Management Prerogatives No Longer Include Right To Make Unilateral Decision To Subcontract

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NOTES

MANAGEMENT PREROGATIVES NO LONGER INCLUDE RIGHT TO MAKE UNILATERAL DECISION TO SUBCONTRACT

Within the context of continued high unemployment, a number of labor-management problems are taking on added importance. Problems of the first magnitude arise when management decides to reduce the number of jobs available to its present employees — either by a decision to automate or to relocate or to contract out work which previously has been done by its own employees. A member of the National Labor Relations Board, John H. Fanning, recently outlined some of the major considerations involved in such decisions:

Today the twin problems of chronic unemployment and automation have given greater dimension to the issues involved; the economic climate surrounding bargaining as to subcontracting or curtailment of operations has become more acute in an economy where upwards of 4 - 5 million employable men and women find themselves unemployed. In many cases employers find it more economical or efficient to shut down certain operations, automate them or subcontract to other employers who have already undergone automation. The result often is that a one-industry town, or indeed any town with a dominant industry finds its industry gone and its people unemployed. In other cases unions, fearing unemployment for their members, demand that no employee be discharged, relying upon work rules which in recent times have subjected these unions to charges of "featherbedding."

Focusing on the problem of subcontracting, in two recent decisions, *Town and Country Mfg. Co.* and *Fibreboard Paper Prod. Corp.*, the National Labor Relations Board has held that a decision to subcontract is not for management alone but rather that management is required to bargain with the bargaining representative when the decision results in the loss of unit jobs, even if the reasons for the decision were economic and nondiscriminatory. Until these cases, it had generally been assumed that an unfair labor practice would not be found in a subcontracting situation without discriminatory behavior by the employer.

The National Labor Relations Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees; that is, refusing "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."

A subject falling within the terms "wages, hours, or other terms and conditions of employment," is considered to be a mandatory subject for collective bargaining — one that must be bargained about if either management or labor so desires. The effect of the Board's decisions in *Town and Country* and in *Fibreboard* was thus to make the decision to subcontract a mandatory bargaining subject.

The Supreme Court considers the scope of the statutory bargaining duty to be quite broad: "effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted to bargain about the exceptional as well as the routine rates, rules, and working conditions."

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1 See Note, Runaway Shop — A Perennial Threat To Organized Labor, 37 Notre Dame Lawyer 357 (1962).
3 136 NLRB 1022 (1962). (Appeal pending before Fifth Circuit Court of Appeals.)
4 138 NLRB No. 67 (1962). (Appeal pending before D.C. Circuit Court of Appeals.)
6 Id. at 158(d). (Commonly referred to as § 8(a)(5).)
Following this directive the courts and the Board have held that such matters as termination of employment by discharge or retirement, layoffs, transfers, recall, reinstatement of strikers, seniority, downgrading, grievances, changes in working hours or working schedules and even disputes concerning coffee breaks, fall within “conditions of employment,” and thus are mandatory bargaining subjects. When viewed in this context, subcontracting, when it results in the loss of unit jobs, seems to fit quite readily within “conditions of employment.”

Spokesmen for management, on the other hand, maintain that the decision to subcontract fits just as readily within the framework of management prerogatives, and thus is not and should not be a mandatory bargaining subject. Subjects such as the corporate or other structure of the business, the composition of the official and supervisory force, general business practices, the products to be manufactured, the location of plants, the schedule of production, and the methods, processes, and means of manufacturing have been traditionally thought of as the prerogatives of management.

I. MANAGEMENT PREROGATIVES.

Since the passage of the National Labor Relations Act in 1935, there has been a contraction of these matters which are within the scope of management alone to decide — the so-called management prerogatives. The Board and the courts have held that such items as company housing, pensions, group insurance, Christmas bonuses, and work schedules are mandatory bargaining subjects, and thus no longer to be considered as management prerogatives. So, it is not possible to determine what is bargainable merely by looking to what was commonly the subject of labor-management negotiation in 1935, as has been contended.

How then have the courts and the Board reached conclusions as to whether a given subject is a mandatory bargaining subject or is within management prerogative? At times, the courts have seemed to base the decision on whether the topics were “frequent subjects of negotiation.” But usually the conclusion is reached that a given subject is within the statutory terms “wages, hours, and other terms

8 Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948).
9 Michalek, d.b.a. Service Metal Industries, 96 NLRB 10 (1951).
10 Administrative Decision of NLRB General Counsel, Case No. F-1105 (1959).
13 Washougal Woolen Mills, 23 NLRB 1 (1949).
14 Belanger v. Local Division No. 1128, 254 Wis. 344, 36 N.W.2d 414 (1949).
16 Arundel Corp., 59 NLRB 505 (1944).
17 Oughton v. NLRB, 118 F.2d 486 (3d Cir. 1941).
18 Timken Roller Bearing Co., 70 NLRB 500 (1946).
20 2CCH 1961 LAB. L. REP. § 3020.
22 See Inland Steel Co., 77 NLRB 1, 27 (1948), enforcement granted, 170 F.2d 247 (7th Cir.), cert. denied, 336 U.S. 960 (1949). The intermediate report of the Board stated: It is well known, however, that over the years of negotiations between unions and employers, the accepted subject matter of collective bargaining has expanded, so that presently various subjects which were formerly deemed to be reserved as “management prerogatives” are bargained about.
23 Bemis Brothers Bag Co., 96 NLRB 728 (1951).
25 Phelps Dodge Copper Products Corp., 101 NLRB 360 (1952).
26 NLRB v. Niles-Bement-Pond Co., 199 F.2d 713 (2d Cir. 1952).
27 Hallan & Bogg's Truck & Implement Co., 95 NLRB 1443 (1951).
28 W. W. Cross & Co. v. NLRB, 174 F.2d 875, 877-78 (1st Cir. 1949); Inland Steel Co. v. NLRB, 174 F.2d 247, 254 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).
and conditions of employment,” with no further rationale offered. It has been suggested that implicit in such decisions is an evaluation of the relative strengths of the interests of management and of those of labor in the subject, resulting in a case by case balancing of those interests.

The concept of mandatory bargaining subjects is based, of course, on the National Labor Relations Act, but it is not so clear on what basis the concept of management prerogative is founded. Three possibilities emerge — either management prerogatives are rooted in legislation, or are conferred by contract, or are the natural product of the manager’s position. Since the labor-management statutes are silent on the subject, the first possibility must be rejected as the source. If the second possibility is accepted — if management prerogatives are derived from contract — then clearly without a contract containing a management prerogative clause, management has no rights. This theory hardly seems acceptable, especially when one is confronted with a realistic account of the historical development of the collective bargaining process. It should be noted, though, that management rights can be expanded by contract to include even mandatory subjects.

Thus, the third theory — that management prerogatives are the natural product or right of the manager’s position — remains to be scrutinized. In support of this theory, it has been stated that:

“... We ourselves, as human beings, have certain needs that come from our nature. We have the right to life and to the means of sustaining life. One of the basic means is the institution of private property, an institution that is antecedent to our established laws. With the right to private property there go other rights, one of which is the right to control the management and distribution of property for the benefit of the owner and the welfare of the community. One who owns a business, then, is entitled either to control it himself or to hire a deputy, his manager, to manage it for him.

By the very nature of these institutions that we hold to be fundamental, the one who owns or manages must control. True, the extent and exercise of the control are mitigated by circumstances of time and place. It is true too that one who controls the means of production and who hires the labor of others to assist him in his enterprise owes a duty to his employees.

This theory as to the source of management rights seems realistically to coincide with the historical development of the collective bargaining process, and is compatible with our traditional notions in regard to property rights.

While it is true that the concept of mandatory bargaining subjects comes from the National Labor Relations Act, it should be noted that the rights of labor are not based solely on legislation. Working men as well as property owners find certain inalienable rights inherent in man as man. Therefore, when the conflict between management prerogative and mandatory bargaining subject is brought clearly into focus, it is viewed as a contest between property rights, statutory rights, and the rights of man as man. In such a situation, the method of evaluating the relative strengths of the interests of labor and management in the topic — a case by case balancing of interests — seems to be not only proper, but essential to a just determination.

In regard to the decision to subcontract both sides are able to find support for their respective positions in the case law. The chief policy argument advanced in support of the position that the decision to subcontract is a mandatory bargaining subject is the contention that such a requirement promotes labor-management peace and cooperation, and thus avoids potential strife.
II. SUBCONTRACTING DECISIONS.

A. The Changing Law.

In the *Town and Country* case, the Board held that the employer, by unilaterally entering into a subcontract by which its trucking department was discontinued, without consulting the duly designated representative of its drivers, violated Section 8(a)(5) of the Act. At the time of the decision to subcontract there was no collective bargaining agreement in existence between the employer and the union which had just been certified as the employees' representative.

Although it found that the employer's motive for contracting out the work was discriminatory in nature, and as such was an unfair labor practice, the Board felt that this was immaterial, and went on to hold that even if the decision to subcontract was based on economic considerations, there still would have been a violation, since such a decision presented a mandatory bargaining subject. The Board outlined in detail what it felt this obligation entailed:

This obligation to bargain in nowise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment. Experience has shown, however, that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. But it commands no less. Based on the language of its opinion in *Town and Country*, the Board felt justified in granting a rehearing and subsequently reversing its earlier decision in the *Fibreboard* case. In this case, the motives for an employer's decision to discontinue the jobs of fifty maintenance and powerhouse workers and contract out the work were found to be economic in nature. Nevertheless, the Board held that the failure of the employer to bargain with the union concerning its decision constituted a violation of Section 8(a)(5) of the National Labor Relations Act. The Board made it clear that it was not holding that a decision to contract out work is foreclosed to management unless a decision is negotiated which is satisfactory to the union. All that it held was that such a decision is a mandatory subject for collective bargaining. The Board felt that its conclusion in *Fibreboard* was dictated by the Supreme Court's decisions in *Order of Railroad Telegraphers v. Chicago & Northwestern R. Co.*,** Teamsters Union v. Oliver,** and *Steelworkers v. Warrior & Gulf Co.*.*

B. Previous Board Decisions.

Having reached the Board's decisions in *Town and Country* and *Fibreboard*, it will now be the purpose of this section to explore previous decisions, from the Board itself and from the courts, with regard to subcontracting and to show how the previous decision did, or did not, bolster the Board's decision.

Authority can be found to support the majority's decision in a number of previous National Labor Relation Board cases, even where discriminatory motives were not expressly found. In *Timken Roller Bearing Co.*,** the Board found that the employer had violated Section 8(a)(5) of the Act by his refusal to bargain about his intention to subcontract out work in the future, although it was not clear from the opinion, however, where the motives for subcontracting were economic.
or discriminatory in nature. In a somewhat analogous situation the Board held, in *Brown Truck & Trailer Mfg. Co.*,\(^{44}\) that the company had violated Section 8(a)(5) by failing to advise the petitioning union of the establishment of a new plant, and thus depriving the union of the opportunity to bargain as to the possible transfer of employees to the new plant. And in *Shamrock Dairy Co.*,\(^{45}\) the Board concluded that the employer had violated Section (a)(5) by failing to bargain with the union as to whether the company should adopt the independent contractor system of distribution. Adoption of this system was equivalent to the elimination of the jobs of the union's members and the contracting out of the work previously done by them.

Once it is shown that the employer has made any decision — including the decision to subcontract — in an effort to discriminate against union membership, that employer has committed an unfair labor practice in violation of Sections 8(a)(3) and 8(a)(1) of the Labor Management Relations Act.\(^{46}\)

An employer that accelerated the effective date of its change in operations, which amounted to a discontinuance of its transportation department and the subcontracting out of the work previously done by that department, in order to avoid recognition of and bargaining with the union, was held to violate Sections 8(a)(3) and 8(a)(5) in *Consumers Gasoline Stations*.\(^{47}\) This case is, of course, distinguishable from second *Fibreboard* since the reasons for the employer's decision here were discriminatory in nature, while in *Fibreboard* they were of an economic nature. However, this case is similar to *Town & Country*, where the decision was also based on discriminatory reasons.

In *Herman Nelson Division, American Air Filter Co., Inc.*,\(^{48}\) the employer abolished its guard department, subcontracted out the work, and transferred the guards to other jobs. Only after it had completed these actions, did it meet with the union to advise it of these facts. The Board held that, by its actions, the employer had committed an unfair labor practice — its motives were explicitly found to be discriminatory.

The dissent in second *Fibreboard* also can find authority for its position in previous Board decisions.\(^{49}\) However, this support aside from the now-reversed first *Fibreboard*, comes from cases decided before 1950. In *Mahoning Mining Co.*,\(^{50}\) the Board determined that the company did not exercise sufficient control over certain individuals to establish an employer-employee relationship, and thus, that the company did not violate 8(a)(5) by failing to bargain in regard to these individuals. In the course of its opinion, the Board stated:

> The Board has never held that once it has established an appropriate unit for bargaining purposes, an employer may not in good faith, without regard to union organization of employees, change his business structure, sell, or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected by the proposed business change.\(^{51}\)

In *Walter Holm and Co.*,\(^{52}\) the Board stated that Section 8(a)(5) does not require an employer to consult with its employees' representative as a prerequisite to going out of business for nondiscriminatory reasons.\(^{53}\) Since going out of business

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\(^{44}\) 106 NLRB 999 (1953).

\(^{45}\) 124 NLRB 494 (1959).


\(^{47}\) 126 NLRB 1041 (1960).

\(^{48}\) 127 NLRB 939 (1960).

\(^{49}\) In evaluating previous Board decisions, the political responsiveness of the Board should be kept in mind. See Note, *The NLRB Under Republican Administration: Recent Trends And Their Political Implications*, 55 COLUM. L. REV. 852 (1955).

\(^{50}\) 61 NLRB 792 (1945).

\(^{51}\) *Id.* at 803.

\(^{52}\) 87 NLRB 1169 (1949).

\(^{53}\) *Id.* at 1172.
is somewhat analogous to the discontinuance of a department or business unit and the contracting out of the work previously handled by that department or unit, this case would seem to lend support to the dissent’s conclusion in second Fibreboard.

C. The Issue as Developed by the Courts.

The dissent’s position receives considerable support, however, from decisions in the United States Courts of Appeals. In NLRB v. Rapid Bindery, Inc., the Court of Appeals for the Second Circuit held that the decision as to whether the employer would move his business to another area was within managerial discretion, and did not have to be submitted for collective bargaining. The court did find a violation of 8(a)(5) however, in the action of the employer in failing to give notice to the union of the move, and thus failing to discuss the treatment to be accorded displaced workers. This decision is very similar to the first Fibreboard case, where the Board held that the employer had a duty to bargain in regard to termination rights and benefits, but no duty to bargain about its decision to contract out the work.

The Seventh Circuit Court of Appeals held, in Jay Foods, Inc. v. NLRB, that where the employer’s sole reason for abolishing its auto repair department, discharging the employees therein, and contracting out the work was an economic one, that there was no violation of 8(a)(5) although the employer did not bargain with the union in regard to such decisions. The court based its decision, at least in part, on the first Fibreboard case, and on the fact that there was no bargaining agreement in effect between the union and the employer.

In NLRB v. Lassing, the Sixth Circuit reversed the Board’s decision in Consumers Gasoline Stations, and found that the change in operations was not made for discriminatory reasons. The court went on to say that since the business was legally terminated for economic reasons, that there was no basis for meeting later with the union for collective bargaining. This conclusion appears contrary to the one reached by the Second Circuit in the Rapid Bindery case.

Situations involving the closing of company departments and the contracting out of the work previously handled by these departments were brought before the courts in NLRB v. R. C. Mahon Co., NLRB v. Adkins Transfer Co., and NLRB v. Houston Chronicle Pub. Co. In none of these cases did the courts consider directly the question of whether a management decision to contract work out of an existing unit was a mandatory subject of collective bargaining. However, there is language in all of these cases to the effect that such a decision is solely a managerial one, and thus the implication is left that such a decision is not a mandatory bargaining subject.

The case of NLRB v. New Madrid Mfg. Co. involved a predecessor-employer who closed one of its plants and sold its machinery to a successor-employer, who opened a plant at a new location. In the course of its opinion, the court spoke of the absolute right of an employer to permanently close and go out of business. The dissent in the second Fibreboard case cited this opinion in support of the proposition that the decision to go out of business completely or to discontinue a department is the decision solely of management.

54 293 F.2d 170 (2d Cir. 1961).
55 292 F.2d 317 (7th Cir. 1961).
56 284 F.2d 781 (6th Cir. 1961).
57 126 NLRB 1041 (1960).
59 269 F.2d 44 (6th Cir. 1959).
60 226 F.2d 324 (6th Cir. 1955).
61 211 F.2d 848 (5th Cir. 1954).
62 215 F.2d 908 (8th Cir. 1954).
63 Id. at 914.
Support for the Board’s Decision

The Courts of Appeals have not left the Board’s majority without support. In a recent decision, the Seventh Circuit went well beyond the position advocated by the Board in *Town and Country* and second *Fibreboard*. The court held in *UAW, Local 391 v. Webster Elec. Co.*, that an employer could not contract out the work previously done by its maintenance department, without the consent of the union. The court based its decision on the fact that a union shop agreement was in existence between the employer and the union at the time. It was decided that the right to contract out was inconsistent with such a union shop agreement. Apparently, the court’s unstated premise was that a union shop agreement means that one who is not a union member shall not do the employer’s work, unless the union consents. This seems to be a very broad interpretation of the meaning of a union shop agreement. It is normally understood that, by entering into such an agreement, an employer promises only that it will employ only those *employees* who join the union within one month after employment. Section 8(a) (5) of the National Labor Relations Act supports the normal interpretation; it is written in terms of “employees,” not in terms that would include anyone who does the employer’s work, such as an independent contractor. The Act itself expressly states in Section 2(3) that the term “employee” shall not include any individual having the status of an independent contractor. It would therefore appear that the court’s conclusion that the right to contract out is inconsistent with a union shop agreement is, itself inconsistent with the Act.

The Tenth Circuit considered a case very similar to *Town and Country* when it decided *NLRB v. Brown-Dunkin Co.* In that case, the court affirmed the Board’s finding that the employer had violated Section 8(a) (5) of the Act by failing and refusing the union an opportunity to bargain in regard to its decision to subcontract out work being done by its employees. No collective bargaining agreement was in existence, but the union had been duly certified as the bargaining agent for the employees involved. The Board found, and the court agreed, that the motives for contracting out the work were discriminatory in nature.

After reaching the conclusion that under the circumstances of the case the union was not given a fair opportunity to bargain with the employer about not subcontracting the work, or with the new employer under the subcontract concerning the conditions of the new employment the court stated:

This is not to say that the Union must first approve before an employer may contract out work, but it is to say that reasonable notice and a chance to bargain must be afforded before an employer enters into a contract affecting the hire or tenure of its Union workers employment. This is so because “Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.”

While this decision lends much weight to the Board’s holding in *Town and Country*, it should be pointed out that no statement is made by the court on the materiality or immateriality of the employer’s discriminatory motives. However,

65 299 F.2d 195 (7th Cir. 1962).
66 CCH 1963 LAB. L. COURSE 2742.
67 29 U.S.C. at 152(3). It should also be pointed out that if the independent contractor employs individuals to assist him in doing the work he has agreed to do, that such individuals should not be considered to be employees of the primary employer. The Supreme Court has stated:

We agree with the Board also in its conclusion that the fact that the contractor and the subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor’s work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. National Labor Relations Board v. Denver Bldg. & Construction Trades Council, 341 U.S. 675, 689-90 (1951).
68 287 F.2d 17 (10th Cir. 1961).
69 Id. at 20.
the reasoning and statements of the court, even taking into account this omission, are consistent with the reasoning of the second *Fibreboard* decision, and then should also lend some support to it on appeal.

As has been stated previously, the Board felt that its conclusion in the second *Fibreboard* case was dictated by decisions of the Supreme Court — especially *Order of Railroad Telegraphers v. Chicago & N.W.R. Co.* In that case, the union notified the railroad that it wanted to negotiate with it, in order to amend the current bargaining agreement to provide that no position then in existence could be abolished without agreement. The railroad contended that no bargainable issue was thereby presented, and thus it refused to negotiate with the union in this regard. The District Court held that the proposal related to “rates of pay, rules, and working conditions,” and that the railroad was therefore subject to bargaining obligations. The Supreme Court agreed:

> Plainly the controversy here relates to an effort on the part of the union to change the “terms” of an existing collective bargaining agreement. The change desired just as plainly referred to “conditions of employment” of the railroad’s employees who are represented by the union. . . . And, in the collective bargaining world today, there is nothing strange about arrangements that affect the permanency of employment. The District Court’s finding that “Collective bargaining as to the length or term of employment is commonplace,” is not challenged.

We cannot agree with the Court of Appeals that the union’s effort to negotiate about the job security of its members “represents an attempt to usurp legitimate managerial prerogative in the exercise of its business judgment with respect to the most economical and efficient conduct of its operations.”

While it is true that the *Telegraphers* case was governed by the Railway Labor Act, and not the National Labor Relations Act, the courts have recognized the similarity of the bargaining obligation imposed by these Acts. In the case of *Elgin, Joliet, & Eastern Ry. Co. v. Brotherhood of Railway Trainmen*, the Seventh Circuit recognized the substantial identity of the bargaining obligation under these Acts. The court held, under the Railway Labor Act, that pensions were mandatory subjects for collective bargaining, basing its decision on *Inland Steel v. NLRB* where the same result had been reached under the National Labor Relations Act. In fact, in *Inland Steel*, the Court completed the circle by pointing out that “other conditions of employment” in the National Labor Relations Act was somewhat broader than the term “working conditions” used in the Railway Labor Act. The interplay between these cases affirms the Board’s position in the second *Fibreboard* case that the *Telegraphers* decision, though decided under the Railway Act, is applicable to situations arising under the National Labor Relations Act.

Soon after the Supreme Court decided the *Telegraphers* case, Senator Everett Dirksen introduced a bill to amend the Norris-La Guardia Act, the National Labor Relations Act, and the Railway Labor Act. His proposal was referred to the Committee on the Judiciary, where, apparently, no further action was taken. Dirksen stated the bill’s purpose: “All the bill does is to provide that the phrase ‘terms of conditions of employment’ and related language in various acts do not include the creation or discontinuance of jobs.” Dirksen felt that such a change was necessitated by the Supreme Court’s decision in the *Telegraphers* case. He read the Supreme

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75 302 F.2d 540 (7th Cir. 1962).
76 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).
77 *Id.* at 255.
78 S. 3348, 86th Cong. 2d Sess. 10232 (1960).
Court's opinion as affecting the bargaining obligation of an employer not only under the Railway Labor Act, but also under the Labor Management Relations Act.

The Board's opinion in the second Fibreboard case also finds support in two other Supreme Court cases — Teamsters Union v. Oliver and Steelworkers v. Warrior & Gulf Co. The Oliver case concerned a collective bargaining agreement between labor unions and interstate carriers. It set up a wage scale for truck drivers, and to prevent evasion, it also provided that drivers who owned and drove their own vehicles should be paid the prescribed wages, plus minimum rentals for the use of their vehicles. The Supreme Court held that such a minimum rental provision was within the scope of the collective bargaining required of parties under Sections 7 and 8 of the National Labor Relations Act.

It seems apparent that such a minimum rental provision is meant to discourage an employer from contracting out work, and thus is aimed at preventing a progressive curtailment of jobs performed by union employees. If such a provision is within the scope of the collective bargaining which the Act requires, and the Court has said that it is, then to hold otherwise than that an employer's decision to contract work out of an existing unit also presents a mandatory bargaining subject would be inconsistent. The Court seemed to recognize this fact when it cited, in support of its holding, Timken Roller Bearing Co. It will be remembered that the Board held there that the employer had violated Section 8(a)(5) of the Act by his refusal to bargain about his intention to subcontract out work in the future.

The case of Steelworkers v. Warrior & Gulf Co. involved a suit brought under the Labor Management Relations Act by a labor union to compel arbitration of a grievance. The grievance was based upon the employer's practice of contracting out work, while at the same time laying off employees who could have performed such work. The collective bargaining agreement between the parties set up a grievance procedure which culminated in arbitration. The agreement further provided that "matters which are strictly a function of management shall not be subject to arbitration." It also provided, however, that "Should differences arise as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise," the grievance procedure should be followed. The employer argued, as he had done so successfully before the District Court and the Court of Appeals, that the decision to contract out work was "strictly a function of management," and therefore not subject to arbitration. Under these circumstances, the Court reversed the lower courts' decisions and held that the question presented, whether the contracting out violated the agreement, was for the arbitrator to decide. It based its decision, to a large extent, on its finding that there was presented a dispute "as to the meaning and application of the provisions" of the agreement, and that the parties had agreed that where such was the case the determination was to be made by arbitration.

Although the Court did not state definitively whether or not the decision to contract out work was "strictly a function of management," the tenor of its opinion and the fact that it reversed the lower courts would seem to indicate that the Court did not consider it to be strictly a management function — and it has been so interpreted. If such a decision is not solely a management function, it is only

81 363 U.S. 574 (1960).
83 70 NLRB 500 (1946); rev'd on other grounds, 161 F.2d 999 (6th Cir. 1947).
84 363 U.S. 574 (1960).
86 Ibid.
87 Id. at 583-84.
a short jump to the conclusion that it is a mandatory bargaining subject, since "terms and conditions of employment" seems broad enough to embrace it.

III. Good Faith Bargaining.

In explaining the requirement of the National Labor Relations Act that an employer must bargain collectively with the representatives of his employees, the Chairman of the Senate Committee on Education and Labor, Senator Walsh, stated: "When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." But the concept of good faith bargaining has been considerably altered since 1935, and when the Board states, as it did in second Fibreboard, that when it holds that subcontracting is a mandatory bargaining subject, all that is required is a "candid discussion of mutual problems by labor and management," it certainly understates the effect of its decision.

The Board and the courts have held that collective bargaining requires "an open and fair mind" when entering into negotiations; when the employer "seals his mind" he is guilty of an unfair labor practice. There is the further duty imposed on the parties "to discuss freely and fully their respective claims and demands, and, when these are opposed, to justify them on reason." Good faith bargaining can, and often does, require more than just an open and free discussion. Where certain material is deemed relevant and necessary to informed bargaining, the employer will be required to furnish it to the union upon request. In the Truitt Mfg. Co. case, the United States Supreme Court ordered enforcement of a Board decision that an employer must submit to the union demand to furnish financial data to substantiate its claim that it could not afford to pay higher wages.

In similar circumstances, employers have been required to furnish information concerning individual earnings, job rates and classifications, merit increases, pension insurance, time studies, incentive earnings, and piece rates, in order to meet the conditions of good faith collective bargaining. This trend has been viewed in the following manner:

[T]he law now regulates the way in which the parties are to deal with each other. It tells them what they may do and what they may not do, even though each recognizes the authority of the other and honestly seeks to reach an agreement. . . . In Senator Walsh's metaphor, the law has crossed the threshold into the conference room and now looks over

92 NLRB v. Montgomery Ward & Co., 133 F.2d 676, 684 (9th Cir. 1943); NLRB v. Boss, 118 F.2d 187, 189 (7th Cir. 1941). See also Singer Mfg. Co. v. NLRB, 119 F.2d 131, 134 (7th Cir.), cert. denied, 313 U.S. 595 (1941); Wilson & Co. v. NLRB, 115 F.2d 759 (8th Cir. 1940).
93 NLRB v. Westinghouse Air Brake Co., 120 F.2d 1004, 1006 (3rd Cir. 1941).
94 NLRB v. George P. Filling & Son Co., 119 F.2d 32, 37 (3rd Cir. 1941).
97 Taylor Forge & Pipe Works v. NLRB, 234 F.2d 227 (7th Cir. 1956).
100 NLRB v. Otis Elevator Co., 208 F.2d 176 (2d Cir. 1953).
102 Vanette Hosiery Mills, 80 NLRB 1116 (1948), enforcement granted, 180 F.2d 173 (6th Cir. 1950).
the negotiator's shoulder. Is the next step to take a seat at the bargaining table?\textsuperscript{103}

The dissent in second 	extit{Fibreboard}, which considered "the numerous technical vagaries, practical uncertainties, and changing concepts"\textsuperscript{104} in the area of good faith bargaining felt that if the ruling that subcontracting is a mandatory bargaining subject stood, that future management actions on such a topic must be taken at managers' peril. Since such an observation could be validly made in regard to any mandatory bargaining subject, it does not materially strengthen the argument against holding subcontracting as such a subject.

If the Board's decision stands — if subcontracting is held to be a subject for mandatory bargaining — then it can be expected that management will be required to furnish such information as is deemed necessary for informed bargaining. It will probably be required to supply financial data to substantiate any claim that subcontracting would result in economic benefit to the company. It is difficult to predict what the outer limits of the concept of relevant data necessary for informed bargaining might be,\textsuperscript{105} but it has been held that an employer is not required to furnish a list of names and manufacturers to whom it has subcontracted work, even though the union has requested such data.\textsuperscript{106} This decision was rendered, however, before the Board had clearly decided the question of whether subcontracting is a mandatory subject.

The Board's position in second 	extit{Fibreboard} that, after the parties have exhausted the processes of good faith bargaining, management is no longer under any legal constraint not to contract work out of an existing unit has recently received analogous support. The Supreme Court has held in discussing a dispute under the Railway Labor Act that: "What is clear, rather, is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute."\textsuperscript{107} In effect, this decision left management free from legal restraints to reach a unilateral decision to abolish 65,000-80,000 jobs. Labor, of course, also became free to resort to self-help — the strike.

\section*{IV. Section (8)(e) of the National Labor Relations Act.}

Assuming that bargaining between the employer and the union reaches the point where a contract is to be entered into, there is a question as to the legality of a clause in which the employer agrees not to subcontract. It has been suggested that the new subsection, 8(e) of the National Labor Relations Act proscribes all agreements that limit the right of an employer to contract out work\textsuperscript{108} except such agreements in the construction or clothing industries. Section 8(e) provides that:

\begin{quote}
It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.\textsuperscript{109}
\end{quote}

Contrary to the position that all agreements limiting subcontracting are void is the general understanding that Section 8(e) was limited to the outlawing of

\textsuperscript{103} Cox, The Duty To Bargain In Good Faith, 71 Harv. L. Rev. 1401, 1402-3 (1958).

\textsuperscript{104} Fibreboard Paper Products Corp., 138 NLRB No. 67 at 13 (1962).

\textsuperscript{105} In Marathon-Clark Cooperative Dairy Ass'n., 137 NLRB No. 91, 50 Lab. Rel. Ref. 1285 (1962), arising out of bargaining concerning subcontracting, the Board found the employer guilty of bad faith bargaining because he "point blank" refused a union request that an efficiency expert be brought in.

\textsuperscript{106} Betty Brooks Co., 99 NLRB 1237, 1246 (1952).


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"hot cargo" agreements — "those that permit the covered employees to refuse to work on the 'hot' goods of producers or shippers who have been declared 'unfair' by the union." 110 The limitation on the scope of this section was supported by the Board's General Counsel: "clauses of this character (prohibiting or restricting subcontracting) however are not precisely in the same vein as the kind of 'hot cargo' provision which was much litigated under the Taft-Hartley Act and which apparently prompted enactment of section 8(e)."111 And Archibald Cox, now the Solicitor General of the United States, also supports such an interpretation. He has written that:

Although the language leaves doubt, the underlying rationale should also exclude from Section 8(e) conventional restrictions upon subcontracting such as the promise that: "All work that is usually performed in the plants of the company shall continue to be performed in such plants unless a change is mutually agreed upon by both parties."112

The Board had indicated in Milk Drivers and Dairy Employees, Local 546,113 that it does not feel that Section 8(e) bars all such agreements, and that it intends to look at each agreement in the light of the facts surrounding it, in order to determine whether it contravenes the subsection.

Since then, it has been found that Section 8(e) was violated by agreements under which preference for subcontracting was to be given to shops having contracts with the union,114 or at least approved by the union.115 The Board has also held that a subcontracting clause which barred the employer's use of the services of anyone who failed to observe the wages, hours, and conditions of employment established by the unions having jurisdiction over such services violated the 8(e) prohibition.116

V. CONCLUSION.

As the law now stands, prior to review by the Circuit Courts, an employer cannot make a unilateral decision to subcontract — at least when such action would result in the "elimination of unit jobs."117 The focus is thus on the effect of the decision to subcontract on the present bargaining unit. With such a focus, the Board's prohibition on unilateral decisions to subcontract logically can be extended to those instances where the prior practice of the employer was to have bargaining unit employees perform a task that was not continual, but where he now wishes a subcontractor to perform the task; or where the operation in question is a new one, never previously performed by any unit employees, but is one that they are capable of performing and is to be continued on a regular basis. Those subcontracting decisions which will not fall within the scope of the Board's opinion will be especially those "one-shot" affairs where the employer has had a prior history of subcontracting, or where there is a practice in the industry to subcontract such work, or where an "emergency" compels that the work be done immediately.118

With the focus of the instant decisions being on the effect of the subcontracting

110 3 CCH 1961 LAB. L. REP. § 5222.
113 133 NLRB 1314 (1961):
114 Automotive, Petroleum, etc., Local 618, 134 NLRB 1363 (1961).
115 District No. 9, Int'Il Ass'n of Machinists, 134 NLRB 1354 (1961).
on the bargaining unit, it does not seem that whether the area subcontracted is of "substantial importance" or is merely an "incidental feature" to the total production operation will be of any relevance to future decisions.\footnote{Cf. Hershey Chocolate Co. (Hershey, Pa.), 28 LAB. ARB. 491 (Saul Wallen, arb., 1957).}

The varied factual situations which can give rise to subcontracting indicate that no one, black-letter rule can be extracted from the Board's decision. Rather, it must be recognized that "a ruling in any subcontracting case may be firmly grounded in the facts and equities of the specific situation and ... can seldom, if ever, serve as a controlling precedent for similar cases arising in the future."\footnote{Cannon Electric Co. (Los Angeles, Cal.), 26 LAB. ARB. 870, 872 (Benjamin Aaron, arb., 1956).} Thus, although the Board has indicated its decision when bargaining unit employees are laid off, it is difficult to predict from this what decision will be made by it in a different factual situation. It is expected that arbitrators will follow the Board's lead, and thus will construe management prerogative clauses, so long as these clauses do not explicitly include subcontracting as a management right, as not including the decision to contract out, when such action would result in the elimination of unit jobs.

\emph{N. Patrick Crooks}