipment may have been sold or moved and the enterprise, or a part of it, may have been closed.[115] The result is a lack of effective remedies which, given the vagueness of the "core" concept, does not encourage respect for law or aid in prediction.

The concern over the predictability of legal results can be resolved by excluding matters from the scope of bargaining. In a June 1981 decision, the Supreme Court basically adopted Justice Stewart's concurrence in *Fibreboard.* In *First National Maintenance Corporation v. NLRB,*[116] the seven

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113. *See, e.g.,* H. BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1974); CASE STUDIES ON THE LABOR PROCESS (A. Zimbalist ed. 1979); R. EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY (1979); D. NOBLE, AMERICA BY DESIGN: SCIENCE, TECHNOLOGY, AND THE RISE OF CORPORATE CAPITALISM (1977).

114. Noble, *Social Choice in Machine Design: The Case of Automatically Controlled Machine Tools,* in CASE STUDIES ON THE LABOR PROCESS, *supra* note 113, at 18-19.

115. *See, e.g.,* Renton News Record, 136 N.L.R.B. 1294 (1962); Apex Linen Serv., 151 N.L.R.B. 305 (1965).

116. First Nat'l. Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

Justice majority expressed great concern for managerial exclusivity, convenience and predictability. Briefly, the employer provided housekeeping and maintenance services to customers, and the dispute arose when the employer refused to bargain with a newly certified union over its decision to terminate its service agreement with a nursing home. The employer apparently felt the agreement was not economically beneficial, while the nursing home seemed dissatisfied with the employer's performance. The factual situation may limit the scope of the decision, but I wish to focus upon the policies reflected in Justice Blackmun's decision.

Justice Blackmun must have been aware that a partial closing has an obvious impact upon employment, and that Congress stated in 1947 that the scope of bargaining

> should be left in the first instance to employers and trade unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts.[117]

"Nonetheless," Justice Blackmun confidently stated, "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."[118] While "equal partnership" was hardly the union's goal, the statement shows the extent to which the Court has simply expunged the policy of encouraging industrial democracy from the Act.

Although there are numerous suggestions that the decision should be viewed as narrow, the relationship of Justice Blackmun's expressed concerns to the views previously discussed should be clear. Broadening bargaining, under existing laws, does not create a "partnership," since the employer can institute a change after an impasse is reached. Union participation, on the other hand, would certainly be consistent with the notion of a "common enterprise" relied upon by the Court to create employee obligations of deference and loyalty. Justice Blackmun, however, uses the employer's argument that it need not bargain at all to raise the issue whether a decision to terminate "should be considered part of petitioner's retained freedom to manage its affairs unrelated to employment."[119] Explic-

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117. H.R. REP. No. 245, 80th Cong., 1st Sess. 71 (1947) (minority report), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 297 (1948).

118. *First Nat'l. Maintenance Corp.*, 452 U.S. at 676.

119. *Id.* at 677 (footnotes omitted). Justice Blackmun's statement of the test begins with the following phrase: "in view of an employer's need for unencumbered decision making . . . ." *Id.* at 679. Moreover, "bargaining over *management* decisions that have a substantial impact on the continued availability of employment should be required only if the benefits, for labor-management relations and the collective-bargaining process, outweigh the burden placed on the conduct of the business." *Id.* (emphasis added).

itly then, he adopts the position that there is an inherent body of exclusively managerial functions.

In functional terms, the policies cited by Justice Blackmun as implicit in the statutory concept of bargaining lead in the other direction. Justice Blackmun recognizes that the union's concern over job security ("a matter of central and pressing concern to the union"[120]) is obviously legitimate and that the function of bargaining is to resolve disputes and thereby encourage industrial peace. Bargaining, he concedes, "will result in decisions that are better for both management and labor and for society as a whole."[121] Nevertheless, he concludes, "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."[122] Apparently the decision whether to bargain would somehow threaten the continued viability of the enterprise. Although Justice Blackmun purports to create a balancing test and to focus upon the amenability of the dispute to resolution via the bargaining process,[123] Justice Brennan's dissent correctly notes that the test used considers only the interests of management.[124] Moreover, the majority's view that the dispute is not resolvable through negotiation is based only upon speculation.[125] Indeed, the court of appeals had reached the opposite conclusion. In addition, the interests considered are those of management, *i.e.*, the "need for speed, flexibility, and secrecy in meeting business opportunities and exigencies"[126] which may be frustrated if management is required to bargain when it has no workable alternative to closing.[127] It is depressing to note that none of these interests were implicated in this case nor does Justice Blackmun even argue that secrecy or other managerial interests justify the refusal to bargain in this situation. If this is a balancing test, it is surely an odd one. Only one side of the balance is considered, and the interests conceivably involved do not have to actually be present.

Decisions such as *First National Maintenance* would be viewed as inevitable by those who view collective bargaining as a system which institutionalizes workplace conflict and legitimizes employer prerogatives by propounding a myth of joint union-employer lawmaking.[128] Indeed, as early as

120. *Id.* at 677.

121. *Id.* at 678 (footnote omitted).

122. *Id.* at 678-79 (footnote omitted).

123. *Id.* at 678-81.

124. *Id.* at 689.

125. Justice Blackmun argues that if bargaining is required, the union will seek to delay or halt the closing. It may offer "concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs." *Id.* at 681 (footnotes omitted). Unaccountably, Justice Blackmun states that it is unlikely that "requiring bargaining . . . will augment this flow of information and suggestions." *Id.* Apparently, since unions can still bargain over the "effects" of the closing, bargaining over the decision itself would not alter the union's role or chance of success.

126. *Id.* at 682-83 (footnote omitted).

127. *Id.*

128. *See, e.g.*, Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L. J. 450 (1981).

the early part of this century, numerous employers considered collective bargaining and the security of the trade agreement necessary to long term managerial planning and to reducing workplace militancy.[129] This critique carries many insights, but it can be easily overstated. To the extent that labor relations and collective bargaining exist in a world of unequal influence and bargaining power, most systems of accommodation would begin unequally. More importantly, collective bargaining was desired by many unions as the only realistic method of creating worker input into workplace decision making. However, as this article suggests, collective bargaining under the NLRA need not come burdened with the various premises courts have created, *i.e.*, assumptions which recognize and even protect managerial independence and prerogatives. The traditional writings of legal, economic and industrial scholars discourse eloquently about workplace democracy and industrial self-governance, yet seem to overlook the realities of the workplace and the legal doctrines discussed throughout this article.

Even in theory, unions can become partners in workplace planning and decision making only with equal power. Although the law creates protections for unions, it makes no attempt to equalize bargaining power and, indeed, the Supreme Court has overruled the Board when it considered relative bargaining power in reaching a decision. Unions which are not strong enough to close down an employer by striking are limited in the pressure devices they can employ. The secondary boycott provisions of the Taft-Hartley Act, for instance, restrict these less drastic weapons. To a union which is weak vis-a-vis a particular employer, the duty of an employer to bargain is thus less significant than it may first appear. Even if some rough equality exists, the law itself permits employers to refuse to discuss important matters of capital movement or shifts in managerial direction. Since nonmandatory items need not be discussed, force cannot be exerted to compel negotiation of such matters. The bankruptcy of the theory can be understood by attempting to derive from the writings which particular matters are to be left to unilateral managerial prerogatives and which fall within the area of joint determination.

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129. B. RAMIREZ, WHEN WORKERS FIGHT: THE POLITICS OF INDUSTRIAL RELATIONS IN THE PROGRESSIVE ERA, 1898-1916 *supra* note 7, 49-84.

RESPONSES

ROBERT RABIN*

The real significance of Professor Atleson's superb paper, and of the larger work from which it is taken, is in what it tells us about the assumptions underlying the law regarding plant closings—assumptions which, on closer examination, may prove to be without foundation.

This is a very discouraging topic, for I agree with Jim Atleson that the law surrounding the management prerogatives doctrine has very little to do with reality. A strong union really doesn't need a legally protected right to bargain about plant closings, while a weak union could make very little use of such a right even if it did exist.

In one respect, however, the right to bargain may be significant in a plant shutdown situation whether the union be weak or strong. Despite the emasculation of the bargaining duty after *Fibreboard*[1] and *First National Maintenance,*[2] the Supreme Court has not repudiated the long-standing National Labor Relations Board doctrine that an employer must bargain about the effects of a plant closing decision (e.g., severance pay, seniority, pensions, and transfer rights) even though it need not bargain about the decision itself.[3] An important implication of this obligation is that the employer must give the union adequate prior notice of the decision so that the union may engage in meaningful bargaining about the effects.[4] This may enable the individual worker to better adjust to the impending change.

Will an employer in fact give this advance notice? If it asks its lawyer "What will happen if we give notice?", the lawyer will observe—if it hasn't already occurred to the client—that within a week practically every piece of equipment in the place may be gone, and even if it isn't, production will not be very good in the waning weeks of operation. If the client asks what it will cost not to give the legally required notice, the lawyer may point out that the remedies for such failure are not very severe. Moreover, a cost-benefit analysis may suggest not complying with the law. This too is discouraging,

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1. Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 217 (1964) (Stewart, J., concurring).

2. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

3. "There is no dispute that the union must be given an opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5)." *Id.* at 681.

4. *See, e.g.,* NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965): "[A]n employer [although not required to bargain respecting a decision to shut down] is still under an obligation to notify the union of its intentions so that the union may be given an opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision."

for it tells us something about the inadequacy of the remedial provisions of our labor law.

It is important to note that while we're talking mostly about the private sector, a parallel *Fibreboard/First National Maintenance* doctrine exists in the public sector.[5] Here, management prerogatives are asserted not in the name of entrepreneurial control or investment capital, but in the name of democracy. However, if you get involved in actual public sector bargaining, as I often do as a mediator, you see that the democracy argument is often a mere facade. You realize, for example, that the school board that refuses to discuss a particular bargaining item is not concerned with the public's right to govern, but with its own power and convenience. We ought, therefore, to explore the assumptions behind the public sector rules which exclude certain items from bargaining as well.

Apart from the National Labor Relations Act (NLRA), are there legal devices for dealing with plant shutdowns? Staughton Lynd has used a common law approach to attempt to weave a set of contractual protections for displaced workers.[6] While he apparently didn't win the war, he achieved some degree of recognition for his approach as well as some legal victories.

Another approach is the legislative one. There is pressure on both national and local levels for legislation that would require firms to give advance notice and perhaps even interim job protection if they decide to relocate a plant. While the movement is at an embryonic stage, a few states have already enacted such legislation.[7]

The potential for such statutory protections brings me to the heart of my comments, which I'll call "Three Paradoxes."

First Paradox. Suppose that an employer is barred under state legislation from moving its plant without giving advance notice. Paradoxically, the employees may enjoy a greater set of rights under such a statute than under the NLRA, the central piece of our whole legal structure fostering collective bargaining. This is largely because the NLRA is concerned only with proce-

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5. *E.g.*, Internal Revenue Service & National Treasury Employees Union, 2 F.L.R.A. 769 (1980) (agency not required to negotiate over decision to change hours of bargaining unit employees, but still must notify union of decision when change will have significant effect on working conditions). State statutes dealing with public employers and employees vary greatly in pattern and scope. Employees of the federal executive branch are covered by Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (1969), as amended by Exec. Order No. 11,616, 36 Fed. Reg. 17,319 (1971).

6. In *Steelworkers, Local 1330 v. U.S. Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980), Lynd based arguments on theories of promissory estoppel, *id.* at 1269; and antitrust violations, *id.* at 1282. Chief Judge Edwards showed interest in each of these approaches, but remained unconvinced of their bases in legal authority.

7. ME. REV. STAT. ANN., tit. 26, § 625-B (1982), WIS. STAT. ANN. § 109.07 (West 1982). *See also* P. PITEGOFF, PLANT CLOSINGS: LEGAL REMEDIES WHEN JOBS DISAPPEAR 11-12 (1981) (available from Industrial Cooperative Association, 249 Elm Street, Somerville, MA 02144); Note, *Advance Notice of Plant Closings: Toward National Legislation,* 14 U. MICH. J.L. REF. 283.

dural rights related to bargaining,[8] and may not provide effective remedial deterrents to plant closings without notice.[9]

Second Paradox. A union is entitled by statute in New York State to data about toxic substances in the workplace.[10] It is likely that the union is entitled to the same sort of health and safety data under OSHA regulations.[11] But, oddly enough, the NLRB has decided only recently that the union is entitled to this information.[12] The propriety of the Board's order has not been judicially reviewed. Even then the extent of the union's entitlement is unclear, as the Board has suggested the need to balance the union's right to data against the employer's interest in trade secrets and employee privacy concerns reflected in the Supreme Court's recent *Detroit Edison*[13] and *Chrysler v. Brown*[14] decisions.

Third Paradox. A series of decisions has held that the National Institute of Occupational Safety and Health (NIOSH), the research arm of the Occupational Safety and Health Administration, is entitled to certain health and safety records of individuals in the workplace, even when individuals claim that their privacy rights are invaded.[15] But a union's right to such information under the NLRA is in doubt under the cases already discussed.

I have thus outlined three situations, one of which happens to involve plant closings, in which the individual may be entitled to greater rights, particularly with respect to access to information, under statutory schemes than through collective bargaining under the NLRA. The disturbing implication of these paradoxes, which hasn't been fully addressed in this symposium, concerns the union's role in the workplace. Government regulation of the workplace is on the increase, at least with regard to the handicapped, the elderly, the victims of other forms of discrimination, and the issues of health and safety, individual privacy, access to records, and plant shutdowns. While unions were once the only guardians of these interests, their role is now becoming duplicative, if not superfluous. Unions must decide whether they want to confine their activities to the traditional narrow area of collective bargaining, or branch out into all these new areas—health and

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8. Under section 8(a)(5) of the NLRA, 29 U.S.C. § 158 (1976), employees can argue that relocating a plant without advance notice is an unfair labor practice, the remedy for which is procedural: a bargaining order.

9. *See* note 3.

10. N.Y. Lab. Law §§ 875-880 (McKinney 1981).

11. 29 C.F.R. § 1910.20 (1980).

12. *See* Minnesota Mining & Mfg. Co., 261 N.L.R.B. 2 (1982); Colgate-Palmolive Co., 261 N.L.R.B. 7 (1982); Borden Chemical, 261 N.L.R.B. 6 (1982).

13. Detroit Edison v. NLRB, 440 U.S. 301 (1979).

14. 441 U.S. 281 (1979).

15. *See* General Motors Corp. v. Director of NIOSH, 636 F.2d 163 (6th Cir.), *cert. denied*, 102 S. Ct. 357 (1981); U.S. v. Lasco Indus., 531 F. Supp. 256 (N.D. Tex. 1981); U.S. v. Allis-Chalmers Corp., 498 F. Supp. 1027 (E.D. Wis. 1980); U.S. v. Westinghouse Elec. Corp., 483 F. Supp. 1265 (W.D. Pa. 1980); E.I. du Pont de Nemours & Co. v. Finklea, 442 F. Supp. 821 (S.D.W. Va. 1977).

safety, job protection, access to health data, privacy, protection of the handicapped and the like—and in effect become full-service agencies for protecting the individual's rights in the workplace.

If unions decide that they wish to expand their services in the direction of fuller coverage for their members, then we must rethink the premises of much of our labor law. To stay just with the topic raised by Professor Atleson's paper, it is quite clear that the law relating to bargaining is quite inhospitable to the expanded union role. If the law isn't modified accordingly, it will either fail to reflect the realities of contemporary bargaining, which destroys confidence in the integrity of the legal system, or it will impair the ability of unions to do what they are about, which will destroy the union movement.

STAUGHTON LYND*

The epidemic of plant closings has exposed the actual inequality of power between management and labor and has demystified class relationships in the workplace. Plant closings are management's exercise of a power ordinarily latent and concealed.

It is no accident then that the management prerogatives clause in the typical collective bargaining agreement has suddenly become a subject of scrutiny. The management prerogatives clause is the unspoken major premise of modern American labor law. As management has found it expedient to use this reserve power, the legitimacy of that authority inevitably comes into question.

Plant shutdowns have been traumatic not only for the workers and communities on whom the ax has fallen, but also for the labor movement as a whole. When push comes to shove, management can close the plant, while employees cannot—or think they cannot—strike. While employers appear to be at liberty to take unilateral direct action to protect their vital interests, employees have allowed themselves to be placed in a position where they cannot do the same.

Organized labor, like a faithful household servant with a false sense of ownership and security, speaks of "my job," "my plant," "my company," until the day the company abruptly closes the plant and demonstrates beyond question who really owns the job.

To put it differently, many persons in the labor movement have explicitly or implicitly entertained a two agenda strategy. Today, the strategy is to protect wages, hours, and working conditions, in exchange for letting the company run the plant. Someday, however, our agenda will be to put investment decisions into the hands of the workers themselves.

The present strategy is bankrupt. There is no way to adequately protect wages, hours, and working conditions without seeking a voice in investment decisions. Concessions such as five cent hourly wage increases and even the right to stop work for unsafe conditions, don't mean very much when the company shuts down the entire plant.

I offer two comments on the strategy of fighting plant shutdowns. I offer them with diffidence because no person, including myself, and no union has a track record on shutdowns which entitles them to be too high and mighty in telling others what to do.

First, there is a need to demystify discussion of plant closing strategies by identifying who is assumed to be carrying out the strategy. This requires that we face what might be termed the "management prerogatives" of national unions. Discussions of plant closing strategies often proceed as if

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the participants were members of the executive board of a powerful national union, rather than being, as most of us are, a ragtag collection of maverick academics and ostracized spokespersons for the rank and file. In such a discussion the assumption is that the power of a national union will be wielded on behalf of strategies which existing national union administrations vigorously oppose. This assumption is unrealistic.

A more realistic approach to plant closing strategies might begin by distinguishing three situations. Just as there are forbidden subjects of bargaining, mandatory subjects of bargaining, and others in between, there are: 1) plant closing strategies which can only be carried out by a national union, 2) plant closing strategies which can be carried out by a local union with national union support, and 3) plant closing strategies which a local union can attempt to carry out when the national union is indifferent or actively hostile. My personal experience has only been with the third situation. Nonetheless, here are my thoughts on all three.

First, the principal plant closing strategy which only a national union can carry out is a national strike. The company says: "We intend to close factory A." The union responds: "If you do, you will have a strike on your hands at all your other plants in the country." To my knowledge, the best example of such a strategy was the British miners strike in February, 1980. The Thatcher government announced its intent to close several dozen mines. With the tacit support of the national union, the miners in Wales went on strike, and were followed by miners in some parts of England. The Thatcher government withdrew its shutdown plan.

It is said that American unions, unlike British unions, are subject to collective bargaining agreements which contain legally enforceable no-strike clauses. As a result, American unions are subject to enormous damage actions if they are implicated in an illegal nationwide strike. That is true. One observes that this did not deter John L. Lewis. But a better answer is that national unions which are serious about resisting shutdowns should change the no-strike clauses in their contracts to permit strike action against investment decisions. Of course, they will have to strike to bring about such changes in the no-strike clause. Note, however, that while investment decisions themselves are probably not mandatory subjects of bargaining, a strike to change the no-strike clause would be a protected activity.

It may also be argued that a changed no-strike clause would not really permit unions to strike against shutdowns because first, management would seek to enjoin the strike until an arbitrator had ruled on the scope of the no-strike clause, and second, the management prerogatives doctrine prohibits a strike against the exercise of those rights. These are drafting problems. The solution is to write a no-strike clause that will protect the union against these possibilities, and strike to get it.

Second, there is much that a local union can do to fight plant closings if the national union will recognize the local's right to bargain. I can't imagine a more legitimate topic of local bargaining than the continued operation of

the plant on which the local union depends for its very existence. Nevertheless, the steelworkers union (United Steelworkers) gave no support to its local unions in Youngstown, and gives no support to its local unions in Pittsburgh, in bargaining over the continued operation of particular plants.

What could a local union do if it were recognized by its international as an appropriate bargaining representative? *First National Maintenance*[1] leaves us the right to bargain over the effects of investment decisions. When U.S. Steel refused to talk with its workers in Youngstown about the possibility of their buying the mill, we could have filed an NLRB charge with the support of the national steelworkers union, alleging that this was a refusal to bargain about the effect of a shutdown decision. We could have sought an injunction forbidding the company to disperse the machinery until the charge had been adjudicated, and bargaining had run its course.

Consider also the demand for a nationwide transfer right. Suppose a union demanded that no new worker be hired anywhere in the country until the workers laid off at every shutdown facility turned down the job. This demand could also become the basis for a Labor Board charge, and a request that the company be enjoined from hiring anyone, anywhere, until the issue was resolved.

Third, there are of course areas of the law to which a local union can turn even if denied the resources of labor law because it was denied the status of a bargaining representative. So far, in Youngstown and Pittsburgh, we have tried to use contract law (the notion of an enforceable contract separate from the collective bargaining agreement), antitrust law, property law, and environmental law.[2]

It is the considered opinion of those most active in the shutdown struggle in Youngstown that without the support of a national union, the best strategy for a local union is to occupy the plant. This may also be the best strategy even with the support of a national union. There is wisdom that says strikes are ineffective in facilities which the company wants to close anyway. Experience proves otherwise. At a UAW bumper plant in Windsor, Ontario, for example, workers sat in for a week to protest a company decision to close the plant rather than yield to the demands of the local union. The workers won. A satisfactory contract was negotiated, and the plant reopened. People on the scene credit the victory to the company's fears about valuable machinery in the occupied plant.[3]

My second, and briefer, comment on plant closing strategies addresses the questions: What is the plant closing problem? Why do plants close, anyway? A common answer is as follows: "X company has closed its plant

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1. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

2. The history of the Youngstown saga has recently been published in S. LYND, THE FIGHT AGAINST SHUTDOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS (1982).

3. *Sit-in Stops Plant Closing in Ontario; UAW Supports Action*, LAB. NOTES, Sept. 29, 1981, at 7.

Y because plant Y is no longer profitable." A more precise answer is the following: "The dollars X company would have to invest to make plant Y competitive would earn a lower rate of profit than those same dollars would if invested in opportunity Z."

U.S. Steel is a familiar case. The American steel industry has the highest rate of profit of any steel industry in the world, according to the Federal Trade Commission and the Office of Technology Assessment.[4]

But steelmaking is unimaginably capital-intensive, and for this reason, as Marx teaches, the rate of profit to be made by investing in steel is likely to be lower than the rate of profit to be derived from investments in chemicals, real estate, or oil. Thus, U.S. Steel, while telling Congress that it lacks the money to modernize its steel mills, had spent more than $6 billion to buy Marathon Oil.

The problem of plant closings is the problem of investment decision-making based solely on profit maximization. Strictly speaking, there is no separate problem of plant closings. The problem is capitalism. Plant closing legislation seems therefore largely beside the point. Liberal plant closing legislation asks for advance notice and reparations to the affected workers and communities. The company is left entirely free to close the plant. Proposed radical plant closing legislation, which would require companies to continue to operate plants that they want to close, is not going to happen. It makes more sense therefore to transfer the plant to worker or public ownership.

The plant closing problem is a function of a system of investment decision making which looks only to the investor's rate of profit. For this reason, such a system may deprive society of essential goods and services like steel by investing in more profitable but less socially needed opportunities. When this happens, and it is happening more and more, the labor movement should advocate worker or public ownership. Just as TVA provided electricity to the hollows of Appalachia when Commonwealth & Southern refused to do so, so worker- or publicly-owned steel mills will have to make the steel U.S. Steel no longer wants to manufacture.

The question presents itself whether worker or public ownership is an immediate, short run solution to the plant closing crises, or only a long term answer, a version of the second agenda of the two agenda strategy.

I think this question has to be answered on a case-by-case basis. Obviously an alternative ownership plan is easiest to bring about in a smaller plant, and the amount of capital required is less. Our basic problem in Youngstown was that at any one of the three mills which closed we needed

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4. FEDERAL TRADE COMMISSION, THE UNITED STATES STEEL INDUSTRY AND ITS INTERNATIONAL RIVALS: TRENDS AND FACTORS DETERMINING INTERNATIONAL COMPETITIVENESS 504-05 (1978); OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGY AND STEEL INDUSTRY COMPETITIVENESS 80, 126 (1980).

not only $15-25 million to buy the property, but roughly ten times that much—$150-250 million—to modernize. We couldn't get it.

One thing is clear. The problem of plant closings is the problem of capitalism. The answer to capitalism is socialism. Right now we must cope with plant closings as best we can, by direct action, by Board charges and litigation, and by worker takeovers. But in the long run, we shall have to transform the way investment decisions are made in this country by creating a socialist society: a society in which investment decisions are made not on the basis of what will maximize profit for the investor in the individual firm, but on the social and economic needs of the whole community.

KARL E. KLARE*

I will speak briefly, and I hope that my focus will complement the points made by the other speakers earlier this morning. I would like to advance just one main point, and that is my belief that the labor movement should think of the problem of democratic control of investment decisions and resource allocation choices as being inextricably linked to the problem of democratic organization of the day-to-day work process. Our aspirations must be broad enough to encompass both the goal of enterprise responsibility to the community and the ideal of worker control of the workplace.

The two concerns, democratic control of investment decisions and worker control of the work process, are fused together by discussion of the management prerogatives doctrine.[1] Discussions of management prerogatives typically focus on the first problem, private versus social control of investment. But the doctrine is also a fundamental barrier to democratic participation by workers in the organization of work. A basic purpose of the doctrine is to induce us to believe in the undesirability and/or the impossibility of democratic decision making in the workplace, both with respect to the content, location, and scale of enterprises and with respect to governance of the work process itself. By the same token, the arguments in support of worker control complement and reinforce the case that we must make for community control of investment decisions. It therefore seems prudent to link the struggle for socially responsible investment to a struggle for worker self-governance in the production process.

Alongside the central issue discussed by this panel, *viz.*, whether society's resources will be dedicated first and foremost to the pursuit of profit or to meeting people's needs, is another issue confronting the nation. Seen from one perspective it is the question of productivity. From another, it is the question of democracy in daily life, including working life.

The advanced technological systems increasingly deployed in our economy potentially call for a labor force characterized by general capabilities to investigate and learn about the unexpected, to think flexibly about new problems, and to participate effectively in complex teamwork. The produc-

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1. The "management prerogatives doctrine" is a fundamental premise of collective bargaining law. It holds that the management of an enterprise is presumptively entitled to legal freedom of action with respect to certain actions and decisions in the workplace. One of the most important implications of the doctrine is the rule that management is not under a duty to bargain collectively regarding certain types of investment and shut-down decisions because these decisions lie at the "core" of entrepreneurial prerogative. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). The most recent formulation of the doctrine by the Supreme Court will be found in First Nat'l Maintenance Corp. v. NLRB, 101 S. Ct. 2573 (1981) (Court undermines workers' statutory right to collective bargaining by balancing it against employers' need for "unencumbered decision-making").

tivity of our industrial and service systems would be enormously enhanced if jobs were designed to draw upon workers' abilities to learn, to accumulate knowledge, and to develop flexible conceptual and interpersonal capabilities. However, designing jobs this way conflicts with the mental habits and instincts of American management. Management inclines toward more traditional modes of workplace organization, less fraught with the danger of loss of control over workers. The impulse to maintain control appears even in some of the recent "quality of working life" experiments through which management hopes to boost productivity by mobilizing the desire of workers to participate in enterprise governance. Fred Block and Larry Hirschhorn have summarized the most basic and enduring managerial attitude: "[a] work force stripped of conceptual skills is easily replaceable, hence cheaper, and is unable to use its knowledge as a lever against management."[2] Therefore, the job-design potentials of advanced technology often go unrealized. Instead, we witness an awesome and systematic degradation of workers and jobs, which has been commented on by other speakers this morning.[3]

Traditional, antiparticipatory modes of workplace organization are not entirely "rational," that is to say profit-maximizing, from the long-run management standpoint. Hierarchy and deskilling deny management the opportunity to capture and cash in on the productive power of workers' learning and problem solving capabilities. For this reason, and also perhaps because of the general democratic norms of our political culture, authoritarian forms of workplace organization are in constant need of ideological justification. The industrial community constantly needs to be persuaded that we ought to have management (in the sense of a distinct, privileged group within workplace organization charged with the responsibility of command). The industrial community needs constantly to be persuaded that command, planning, and choice ought to be separated from execution. Management prerogatives doctrine functions as part of this process of persuasion and legitimation.

Professor Atleson's presentation, and the longer work on which it is based,[4] carefully identify and examine the values and assumptions that are nourished and continuously revitalized by the management prerogatives doctrine. Included in these underlying assumptions are the premises that denial of employee input and control over basic or even routine enterprise decisions is justified because workers lack knowledge about financial and operational matters,[5] because they lack interest in investment and resource

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2. Block & Hirschhorn, *New Productive Forces & The Contradictions of Contemporary Capitalism: A Post-Industrial Perspective*, 7 THEORY AND SOCIETY 363, 375 (1979).

3. *See generally* H. BRAVERMAN, LABOR & MONOPOLY CAPITAL (1974).

4. J. ATLESON, VALUES & ASSUMPTIONS IN LABOR LAW (forthcoming 1983).

5. Typical of administrative and judicial attitudes on this point is General Motors Corp., 191 N.L.R.B. 951 (1971) (decision to withdraw from business not subject to duty to bargain), *enforced sub nom.* UAW v. N.L.R.B., 470 F.2d 422 (D.C. Cir. 1972) ("decisions

allocation choices, and because business growth supposedly requires free capital mobility regardless of the human consequences. Perhaps most important is the ancient non sequitur that management has a right to control the workplace because it owns the workplace.

The crucial point of Jim Atleson's paper and other recent work in the new "critical labor jurisprudence,"[6] is that the ideological content of the management prerogatives doctrine is important. The vision of the world of work that the doctrine underwrites and advances provides significant symbolic and emotional underpinnings that tend to legitimate an historically obsolete form of workplace organization. The social function of significant legal ideas like the management prerogatives doctrine is to induce us to accept a certain view of the possibilities of and constraints upon human freedom, to induce us to believe in the justice, or at the least the inevitability of existing institutional forms. In particular, management prerogatives doctrine is designed to get us to believe the simplistic if not plainly inaccurate claim that management has always had the power to govern the work-process (unless it conceded part of that power by agreement); and the plausible but nonetheless wholly undemonstrated claim that operational efficiency in work requires hierarchy and command. In sum, the purpose of the management prerogatives doctrine is to deny us access to knowledge about our past and political imagination about our future.

Moreover, the doctrine shifts the "burden of proof" regarding justification of democratic accountability. In a democratic culture, those who exercise power should, presumptively be subject to the norms of popular participation and communal responsibility. By making it appear that private, non-accountable command is somehow "natural" or appropriate in the workplace, the management prerogatives doctrine places the uphill burden of justification upon those who would apply basic democratic ideals to so-called private holders of economic power.[7] This is an imposing obstacle to the moral progress of an industrial society. It tends to inhibit all of us from seeing the workplace as a potential setting for workers to experience and develop their capacities for self-realization and collective self-governance.

To be successful, the overall attack on the management prerogatives doctrine must include the objectives of worker self-management on a day-

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such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. . . . They . . . involve subject areas as to which the determinative financial and operational considerations are likely to be unfamiliar to the employees and their representatives").

6. *See generally* Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law,* 4 INDUS. REL. L.J. 450 (1981), particularly sources cited at *id.* at 450 n.1.

7. These themes are developed at greater length in Klare, *supra* note 6, and Klare, *The Public-Private Distinction in Labor Law,* U. PA. L. REV. (forthcoming 1982).

to-day level as well as socially responsible investment decisions. Therefore, it seems appropriate and prudent that we fight for both workers' control and democratic resource allocation as alternatives to the existing and accepted forms of workplace organization. The fight for jobs is an urgent and commanding priority. But we should also be fighting for better jobs, for jobs with meaningful content, jobs offering workers self-developmental possibilities, jobs offering the possibility of a satisfying balance between work time and personal life.

It will not be easy to wage both struggles simultaneously. We live in desperate times. Yet I agree with Staughton Lynd that while we fight for our immediate priorities, we must keep our eyes on the horizon. By placing the question of workers' control high on our agenda, we contribute to the great task of mobilizing this generation to carry on the historic work of the labor movement. As a subpoint by way of conclusion, I would urge continuing theoretical work on the legal system as part of the broader effort of formulating our aspirations for democratic participation in viable political, organizational, and doctrinal terms. A part of our task must be to decode, understand, and transcend the cultural obstacles to democratic progress represented by powerful and pervasive legal ideas such as the management prerogatives doctrine.

DISCUSSION

THOMAS CHRISTENSEN,* MODERATOR: Now we will open up the discussion and give the audience a chance to respond or ask questions about the statements made.

STAUGHTON LYND: I'd just like to make one comment, if I might, because there was a situation in Youngstown I'm reminded of; it wasn't a steel mill, it was a fabricating company that made desks and files. At contract time, the company negotiators said to the union, look, we have plans for a new plant right here in Youngstown. They took them to a certain room and they showed them blueprints and the architect's drawings, and they said all that is needed in order to build this new plant is for the union to take no wage increase at all in the first year of the contract. The union people agreed to that; they went out in the plant and sold it and they sure as heck gave up the wage increase in the first year of the contract, and they never got the plant. It seems to me that one thing as lawyers and as negotiators for unions we ought to get better at is that when we do make agreements with companies in this area, we ought to put in language that's just as good as their language. I mean really enforceable language. For instance, I'm worried about the Ford agreement, Mr. Gray; I haven't seen it, but in the newspapers it seemed as if they promised not to close their plants if the closing were for a certain kind of reason. We all know from experience with the Board in discharge situations, that when you have those mixed motive cases, it's almost impossible to prove that the discharge was for this reason rather than for that reason. If that is what that agreement says, you now feel collectively, as labor lawyers and labor negotiators, we may have done a bad drafting job, in that instance. We have just to get it through our heads that the day is gone when we give up something definite, and they make one of these vague, unenforceable promises that doesn't do us any good.

EDWARD GRAY†: Staughton, I think you ought to know that we have never had a draft of the perfect contract. I think our contracts on the whole are very good, and they're generally enforceable. I think we have quite good success in changing the work conditions in the plants, but I would admit very quickly, that the contracts are not written perfectly, and probably never will be. I, too, have read some of the excerpts from the Ford Agreement; it seems to me too, that the language could be somewhat tighter. But, one of the problems we have at the bargaining table is that we don't write the contract; it is jointly written, it is a matter of whether you can get an agreement to do things the way that they ought to be done. Believe me, if we wrote them by ourselves, no problem at all—they'd be perfect contracts. But unfortunately in the efforts to put things together in a way that we can all

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live with them, at least for a period of time, very often they are not written quite the way they ought to be. The Ford thing may work; give us a little time. I hope the GM thing will too. But at least we're moving into areas that we never even were able to talk about before, and that, to me, is very important.

AUDIENCE COMMENT: I have a question for Mr. Lynd. Could you describe more explicitly what the community can do to aid a local union in opposing a plant shutdown or securing an alternative ownership. By community, I include the litigation and public relations capability of environmental groups, consumer groups, civil-rights groups, and the public interest community at large.

STAUGHTON LYND: I think that one of the things that we've all experienced in shutdown situations is that in many ways, the employee whose job is at stake, is the person who finds it most difficult to take direct action. If, for example, that person is involved in a plant occupation and if it goes on long enough to provoke arrests, it is a difficult situation. It's the same situation, I came to realize, in Youngstown as with the occupation of university administration buildings in the late 60's. If the company is dumb, it sends in the police; if it's smart, it just waits and dribbles little negotiating orders, and tries to break up your morale. But, if a factory occupation is determined and it comes to the point of arrests and discharges, then the worker in that plant who is arrested and discharged loses transfer rights, unemployment compensation and a whole series of ancillary benefits which may help that person to get by if, in fact, the plant closes. Therefore, it's asking an awful lot of the individual whose job is at risk to take the lead, to be the vanguard in such a struggle. It's a little like the movie, *Salt of the Earth,* that we've all seen, where in that case the strikers were under an injunction and it was their wives who came forward and carried on the picket line. It seems to me that essentially in the same way, members of the community may be more free. It may be a lot less burdensome for them to come forward and take all kinds of actions in a plant-closing situation. The problem is whether they will have the motivation to do so; whether they will see the connection between the closing of the particular plant and their situation in the community. I think that in settings where they're not modernizing, and they're not even doing the maintenance properly, you know that the handwriting is on the wall. The people in the plant are the people who know best that that plant is on the death list. That's when it seems to me that before the company makes its move, the people in the labor movement ought to begin building in the community. What can you build around? One obvious thing is if the plant goes, the property taxes in the community are going to disappear, which will shift the burden to homeowners. Taxes will also be less in total, and that means that the quality of schools will deteriorate, all of the public services in the community will deteriorate. In Youngstown it was very difficult to paint that picture before it actually happened; in Pittsburgh it's much easier because Youngstown is only seventy-five miles away. So I think that the

question of property taxes, loss to the community if the plant closes and no longer pays its share of the taxes, affect on social services, if that occurs, are issues around which you can begin to organize people in the community before a closing actually occurs. The environmental movement is a collection of middle class people in tennis shoes who want to take jobs away from workers. The people who suffer most from environmental insults are workers, who work in the crap before it gets out in the community. The mortality rate of steel workers who work on top of coke ovens from lung cancer is ten times that of the general community. So that there's an issue which might seem on the surface to have very little to do with plant closings, but where you can begin to build alliances before this sort of crisis arises. Churches are suffering from the plant-closing problem in the sense that as the center cities of industrial communities decay, people move out to the suburbs. Catholic churches, in particular working class churches, are losing their parishes. The Catholic Church has a vested interest in preserving existing industrial communities, and in modernizing in those communities, rather than in new green field sites. The Bishop of the Youngstown diocese was the head of the effort to reopen the Campbell works under employee ownership; Catholic parish priests and radical Catholic activists are by far the most active clergy in the Pittsburgh situation.

AUDIENCE COMMENT: I'm from the Workers Rights Law Project out of Philadelphia. We are working on a plant-closing situation which might be applicable elsewhere. Bluebird Foods was a ham processing outfit in South Philadelphia. They were represented by the United Food and Commercial Workers; the employees won and Bluebird shut down. About four months later, they reopened under the name of another subsidiary of the same parent corporation. We filed a charge with the NLRB claiming that the reason for the closing and the reopening was to avoid the employer's obligations under the existing contract, relying to a great extent on a case called *Los Angeles Marine Hardware* in Volume 235 [the NLRB Reports]. There a union plant shut down and then opened up on the other side of town with an entirely new work force. The challenge succeeded and was enforced by the Ninth Circuit. If anybody has any comments on that, I'd appreciate it. Possibly the same kind of theory could be applied, say when a plant closes down during the term of its contract and moves south.

STAUGHTON LYND: The thing, of course, about NLRB charges, is that anyone can bring an NLRB charge. But, if it's a refusal to bargain charge, then you have to be recognized as a bargaining representative, which was the problem I was pointing out when you're going under section 8(a)(5). But you would be going, I take it, under section 8(a)(1) or section 8(a)(3), and you'd have a different situation.

AUDIENCE COMMENT: We would be be going under section 8(a)(3) and a case called *Brown Company,* Vol. 243 NLRB 100. It specifically says that this cause of action would be available.