

BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW

VOLUME XIV

JULY 1973

NUMBER 6

PLANT RELOCATION: CATCHING UP WITH THE RUNAWAY SHOP†

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INTRODUCTION

Once a tempest of controversy, the law regarding plant relocation has remained comparatively sedate for the past several years. However, recent Supreme Court decisions in several collateral areas of labor law have brought into question the continued validity of previous National Labor Relations Board (NLRB or Board) policies in relocation cases. Plant relocations are common in our economy and have taken place with increased rapidity in the past few years.¹ Industrialists, in striving to compete successfully with both domestic and imported manufactures, have frequently been forced to resort to relocating their plants to non-unionized areas of the country to cut labor costs. As the incidence of relocations rises, the severe economic effects of a plant relocation and its impact on the livelihood of employees and unions make this an increasingly important area of the law.

This article will consider the broad problem of plant relocation as it relates to the economy and to the law of labor relations. Specifically, it will consider the economic forces that cause an employer to relocate, and the circumstances that convert a plant relocation into a "runaway shop." It will then probe the effect on relocation of recent Supreme Court rulings in the related areas of employer discrimination, the duty to bargain, successorship, and the adequacy of the remedies of the NLRB.

† This study was undertaken and funded pursuant to the Labor Relations and Public Policy project of the Industrial Research Unit, The Wharton School, University of Pennsylvania.

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¹ Fulton, *New Factors in Plant Location*, 49 Harv. Bus. Rev. 4, 5 (May-June 1971).

I. DEFINING THE RUNAWAY SHOP

Plant relocation has two basic elements of legal significance: first, substantially identical jobs must be available in a different locale; second, the employees at the original plant site would normally be discharged. Within this definition of plant relocation, there are three categories. First there is the employer who decides to abandon his current plant and remove his whole business to a new location.² Next there is the situation in which an employer only wishes to relocate a particular operation in his business to a new site while continuing the other operations at the original site.³ Finally there is the multi-plant employer who transfers production contracts from one plant to another.⁴ These categories may be differentiated from plant closings, partial closings, subcontracting and automation where the jobs have either disappeared or are no longer within the employer's control. This distinction becomes significant in framing remedies to enforce the law effectively.⁵

Plant relocation becomes a "runaway shop" when the move is effected for anti-union motives, an action prohibited under the National Labor Relations Act (NLRA).⁶ An unlawful relocation can take place if an employer wants to thwart a union altogether or simply to remove unionization's adverse effect on the company's profitability.

Though the runaway shop is not expressly prohibited by section 8(a)⁷ of the NLRA, a relocation to defeat a union has been characterized by the Board and the courts as falling within the prohibitions of three possible paragraphs of section 8(a). A discharge of employees in connection with a plant relocation may violate section 8(a)(3),⁸ which forbids employer discrimination against employees related to union affiliation or activity. An employer violates section 8(a)(5)⁹ if his purpose in removing the plant is to avoid his duty to bargain with the union. In addition, he commits a section 8(a)(1)¹⁰ violation, derivative of the 8(a)(3) and 8(a)(5) violations, for interfering with the union's section 7¹¹ right to organize by relocating in the face of unionization.

² See, e.g., *McLoughlin Mfg. Corp.*, 182 N.L.R.B. 958, 74 L.R.R.M. 1756 (1970) (Supp. Dec. & Order), *aff'd sub nom. ILGWU v. NLRB*, 463 F.2d 907, 80 L.R.R.M. 2716 (D.C. Cir. 1972).

³ See, e.g., *Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369, 34 L.R.R.M. 1209 (1954).

⁴ See, e.g., *Industrial Fabricating Inc.*, 119 N.L.R.B. 162, 41 L.R.R.M. 1038 (1957).

⁵ See text at notes 187-88 *infra*.

⁶ 29 U.S.C. §§ 141-68 (1970).

⁷ 29 U.S.C. § 158(a) (1970).

⁸ 29 U.S.C. § 158(a)(3) (1970).

⁹ 29 U.S.C. § 158(a)(5) (1970).

¹⁰ 29 U.S.C. § 158(a)(1) (1970).

¹¹ 29 U.S.C. § 157 (1970).

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However, it is rare for a relocation to occur solely on account of an employer's anti-union motives. The circumstances of plant relocation virtually prohibit the moving of plants for discriminatory reasons absent economic justification. The selection of a plant site is a determination of which location, in view of all the circumstances, will enable the delivery of the manufactured product at the lowest cost to the customer.¹² Employers relocate because of detrimental economic factors at the current location and the promise of greater economies at the new site. Thus, management's reasons for abandoning a location may include:

- (1) the need for expansion coupled with a desire to place the new capacity in a more advantageous location for marketing;
- (2) the depletion of reliable sources of quality materials at competitive prices;
- (3) changes in the availability of dependable transportation at competitive prices;
- (4) an adverse rise in the cost of production because of labor and/or overhead increases.¹³

Although strained labor relations may enter into decisions to relocate, economics in competitive industries prevent them from predominating. The "rugged individualist" management practices of the first part of the twentieth century have given way to reasoned and scientific approaches.¹⁴ Plant location is itself a science utilizing detailed techniques of systems analysis. Rarely does a company relocate without careful study, and usually the advice of consultants is utilized.¹⁵ The movement itself entails economic loss from disruption of production, employee benefits and the cost of physically moving assets and per-

¹² R. Reed, Jr., *Plant Location, Layout, and Maintenance* 3 (1967).

¹³ See H. Timms, *The Production Function in Business* 293-94 (1962); Comment, *The NLRB's Pursuit of the Runaway Shop*, 7 *Vill. L. Rev.* 450, 451 (1962). For a thorough listing of major factors influencing the choice of a new location, see R. Reed, Jr., *supra* note 12, at 16-17.

¹⁴ See R. Reed, Jr., *Plant Layout: Functions, Principles and Techniques* 343 (1961):

In the past it has been common to locate a plant either upon the wishes or whims of the individual financier or in a location where similar industries have become popular. However, as any country develops industrially; as the transportation systems of that country improve and materials and labor are dispersed to a variety of new locations; and as a good labor supply becomes more widespread, the location of plants must be increasingly controlled by the economic factors and conditions created by alternative sites, and less by traditional influences or the personal whims of the financier. Proper plant site selection requires scientific determination of the location factors involved for particular installation, and the scientific analysis of those factors, in order to ensure a location which will provide optimum production and business atmospheres.

¹⁵ F. Moore, *Manufacturing Management* 169 (5th ed. 1969).

sonnel. Thus, the effect of an abrupt, ill-planned relocation may be to bankrupt the enterprise.¹⁶

The effect of restrictive interpretations of the NLRA by the Board with respect to plant relocation has been to prevent employers from effecting economically justified relocations. Shifts in the geographical concentration of supply and demand occur with frequency in a dynamic economy but are met with more consternation than action from management. Relocations probably should occur more frequently than they presently do,¹⁷ but management is typically reluctant to relocate because of fear of conflict with the labor laws. Management's decision to relocate notwithstanding this reluctance is often a response to aggregated diseconomies rather than a current occurrence, and a decline in the profit margin will not usually instigate a move unless it is severe or sustained. Thus, to characterize a relocation according to the final event prompting it is to misunderstand the management decision-making process.

In certain industries, a decisive factor prompting relocation has been the availability of less expensive labor at the new location, and particularly nonunion labor.¹⁸ Unions can impose higher costs on employers by increasing wages as well as by restricting employment practices designed to achieve employer economies. Unions more powerful than their management counterparts can achieve gains which impose artificial wage levels. Where the employee entry level skill is low, unions have removed the competitive effect of unorganized labor. Thus, those companies which have a low ratio of capital to cost of production and which employ largely unskilled or semi-skilled laborers are more susceptible to relocation as an answer to unionism.¹⁹

¹⁶ *Id.* at 167.

¹⁷ *Id.* at 170.

¹⁸ Comment, *The NLRB's Pursuit of the Runaway Shop*, *supra* note 13, at 451; *Plymouth Indus., Inc.*, 177 N.L.R.B. 607, 613, 73 L.R.R.M. 1044, 1045 (1969).

¹⁹ Fuchs, *Changes in the Location of Manufacturing in the United States Since 1929*, at 164-65 (1962); Note, *The Effect of Relocation or Sale of Industry Upon Labor-Management Relations*, 5 W. Res. L. Rev. 84, 86 (1953).

The apparel industry illustrates this point well. See G. McLaughlin & S. Robock, *Why Industry Moves South* 71 (1949). Apparel manufacturers have comparatively little capital invested in machinery, but maintain substantial cloth inventory. The machinery is small and needs no specially adapted buildings to house it. Because transportation of the finished product is relatively inexpensive, the plant need not be near wholesale outlets. *Friedman-Harry Marks Clothing Co.*, 1 N.L.R.B. 411, 418, 1 L.R.R.M. 84, — (1936). In addition, the cost of plant removal is comparatively inexpensive. See *Garwin Corp.*, 153 N.L.R.B. 664, 675, 59 L.R.R.M. 1405, — (1965), where in 1963 the removal of a garment plant employing 50 to 60 full-time workers from New York to Miami, Fla. cost \$2516.

Between 1950 and 1969, the number of apparel industry employees working in the South increased from 15.3% to 38.3% of the U.S. total, while the number employed in New York, New Jersey, and Pennsylvania, formerly the center of the apparel industry, declined from 54.8% to 37.8%. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. 1312-7, *Employment and Earnings, United States, 1909-70* (1971); U.S. Bureau of

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In determining whether a relocation has been effected for prohibited anti-union reasons, the Board has traditionally considered a number of factors. Primarily, it has attempted to gauge whether the motivating factor behind the relocation was a valid economic reason, or whether its purpose was to discriminate against or discourage unionism within the plant. However, since employers were seldom solely motivated by one or the other reasons, the Board has had difficulty in the past in setting forth a consistent rule as to when a relocation was a prohibited runaway shop.²⁰ Other factors which the Board has considered in distinguishing between a valid relocation and a runaway shop are: (1) whether the employer has notified the union of the relocation and has consented to bargain with the union about the relocation; and (2) whether the employer has attempted to disguise a runaway shop by selling the plant to a new owner or by reincorporating, with a subsequent removal of the plant. When the Board has found that a plant relocation had in reality been effected for anti-union motives or that the employer had committed an unfair labor practice by refusing to bargain concerning the removal, it has had difficulty in formulating a remedy which at the same time was within the scope of its power; was equitable to all of the parties involved—the employer, the union and the employees at the old plant; and fulfilled the purposes of the Act.

While there has not been a great deal of movement in the law on plant relocations, several recent decisions of the Supreme Court, concerning employer discrimination, the duty to decision bargain, successorship, and the adequacy of Board remedies have to a large extent altered the law in these related areas. Considered together, these changes may have a significant impact on future Board and court reactions to plant relocations.

II. DEVELOPMENTS IN RELATED AREAS AND THEIR EFFECT ON PLANT RELOCATIONS

A. *The Impact of Great Dane on Section 8(a)(3) Violations*

Employees discharged on account of a plant relocation may allege a section 8(a)(3) violation. That section makes it an unfair labor

Labor Statistics, Dep't of Labor, Bull. 1370-7, Employment and Earnings, States and Areas, 1934-69 (1971). This trend is expected to continue. See Shobecoff, Cheap Imports & Jeans Imperial Dressmakers Here, N. Y. Times, Feb. 19, 1973, at 25, col. 1. Since 1956, total union membership has declined slightly while the total employment in the industry increased approximately 10% over the same period. U.S. Dep't of Commerce, Annual Survey of Manufactures (1970); U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. 1635, Labor in the Textile and Apparel Industries (1969). The decline in percentage union membership can be attributed to relocations in difficult to organize areas. Id. at 48.

²⁰ Compare Rapid Bindery, Inc., 127 N.L.R.B. 212, 45 L.R.R.M. 1524 (1960), with Trenton Garment Co., 4 N.L.R.B. 1186, 1A L.R.R.M. 456 (1938).

practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"²¹ Though the basic charge is discrimination, proof of anti-union motivation as well as a discriminatory effect upon the union of the employer action has been central to a violation. Such was the congressional intent,²² and the NLRB has interpreted the section in this manner.²³

In *NLRB v. Great Dane Trailers, Inc.*,²⁴ the Supreme Court held that an employer who refused to pay vacation benefits to strikers while announcing an intention to pay such benefits to non-strikers violated section 8(a)(3) even though he was not proved to have had an anti-union motivation.²⁵ In so holding, the Court significantly modified the requirement of proving discrimination. If the General Counsel of the NLRB can adduce prima facie evidence of anti-union motivation, the employer must come forward with proof of substantial and legitimate business justification. If the employer fails to meet this burden, the evidence of violation is sufficient without substantial proof of anti-union motivation. Where the employer does submit evidence of business justification, the General Counsel may still not be required to show substantial anti-union motivation. If the trial examiner characterizes the employer's conduct as "inherently destructive" of employee rights, nothing beyond prima facie evidence is required to make the case ripe for the balancing test determination. However, if the employer's conduct is characterized as having only a comparatively slight effect on employee rights, the complaint will be dismissed unless the General Counsel proves substantial anti-union motivation. Consequently, the fate of many cases hinges on the trial examiner's, and ultimately the Board's, characterization of employer conduct.

Subsequent to *Great Dane*, relocation has been treated by the Board as conduct having only a comparatively slight effect on employee rights. In *American Carpet Mills, Inc.*,²⁶ the Board adopted the decision of the trial examiner, refusing to find the employer's conduct inherently destructive of employee rights although that was the position advocated by the General Counsel.²⁷ The employer had decided to relocate his clerical operation before the union was certified, causing the union to allege a discriminatory discharge of the clerical employees.

²¹ 29 U.S.C. § 158(a)(3) (1970).

²² 79 Cong. Rec. 2333 (1935) (remarks of Rep. Boland). See discussion in Comment, Proving an 8(a)(3) Violation: The Changing Standard, 114 U. Pa. L. Rev. 866, 867 (1966).

²³ 1 NLRB Ann. Rep. 77-84 (1936).

²⁴ 388 U.S. 26 (1967).

²⁵ Id. at 34-35.

²⁶ 170 N.L.R.B. 1715, 69 L.R.R.M. 1078 (1968).

²⁷ Id. at 1726, 69 L.R.R.M. at —, citing *Great Dane* as inapposite.

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Since the General Counsel had only proffered evidence to refute the employer's substantial business justification, the Board dismissed the section 8(a)(3) charge, stating that he was under an affirmative duty to prove anti-union motivation.²⁸

Unfortunately, the Supreme Court in *Great Dane* neglected to establish guidelines for characterizing employer conduct. In the two cases in which the Supreme Court has had occasion to apply the *Great Dane* standard,²⁹ the employers had failed to come forward with evidence of substantial and legitimate business justification, so that the Court avoided characterizing the conduct. The Board in subsequent cases has found the employer conduct complained of in these two cases—refusal to pay accrued vacation benefits to strikers and refusal to reinstate strikers—to be inherently destructive.³⁰ The Board and the courts of appeals have also been reluctant to promulgate guidelines as to whether employer conduct is inherently destructive of employee rights, but appear to have made determinations on a case-to-case basis.³¹ However, employer conduct should be characterized independently of the exigencies of a case, thus making guidelines a necessity. Although the characterization is a substantive finding, it establishes a procedural result and may be subject to misuse. The characterization should be predicated solely on the effect of employer conduct and should measure that quantum of harm in its intensity and permanence. Unfortunately, the Board has used the characterization more as a conclusion than as an initial finding.

The thrust of *Great Dane* was to require the employer affirmatively to show "legitimate and substantial business justification"³² for his conduct, regardless of the General Counsel's ability to prove anti-union motivation. Since the employer's conduct leading to the com-

²⁸ *Id.*

²⁹ *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

³⁰ *Northwest Oyster Farms, Inc.*, 173 N.L.R.B. 872, 69 L.R.R.M. 1564 (1968) (refusal to reinstate striker except at reduced wage is inherently destructive conduct); *Great Atl. & Pac. Tea Co.*, 166 N.L.R.B. 27, 65 L.R.R.M. 1489 (1967) (withholding of holiday benefits from unionized employees is inherently destructive conduct).

³¹ See, e.g., *NLRB v. Darling & Co.*, 420 F.2d 63, 73 L.R.R.M. 2117 (7th Cir. 1970), enforcing 170 N.L.R.B. 1068, 68 L.R.R.M. 1415 (1968) (giving severance pay to non-union employees only following plant shutdown is inherently destructive); *NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306, 70 L.R.R.M. 289 (1st Cir. 1969), enforcing 167 N.L.R.B. 670, 66 L.R.R.M. 1127 (1967) (promise of wage increase before representation election is conduct having comparatively slight effect); *Signal Oil & Gas Co. v. NLRB*, 390 F.2d 338, 67 L.R.R.M. 2708 (9th Cir. 1968), enforcing 160 N.L.R.B. 644, 63 L.R.R.M. 1024 (1966) (investigation and discharge of an employee after he has made a pro-union statement is inherently destructive conduct); *Swift Service Stores, Inc.*, 169 N.L.R.B. 359, 67 L.R.R.M. 1181 (1968) (Christmas bonus conditioned on refraining from strike activity is inherently destructive conduct).

³² 388 U.S. at 34.

plaint was affirmative, evidence of his business justification should be available to him and peculiarly within his knowledge.³³ The business justification rule of *Great Dane* is particularly appropriate for determining when a plant relocation has become a runaway shop. Substantial business justification for relocation may be attributable to increased business activity,³⁴ causing a lack of adequate space for expansion³⁵ and an inability to recruit qualified employees in the vicinity.³⁶ More often, the justification offered reflects declining business operations, evidenced by current operating losses³⁷ and increased competition.³⁸ The place of relocation may offer lower rent and operating costs,³⁹ lower transportation costs for raw or finished materials,⁴⁰ better insurance rates, tax advantages, and less vandalism.⁴¹

In plant relocations, an important indication of motivation is the timing of the move. Since many suspect relocations occur shortly after certification of a new union or during strike activity, the Board has found immediate relocation following such action to be evidence of anti-union motivation.⁴² However, it is doubtful that such circumstantial evidence alone would satisfy the burden of proof. In some situations the employer had already decided to relocate and union activity forced him to accelerate his plans. The Board has found acceleration in relocation to violate section 8(a)(3) in itself, absent strong economic justification.⁴³ However, several courts have indicated that wherever there is economic justification for the move, acceleration is not an unfair labor practice.⁴⁴ The reasoning is that where a deci-

³³ Note, 9 B.C. Ind. & Com. L. Rev. 213, 219 (1967).

³⁴ See, e.g., *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 48 L.R.R.M. 2658 (2d Cir. 1961).

³⁵ See, e.g., *Fraser & Johnston Co. v. NLRB*, 469 F.2d 1259, 81 L.R.R.M. 2964 (9th Cir. 1972); *Cooper Thermometer Co.*, 160 N.L.R.B. 1902, 63 L.R.R.M. 1219 (1966), enforced in part, 376 F.2d 684, 65 L.R.R.M. 2113 (2d Cir. 1967); *Winchester Elec., Inc.*, 128 N.L.R.B. 1292, 46 L.R.R.M. 1453 (1960).

³⁶ See, e.g., *Plymouth Indus., Inc.*, 177 N.L.R.B. 607, 73 L.R.R.M. 1044 (1969); *Winchester Elec., Inc.*, 128 N.L.R.B. 1292, 46 L.R.R.M. 1453 (1960).

³⁷ See, e.g., *Plymouth Indus., Inc.*, 177 N.L.R.B. 607, 73 L.R.R.M. 1044 (1969); *Garwin Corp.*, 153 N.L.R.B. 664, 59 L.R.R.M. 1405 (1965); *Brown-McLaren Mfg. Co.*, 34 N.L.R.B. 984, 9 L.R.R.M. 50 (1941).

³⁸ See, e.g., *Plymouth Indus., Inc.*, 177 N.L.R.B. 607, 73 L.R.R.M. 1044 (1969).

³⁹ See, e.g., *Bermuda Knitwear Corp.*, 120 N.L.R.B. 332, 41 L.R.R.M. 1500 (1958); *Trenton Garment Co.*, 4 N.L.R.B. 1186, 1A L.R.R.M. 456 (1938).

⁴⁰ See, e.g., *Winchester Elec., Inc.*, 128 N.L.R.B. 1292, 46 L.R.R.M. 1453 (1960); *Bermuda Knitwear Corp.*, 120 N.L.R.B. 332, 41 L.R.R.M. 1500 (1958); *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999, 32 L.R.R.M. 1580 (1953).

⁴¹ See, e.g., *Plymouth Indus., Inc.*, 177 N.L.R.B. 607, 73 L.R.R.M. 1044 (1969).

⁴² *American Radiator Co.*, 7 N.L.R.B. 1127, 2 L.R.R.M. 397, enforced, 102 F.2d 974, 4 L.R.R.M. 791 (8th Cir. 1938); *Omaha Hat Corp.*, 4 N.L.R.B. 878, 1A L.R.R.M. 399 (1938).

⁴³ See *Omaha Hat Corp.*, 4 N.L.R.B. at 886-87, 1A L.R.R.M. at 401-02.

⁴⁴ *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 48 L.R.R.M. 2658 (2d Cir. 1961);

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sion to relocate predated union activity, accelerated relocation to avoid the probable effects of union organization is justified, since unionism is but another economic consideration faced by an employer in preparing plans for his business operation.⁴⁵

Although the prospect of lower labor costs is ostensibly a valid business justification,⁴⁶ few employers have argued this point in litigation,⁴⁷ probably out of fear that they would be contributing to evidence of anti-union motivation.⁴⁸ But dismay over the effects of unionization is very different from hostility to unionization in terms of the conduct proscribed by section 8(a)(3). Labor costs are a major consideration, particularly in companies with low ratios of capital to cost of production. Certainly where a union has priced labor out of the reach of business, it is hypocritical to stifle evidence of the effects of labor costs on declining profitability. Furthermore, it must be asked: to what extent should the labor laws prevent an employer who is paying a standard union wage and earning a reasonable return on his investment from striving for a better economic position?

The difficult issue is whether the prospect of lower labor costs alone could defend an employer from a section 8(a)(3) charge. While it may be fanciful to suggest that such a factually simple case will arise, it is submitted that absent affirmative evidence of employer hostility to the union, a relocation to obtain a cheaper supply of labor does not violate section 8(a)(3). Certainly an employer paying the standard union wage to his employees is not exercising bad business judgment if he relocates to save labor costs and augment his competitive position in the market. Of course it would be to his advantage to relocate where labor is unorganized since it would be the least restrictive as well as the least expensive plant location. Yet to what extent should public policy insulate unions from the effects of their economic policies? The unions are free to unionize unorganized workers. If insol-

NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848, 33 L.R.R.M. 2847 (5th Cir. 1954).

⁴⁵ NLRB v. Lassing, 284 F.2d 781, 47 L.R.R.M. 2277 (6th Cir. 1960); cf. Note, Labor Law Problems in Plant Relocation, 77 Harv. L. Rev. 1100, 1101 (1964).

⁴⁶ Eighty-seven percent of the Tennessee employers engaged in apparel and related industries indicated that cheaper labor was the most important reason for relocating their plants in that state. Bureau of Business & Economic Research, An Explanation of Plant Location in Tennessee 196-200 (1966).

⁴⁷ But see Weltronic Co., 173 N.L.R.B. 235, 69 L.R.R.M. 1282 (1968), enforced, 419 F.2d 1120, 73 L.R.R.M. 2014 (6th Cir. 1969); Sidele Fashions, Inc., 133 N.L.R.B. 547, 48 L.R.R.M. 1679 (1961); Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999, 32 L.R.R.M. 1580 (1953).

⁴⁸ Cf. Sheinkman, Plant Removal Under the National Labor Relations Act: Can Bargaining Be Avoided and Should Bargaining Be Avoided?, 16 N.Y.U. Conf. Lab. 81, 96-97 (1962); but see O'Connell, The Implications of "Decision Bargaining," 16 N.Y.U. Conf. Lab. 99, 114 (1962).

vency is a reality for an employer, why should plant relocation to gain cheaper labor be any less a reality for unions?

B. *The Fibreboard Doctrine*

The Supreme Court's decision in *Fibreboard Paper Products Corp. v. NLRB*⁴⁹ in 1964 was fraught with conflicting dicta. Since the case was decided, it has been expansively interpreted by the Board and circumscribed by the courts of appeals. Though *Fibreboard* was a subcontracting case, the Board has applied it in the context of plant relocation.⁵⁰ In so doing the Board has lost sight of important policy considerations.

Factually, *Fibreboard* was not a difficult case. After completing a cost-study analysis of its maintenance operation, the employer decided to subcontract that operation for purely monetary considerations. The union was notified in due time, but the employer refused to bargain concerning the decision to subcontract. The Supreme Court held that an employer's decision to subcontract, albeit for purely economic reasons, is a mandatory subject of bargaining with the union.⁵¹ Chief Justice Warren, writing for the majority, reasoned that the contracting out of work previously performed by plant employees was within the phrase "terms and conditions of employment," and was therefore the subject of mandatory bargaining. But he clearly limited the scope of that duty to bargain by defining it within the facts of the case,⁵² although he suggested that termination of employment was also a condition of employment: "The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit."⁵³

Justices Stewart, Harlan and Douglas were clearly disturbed over the implications of that dicta. In concurring with the majority's result, they emphasized the narrow factual situation in which mandatory bargaining was required, and deplored the breadth of the majority's dicta: "The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty."⁵⁴ More specifically, the three Justices stressed that management decisions fun-

⁴⁹ 379 U.S. 203 (1964).

⁵⁰ See, e.g., *Weltronic Co. v. NLRB*, 419 F.2d 1120, 73 L.R.R.M. 2014 (6th Cir. 1969).

⁵¹ 379 U.S. at 215.

⁵² *Id.* at 213.

⁵³ *Id.* at 210.

⁵⁴ *Id.* at 218 (concurring opinion).

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damental to the basic direction of a corporation or those decisions impinging only indirectly on employment security are not within the purpose of section 8(d).⁵⁵ Citing *Mount Hope Finishing Co. v. NLRB*,⁵⁶ in which a relocation without anti-union motivation was held to be within management prerogative, they implied that the decision to relocate was not a mandatory subject of bargaining.⁵⁷

Despite the broad dicta, Chief Justice Warren stressed the pragmatic approach utilized in reaching the decision under the *Fibreboard* factual situation. No capital investment was made, the structure of the company was static, and the maintenance work still required execution. In addition, the subcontracting agreement was terminable by either party on sixty days notice. The Chief Justice was correct in concluding that under those facts, management's freedom to manage would not be unduly restricted by a duty to bargain. Furthermore, he stated that bargaining could possibly be to the benefit of both management and union since the union might be able to effect cost savings for management. He cited the fact that about twenty-five percent of the collective bargaining agreements in a 1959 survey contained clauses limiting employer prerogative to subcontract.⁵⁸ Yet the very fact that unions have won the inclusion of clauses limiting subcontracting indicates their relative strengths and priorities in restricting management prerogative rather than the effectiveness of bargaining concerning subcontracting. It is unfair to impose a duty on an employer which the union could not win through negotiation or which it gave up to obtain some other concession.

Only recently has a majority of the Board relaxed its decision bargaining principle in contexts other than subcontracting.⁵⁹ *Ozark Trailers, Inc.*,⁶⁰ involving the duty of an employer to decision bargain with regard to the closing of part of his operation, had summarized the Board's position that an employer was under a duty to decision bargain regarding changes affecting employment of the work force. Although *Ozark Trailers* involved a plant closing, the Board indicated that there was no reason to treat plant closings differently from reloca-

⁵⁵ Id. at 223 (concurring opinion).

⁵⁶ 211 F.2d 365, 374, 33 L.R.R.M. 2742, 2750 (4th Cir. 1954), cited in 379 U.S. at 222.

⁵⁷ 379 U.S. at 222 (concurring opinion).

⁵⁸ Id. at 212 n.7. A recent survey by the Bureau of Labor Statistics indicates that 21% of the 1823 contracts reviewed contained some limitation on plant removal or shutdown. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. 1425-10, Plant Movement, Transfer and Relocation Allowances, 4 (1969). The rate was 78% in the apparel industry, where plant relocations are more frequent than the average for all of the industries surveyed. Id.

⁵⁹ See text at note 68 infra.

⁶⁰ 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966).

tions since the considerations involved were identical.⁶¹ The Board, following *Fibreboard*, found a duty to decision bargain because the employer's decision resulted in a termination of employment.⁶² It reasoned that the employees' interest in the protection of their livelihood was at least as important as the employer's interest in the protection of his capital,⁶³ that many factors prompting the employer's decision were particularly suitable for resolution through collective bargaining,⁶⁴ and that bargaining limited to the impact of the employer's decision could not be meaningful without decision bargaining.⁶⁵

The Board subsequently applied its *Ozark Trailers* rationale directly to a plant relocation in *McLoughlin Manufacturing Corp.*⁶⁶ The employer in that case had decided to terminate operations at his Peru, Indiana plant because of economic considerations. He informed the union that he was closing the business entirely, while in reality he relocated the plant to Uniontown, Alabama. The Board adopted the trial examiner's finding that since the transaction was a relocation rather than a complete closing of the business, the employer was required to bargain over its decision to move as well as its impact on the employees.⁶⁷

Recently, the Board swept aside its *Ozark Trailers* rationale in *General Motors Corp.*⁶⁸ In that case, General Motors (GM) sold a retail truck dealership in Houston, Texas to Trucks of Texas in a franchising agreement. GM engaged in impact bargaining with the union after it became known that Trucks of Texas would not employ any of the former GM employees. The United Auto Workers, representing GM's employees at the dealership, alleged that GM had violated section 8(a)(5) because it had failed to bargain about its decision to sell prior to the sale of the entity. The Board dismissed the complaint, holding that a decision to sell an enterprise is not a mandatory subject of bargaining under section 8(a)(5):

We believe, however, that this issue is controlled by the rationale the courts have generally adopted in closely related cases, that decisions 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

⁶¹ Id. at 569, 63 L.R.R.M. at 1268.

⁶² Id. at 565, 63 L.R.R.M. at 1267.

⁶³ Id. at 566-67, 63 L.R.R.M. at 1267-68.

⁶⁴ Id. at 567-68, 63 L.R.R.M. at 1268.

⁶⁵ Id. at 570, 63 L.R.R.M. at 1269.

⁶⁶ 182 N.L.R.B. 958, 74 L.R.R.M. 1756 (1970).

⁶⁷ Id. at 965, 74 L.R.R.M. at 1759.

⁶⁸ 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971), aff'd sub nom. Local 864, UAW v. NLRB, 470 F.2d 422, 81 L.R.R.M. 2439 (D.C. Cir. 1972).

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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 employment, or other conditions of employment.'⁶⁹

The Board's decision is significant in several respects. First, it recognized the previous divergence between its decisions and those of the courts of appeals regarding decision bargaining, and opted to abandon its previous line of reasoning. Second, the Board could have rested its decision on the fact that it had never decided whether decision bargaining was required in the context of the sale of an enterprise. Instead, the Board broke with its own precedent and repudiated mandatory decision bargaining over decisions " 'at the core of entrepreneurial control.' "⁷⁰ Finally, the Board implied that it was conceding that decision bargaining is indeed restrictive of managerial functions. It stated that even though management decisions affect employment security, employees and their representatives are unlikely to be familiar with operational considerations and can substantially impede management at a time when it needs secrecy and freedom of action.⁷¹

The last consideration is perhaps the most important, since it marks the first departure from Chief Justice Warren's proposition in *Fibreboard* that decision bargaining is not unduly restrictive of management,⁷² and from the Board's own dicta in *Ozark Trailers* that no significant intrusion upon management prerogative is created by requiring management to bargain over its decision to relocate or terminate part of its business when it has reached the stage of serious consideration of a move.⁷³

The *General Motors* decision has extremely significant implications in the context of plant relocations. Decision bargaining is at least as restrictive of management in a relocation as in the sale of the business in *General Motors*. A decision to relocate by an employer usually results from a complex economic analysis.⁷⁴ Consequently, the decision must account for many factors other than the costs to employers of wages and conditions of employment. Because the cost of labor is but one factor in the relocation matrix, mandatory decision bargaining to explore the possibility of eliminating the necessity for the relocation by reducing labor costs would delay and impede implementation of a

⁶⁹ 77 L.R.R.M. at 1539.

⁷⁰ Id.

⁷¹ Id.

⁷² 379 U.S. at 213.

⁷³ 161 N.L.R.B. at 569, 63 L.R.R.M. at 1269.

⁷⁴ See text at notes 12-15 supra.

relocation which was caused only in part by labor conditions, yet which requires speed and efficiency.

The Board has failed to consider the ramifications of decision bargaining in the relocation context. Since decision bargaining becomes futile after a relocation has occurred, employers are encouraged to relocate without notice to employees or unions in order to avoid the duty to bargain.⁷⁵ A further inducement to a runaway shop is the Board's ruling in *Ozark Trailers* that an employer must notify the union "once he has reached the point of thinking seriously about taking such an extraordinary step as relocating . . ."⁷⁶ Although the Board felt that this requirement would not restrict management, in fact it requires notification and subsequent bargaining as soon as the possibility of relocation ripens into a prospect. Yet the employer is not in a position to negotiate until his plans have taken concrete form. He may need to initiate studies, hire consultants and discuss the merits of relocation at several board meetings.⁷⁷ When relocation is a mere possibility the employer would be unprepared to deal with the union. Although the employer is obligated to notify the union before his decision to relocate becomes irreversible, at the earliest that duty should not arise until he is prepared to finalize his plans.⁷⁸

The timing for notification of relocation is critical to the employer. Disclosure results in the loss of flexibility which secrecy had provided, and may affect the employer's competitive position in the market. He also risks low morale among employees, causing a failure to meet production quotas. Additionally, the employer is under a duty to supply the union with relevant information relating to the subjects of bargaining.⁷⁹ Though the scope of that information is subject to dispute, the Board

⁷⁵ Relocation without notification is an independent 8(a)(5) violation. *Rome Products Co.*, 77 N.L.R.B. 1217, 22 L.R.R.M. 1138 (1948).

⁷⁶ 161 N.L.R.B. at 569, 63 L.R.R.M. at 1269.

⁷⁷ R. Reed, Jr., *Plant Location, Layout, and Maintenance* 10 (1967):

The responsibility for decisions on location selection and facility planning rests with top management. However, top management must delegate the details to specialists including market researchers, economists, engineers, operations researchers, and perhaps financial analysts, sociologists, and others. The principal analyst must coordinate the activities of a diverse group, acting as a collector of facts and a maker of unbiased plans while delving into economics and probabilities to assure that the final result is both feasible and practical. The location, operation, and organization constitute an integrated system each component of which affects and in turn is affected by the other components. It is imperative therefore that the principal coordinator apply rules and techniques of systems analysis and design in order to balance interactions to optimize the effectiveness of the complete system rather than of the components piecewise.

⁷⁸ Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 Colum. L. Rev. 803, 833 (1971).

⁷⁹ *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

has in the past ordered the employer to supply the union with data concerning job classifications, the work force, and conditions of employment at the new plant.⁸⁰ This information may also be instrumental to the union in bringing an unfair labor practice charge against the employer.

There is no recognition in Board decisions of the practical considerations entailed in mandating decision bargaining in a relocation case. Decision bargaining may be used as a subterfuge by unions to wrest concessions from the employer, thereby insuring the survival and continuity of the union at the sacrifice of employee welfare—in a word, leverage. Aside from wage considerations, management needs flexibility in arranging its operations at the new plant, and an uncooperative union could hamstring it from the outset. Although the employer cannot discriminate against union members in hiring employees at the new plant,⁸¹ it is obviously to the employer's advantage to have a non-union shop. In order to gain recognition at the new plant or the employment of strong union adherents there, the union may be willing to make concessions on employee benefits which might have been won for those workers who cannot, or choose not to, transfer to the new plant. Since it would be bad faith for an employer to relocate while still decision bargaining with the union,⁸² a union may jeopardize the economy of an employer's relocation by unnecessarily stalling in its bargaining tactics. Thus, in order to maintain a profitable position, the employer may be induced to breach section 8(a)(2)⁸³ by offering to support the union and recognize it at the new plant.⁸⁴

On the whole, the courts of appeals have effectuated the guidelines suggested by Justice Stewart's concurring opinion in *Fibreboard*. Recently the District of Columbia Circuit affirmed the Board's *General Motors* decision.⁸⁵ The decision was written by Justice Clark, sitting by designation, who was a member of the majority in *Fibreboard*. He reiterated that the *Fibreboard* decision was limited to its facts and did not expand the scope of mandatory decision bargaining to employer decisions fundamental to the operation of the business.⁸⁶ In addition, he

⁸⁰ *Cooper Thermometer Co.*, 160 N.L.R.B. 1902, 1918, 63 L.R.R.M. 1219, — (1966). Refusal to supply relevant information is not a per se violation of good faith under § 8(a)(5), but it is weighty proof. Section of Lab. Rel. Law, Am. Bar Ass'n, *The Developing Labor Law* 318-20 (C. Morris ed. 1971) [hereinafter cited as C. Morris].

⁸¹ 29 U.S.C. § 158(a)(3) (1970).

⁸² Cf. *Ozark Trailers, Inc.*, 161 N.L.R.B. at 568, 63 L.R.R.M. at 1268.

⁸³ 29 U.S.C. § 158(a)(2) (1970).

⁸⁴ Cf. *Westinghouse Elec. Corp.*, 174 N.L.R.B. 636, 70 L.R.R.M. 1255 (1969), where the union brought an unfair labor practice charge when the employer breached an "understanding" that the union would automatically be recognized at any new facility.

⁸⁵ *Local 864, UAW v. NLRB*, 470 F.2d 422, 81 L.R.R.M. 2439 (D.C. Cir. 1972).

⁸⁶ *Id.* at 424, 81 L.R.R.M. at 2441.

expressed the fear that a further extension of the decision bargaining principle would amount to labor's usurpation of management functions.⁸⁷ Three other appellate decisions illustrate the application of the *Fibreboard* fundamental change test in the relocation context.

In *ILGWU v. NLRB*,⁸⁸ the District of Columbia Circuit enforced the Board's decision in *McLoughlin Manufacturing Corp.*,⁸⁹ imposing a duty on the employer to decision bargain about a move from Indiana to Alabama. In applying the *Fibreboard* doctrine, the court failed to consider whether the relocation entailed a fundamental change in the employer's operations. Instead, it incorrectly substituted a determination that the scope of the enterprise had not been altered by the move, taking into account the enterprise's customers, type of business, and management,⁹⁰ but failing to consider the effect on the enterprise of the distance involved in the relocation and its effect on the work force, and failing to consider the capital investment by the employer involved in the relocation.⁹¹ In *Weltronic Co. v. NLRB*,⁹² the employer moved a central operation from one plant to another three miles away, but refused to transfer employees to the new plant in order to keep it non-union. This resulted in the loss of fourteen employees at the old plant. In enforcing the Board's order of decision bargaining, the Sixth Circuit implicitly rejected the employer's claim that the relocation was a fundamental change within his management prerogative.⁹³ The apparent bad faith of the employer in attempting to keep the new plant nonunion and the subsequent relocation of the operation 130 miles away while litigation was pending may have been motivating factors for the court. However, the Sixth Circuit denied enforcement of a decision bargaining order in *NLRB v. Acme Industrial Products*,⁹⁴ where the employer had built a new plant forty miles away and had engaged in impact bargaining with the union. The court held that neither *Weltronic* nor *Fibreboard* stood for an absolute duty to bargain concerning management decisions which resulted in the termination of employment.⁹⁵ However, the *Acme* court did not articulate the rationale that decision bargaining is not required concerning a fundamental

⁸⁷ *Id.*

⁸⁸ 463 F.2d 907, 80 L.R.R.M. 2716 (D.C. Cir. 1972).

⁸⁹ 182 N.L.R.B. 958, 74 L.R.R.M. 1756 (1970).

⁹⁰ 463 F.2d at 916-17, 80 L.R.R.M. at 2722-23.

⁹¹ This final factor was cited in *Fibreboard* as an important consideration in determining whether the management decision was fundamental to the direction of the company. 379 U.S. at 213.

⁹² 419 F.2d 1120, 73 L.R.R.M. 2014 (6th Cir. 1969), cert. denied, 398 U.S. 938 (1970).

⁹³ *Id.* at 1123, 73 L.R.R.M. at 2015-16.

⁹⁴ 439 F.2d 40, 76 L.R.R.M. 2697 (6th Cir. 1971).

⁹⁵ *Id.* at 42, 76 L.R.R.M. at 2699.

change in the enterprise; it merely stated that the Board was attempting to extend too broadly the *Fibreboard* and *Weltronic* holdings, which were both limited to the specific facts in each case.⁹⁶

In both *Weltronic* and *Acme*, the Sixth Circuit ignored the suggestion of the Board in *Ozark Trailers* that the fundamental interests of employees in their jobs justify the imposition upon the employer of a duty to bargain about a relocation decision even though relocation is a fundamental change in the business. This would seem to indicate adherence in the relocation context to the rule set forth in *Fibreboard* that decision bargaining is not required in the case of a fundamental change.⁹⁷ Though not every relocation involves such a fundamental change or a reinvestment of capital,⁹⁸ it would seem that a removal to a new location a substantial distance from the original site and a major investment in a new physical plant are factors indicating that the relocation involves a fundamental change. Hence, at least in many plant relocations, decision bargaining would seem not to be required by the *Fibreboard* decision.

Moreover, the *General Motors* case has created an atmosphere more hospitable to the exigencies of decision bargaining. It seems clear that, after *General Motors*, despite the lack of an explicit articulation of the theory in the *Acme* decision, the Board and courts will not require decision bargaining regarding plant relocation where there is evidence that the move is a fundamental change in the business entity. Also, the Board should be receptive to arguments that decision bargaining would unduly restrict management in effecting the relocation. Unfortunately, this line of reasoning fails to come to grips with the nature of plant relocation. The runaway shop is a highly infrequent phenomenon in labor relations, but it is highly visible when it occurs. The vast majority of plant relocations are by definition basic changes in companies and thoroughly unsuitable for decision bargaining because of predominantly non-labor considerations. Hence, recognition of the consequent inappropriateness of decision bargaining over plant relocation is both practical and realistic.

⁹⁶ Id. Other circuits dealing with analogous situations of subcontracting and partial closings have interpreted *Fibreboard* not to require decision bargaining whenever the management decision involved a fundamental change in the business or a reinvestment of capital. *NLRB v. Thompson Transp. Co.*, 406 F.2d 698, 70 L.R.R.M. 2418 (10th Cir. 1969) (plant closing); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 65 L.R.R.M. 2861 (9th Cir. 1967) (termination and relocation as partner in a joint venture); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 60 L.R.R.M. 2033 (3d Cir. 1965) (plant closing); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 60 L.R.R.M. 2084 (8th Cir. 1965) (subcontracting).

⁹⁷ 379 U.S. at 213, 223. See text at note 86 supra.

⁹⁸ See, e.g., *Weltronic Co. v. NLRB*, 419 F.2d 1120, 73 L.R.R.M. 2014 (6th Cir. 1969).

C. *Post-Purchase Relocation*

Purchasers of established businesses on occasion relocate their acquisitions immediately after purchase. The reasons for post-purchase relocation may vary from attempting to improve the geographical advantages of a marginal or failing business to bringing an operation in closer proximity to the purchaser's residence. Although the purchaser and previous owner have not engaged in a discriminatory relocation, the purchaser may be obligated to recognize and bargain with the union representing his predecessor's employees as the representative of employees at the new location,⁹⁹ and abide by the arbitration clause in the previous owner's collective bargaining agreement.¹⁰⁰ These duties arise whenever the purchaser is deemed a successor to the previous owner. "Successorship," as employed by the Board and courts, is a term of art "involv[ing] a judgment that the employing industry has remained essentially the same despite the change in ownership."¹⁰¹ Member Fanning of the NLRB has listed seven considerations to aid in the determination of successorship,¹⁰² and these have gained Board approval.¹⁰³

- (1) Whether there has been a substantial continuity of the same business operations;
- (2) whether the new employer uses the same plant;
- (3) whether he has the same or substantially the same work force;
- (4) whether the same jobs exist under the same working conditions;
- (5) whether he employs the same supervisors;
- (6) whether he employs the same machinery, equipment, and methods of production; and
- (7) whether he manufactures the same product or offer[s] the same services.

The successorship doctrine evolved in static location cases where the purchaser merely operated the business at the same location as his predecessor. However, the doctrine should be flexibly applied to post-

⁹⁹ *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). For a detailed discussion of the Supreme Court's opinion in *Burns*, see Note, 14 B.C. Ind. & Com. L. Rev. 193 (1972).

¹⁰⁰ *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). For a thorough analysis of a successor's obligations, see generally Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U.L. Rev. 735 (1969).

¹⁰¹ *William J. Burns Int'l Detective Agency, Inc.*, 182 N.L.R.B. 348, 349, 74 L.R.R.M. 1098, 1100 (1970).

¹⁰² Fanning, *The Purchaser and the Labor Contract — An Escalating Theory*, 1967 Lab. Rel. Yearbook 284, 286.

¹⁰³ *J-P Mfg., Inc.*, 194 N.L.R.B. No. 161, 79 L.R.R.M. 1216 (1972).

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purchase relocations. While the Board may list as a factor in successorship questions whether the purchaser utilizes the same plant, its emphasis is not on the significance of the geographical location as an economic necessity for the business (which is the important question in relocation cases), but on the identity and allocation of working area, suitability of the plant to employees and its convenience for commuting. Although a purchaser might attempt to bar a union from his relocated operation by failing to hire his predecessor's employees, he violates section 8(a)(3) only if he discriminates against union members in his hiring practices.¹⁰⁴

Successorship should not be imposed in the context of a post-purchase relocation unless a majority of employees have been retained by the purchaser in the new location;¹⁰⁵ the duties of recognition, bargaining and observance of the predecessor's arbitration agreement should not be incumbent upon a purchaser where a majority of his current employees have not supported the union as their bargaining agent. The transfer of a majority of the predecessor's employees to the newly located business entity should be a threshold finding to any imposition of successorship on the purchaser. In *Local 57, ILGWU v. NLRB (Garwin Corp.)*,¹⁰⁶ the employer feigned a sale of his garment plant and relocated it from New York City to Miami, Florida, to escape the effects of the recent unionization of his employees. The Board had previously found the relocation to be discriminatory and the sale a sham.¹⁰⁷ At issue before the District of Columbia Circuit was whether the Board could order the employer to recognize and bargain with the union in the New York plant as the representative of the Miami employees. The court held that the Board could not order the employer to recognize and bargain with the union certified in the original location unless a majority of former employees were expected to transfer to the new plant. Circuit Judge Burger reasoned for the majority that the policy of the Act was to grant workers their freedom of choice in selecting a bargaining representative.¹⁰⁸ To impose a bargaining representative on the new employees would not promote industrial peace and would violate one of the basic policies of the Act.

However, the retention of a majority of employees alone should not be enough to subject a purchaser to the duties incumbent on a successor. Justice Rehnquist convincingly made this argument in his

¹⁰⁴ Cf. *Asheville-Whitney Nursing Home*, 188 N.L.R.B. No. 31, 76 L.R.R.M. 1242 (1971); *Barrington Plaza & Tragniew, Inc.*, 185 N.L.R.B. 962, 75 L.R.R.M. 1226 (1970).

¹⁰⁵ *Goldberg*, supra note 100, at 795: "Thus, it is a *sine qua non* to successorship that a majority of the alleged successor's work force, at the time the union seeks to compel bargaining, be comprised of a majority of the predecessor's employees."

¹⁰⁶ 374 F.2d 295, 64 L.R.R.M. 2159 (D.C. Cir.), cert. denied, 387 U.S. 942 (1967).

¹⁰⁷ *Garwin Corp.*, 153 N.L.R.B. 664, 59 L.R.R.M. 1405 (1965).

¹⁰⁸ 374 F.2d at 301, 64 L.R.R.M. at 2162.

dissent in *NLRB v. Burns International Security Services, Inc.*¹⁰⁹ In that case Lockheed awarded to Burns a protection services contract which had previously been held by Wackenhut Corporation. Burns retained twenty-seven of Wackenhut's employees in its force of forty-two. The Wackenhut employees had been represented by United Plant Guard Workers (UPG), which now claimed that Burns, as Wackenhut's successor, must recognize it and abide by its collective bargaining agreement with Wackenhut. The majority held that while Burns must recognize UPG, it was under no obligation to accept the terms of the agreement between UPG and Wackenhut.¹¹⁰

Justice Rehnquist, writing for himself and Justices Burger, Brennan and Powell, contended that Burns was not a successor to Wackenhut. The majority scrupulously avoided that issue, apparently accepting the Board's finding of successorship or judging that, like the question of appropriate bargaining unit, it had not been preserved on appeal.¹¹¹ The Board had accepted the trial examiner's findings of successorship based on the transfer of a majority of employees and the unchanged nature of the business.¹¹² But Justice Rehnquist argued that Burns was not a successor where there was no transfer of assets, either tangible or intangible, and that the retention of employees alone should not subject an employer to successorship.¹¹³

It would seem that the imposition of successorship in *Burns* was inequitable. Burns did not succeed to Wackenhut's business as the Board argued, for they were in the same business; Burns merely took over Wackenhut's former account and had no dealings whatsoever with Wackenhut. Furthermore, Burns did not anticipate the role of successor or having to deal with UPG. Though Burns knew that the UPG was certified in the Wackenhut unit,¹¹⁴ this knowledge does not seem to be a sufficient basis for imposing a successorship obligation. While Burns was remiss in recognizing the American Federation of Guards before ascertaining that it represented a majority of workers, Burns did not foresee having to recognize UPG without even a card check.

Justice Rehnquist was most concerned about the expansion of the successorship doctrine so that the mere retention of a majority of em-

¹⁰⁹ 406 U.S. at 296-310. Although Justice Rehnquist's opinion both concurred and dissented on specific issues with that of the majority, it will be referred to as the dissenting opinion here.

¹¹⁰ *Id.* at 286-87.

¹¹¹ *Id.* at 278, 298.

¹¹² William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. at 353, 74 L.R.R.M. at 1098, 1100.

¹¹³ "The fact that the employees in the instant case continued to perform their work at the same situs, while not irrelevant to analysis, cannot be deemed controlling." 406 U.S. at 308 (dissenting opinion).

¹¹⁴ *Id.* at 275.

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ployees by the new employer would satisfy the Board's substantial continuity test. While his dissenting opinion suggests that he would be willing to find a successor relationship where a new employer purchases the assets of the former employer, it is more significantly an indication of an attitude among a bloc of four justices to apply the successorship doctrine more restrictively in the future. Moreover, such a posture by the dissenting justices may well lead, in post-purchase relocation cases, to the necessity of showing greater continuity of operation than has previously been required by the Board and the courts in order to invoke the successorship doctrine against a new employer.

As Justice Rehnquist recognized, successorship is an "admittedly imprecise concept."¹¹⁵ Speculation and uncertainty abound as to the Board's determination of successorship in plant relocations, which still proceeds on a case-by-case basis. The Board's obligation to protect employees must be balanced by a duty not to impede normal economic development. For businessmen making large investments into commercial entities, the risk of being deemed successors will prevent potential purchasers from employing their capital to achieve economic adjustment in marginal ventures. The purchaser of a business usually undertakes a larger investment than the sale price of the operation. The assets of production from the former entity may be the focus of the new operation, but the purchaser may contemplate a different product or processing method.¹¹⁶ The good will and lines of supply and distribution of the old entity may be of limited or no value to the purchaser. When the purchaser must speculate as to his profitability based on uncertain wage rates and conditions of employment, and a decline in operating flexibility—all of which accompany a finding of successorship—the marginal venture becomes a dangerous proposition.

The uncertainty of the Board's case-by-case approach is illustrated by the case of *West Suburban Transit Lines, Inc.*¹¹⁷ An insolvent bus line was purchased from a receiver, and the terminal relocated fifteen miles away. The purchaser maintained identical routes, schedules and fares, and retained fifty-two of the sixty-one former employees. How-

¹¹⁵ Id. at 299 (dissenting opinion).

¹¹⁶ See, e.g., *Apex Record Corp.*, 162 N.L.R.B. 333, 64 L.R.R.M. 1044 (1966), in which the Board held a purchaser not to be a successor where the purchaser had taken over his predecessor's record production plant but produced records for a different purpose and for a different market.

¹¹⁷ 158 N.L.R.B. 794, 62 L.R.R.M. 110 (1966). Compare *Pargament Fidler, Inc.*, 173 N.L.R.B. 696, 69 L.R.R.M. 1424 (1968), in which a printing shop was sold and relocated from Manhattan to Brooklyn but only 10 of the 31 former employees were retained. The purchaser continued in the same line of business, sold to his predecessor's customers, employed the predecessor to manage the operation, but only purchased part of the predecessor's assets. Though the Board held that the purchaser was not the alter ego of his predecessor, it did find a successorship relationship notwithstanding the fact that less than a majority of the employees were retained.

ever, he also initiated a chartering service accounting for twenty percent of his gross revenue, replaced forty percent of the fleet with new buses and hired additional employees. The Board found the purchaser to be a successor employer because of the substantial continuity in the business. Yet it failed to consider the purchaser's economic adjustment in rehabilitating a failing business, the new capital investment or the change in the business' direction. Consequently, it neglected to consider that businessmen will normally be hesitant to incur substantial risk by investing in a venture when their labor law obligations are at best uncertain. The Board's definition of successorship, apparently sustained by the Court in *Burns*, discourages necessary economic adjustments in marginal ventures.

Occasionally post-purchase relocations have been employed to thwart unionism in the original business entity. Characteristically, where this has occurred, the purchaser has retained every aspect of the former business so that successorship, except for the transfer of employees, is easily found.¹¹⁸ A credible showing that a majority of employees would have transferred but for employer discrimination would be sufficient alternative proof to aid in the successorship determination.¹¹⁹ Yet it is easy to overplay the incidence of discriminatory post-purchase relocations. They are only feasible in industries with low ratios of capital to cost of production. If former employees are skilled, it is unlikely that a purchaser could afford not to retain them. A discriminatory post-purchase relocation is an extraordinary step for an employer to take, and is usually indicative of a declining industry or a union imposing artificial wage levels.

Where the successor employer in a post-purchase relocation is found to be the alter ego of his predecessor, both are held liable to remedy the unlawful relocation.¹²⁰ Alter ego is a finding that the successor is really just the predecessor in disguise. The Board will not permit unfair labor practices to go unremedied where the employer has merely changed his outward form. Important considerations include continuity in the shareholders and officers, assets, operations, employees and supervisory force.¹²¹ In addition, the Board often looks to determine if fair compensation was tendered for the business. In *Hopwood*

¹¹⁸ See, e.g., *Intergraphic Corp. of America*, 160 N.L.R.B. 1284, 63 L.R.R.M. 1205 (1966), in which the purchaser was controlled by the predecessor and had merely relocated the production assets from Queens to Manhattan without changing the final product or customers.

¹¹⁹ *Fraser & Johnston Co. v. NLRB*, 469 F.2d 1259, 81 L.R.R.M. 2964 (9th Cir. 1972).

¹²⁰ See, e.g., *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908, 913, 34 L.R.R.M. 2844, — (8th Cir. 1954).

¹²¹ *Atlanta Paper Co.*, 121 N.L.R.B. 125, 42 L.R.R.M. 1309 (1958); C. Morris, *supra* note 80, at 375.

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Retinning Co.,¹²² a post-purchase relocation, the Board found a sham sale where only \$23,000 was paid for an operation doing about \$622,000 of business per year.¹²³ However, there may be unusual circumstances where a finding of alter ego would be unjustified. For example, the infusion of new capital into a company or the development of a new product line would be primary economic justification overshadowing any residual anti-union motivation. An illustration of this is *Diaper Jean Manufacturing Co.*,¹²⁴ in which the Board held that where the principal shareholders formed a successor company at a new location, brought in new capital, and new shareholders held one-third of the stock, there could be no finding of alter ego.¹²⁵

Since alter ego is not difficult to prove, cases employing the sham have dwindled in recent years.¹²⁶ Of more significance are cases of successor employers purchasing with knowledge of their predecessor's unlawful motive in effecting relocations. In *New Madrid Manufacturing Co.*¹²⁷ the Board held that where the successor employer had knowledge of his predecessor's unlawful motive for relocation, the successor was also liable to remedy the violations of labor law.¹²⁸ The Eighth Circuit took exception to this reasoning, stating: "[T]here must be some basis of theory, reason and justice for subjecting a successor, who is so in both law and fact, to a responsibility for his predecessor's acts, beyond the mere naked circumstance of his constituting a purchaser."¹²⁹ Yet the court affirmed the Board's holding on the grounds that the successor employer had participated in the original employer's unfair labor practices. The purchaser in *New Madrid* had been the manager of his predecessor's business, so his participation was central in both planning and execution. Under the court's rationale, notice without participation is not enough to incur successorship obligations. However, the Fifth Circuit has more recently held, in *United States Pipe & Foundry Co. v. NLRB (Perma Vinyl)*,¹³⁰ that a bona fide purchaser with knowledge of his predecessor's unfair labor practices is liable for remedying them under the successorship theory. The Board has subsequently applied the *Perma Vinyl* doctrine in static location cases¹³¹ although the issue has not arisen in a post-purchase relocation. The Board is likely to insist, on the basis of the static location cases, that notice of the prede-

¹²² 4 N.L.R.B. 922, 1A L.R.R.M. 416 (1938).

¹²³ Id. at 934, 1A L.R.R.M. at 417-18.

¹²⁴ 109 N.L.R.B. 1045, 34 L.R.R.M. 1504 (1954).

¹²⁵ Id. at 1049-50, 34 L.R.R.M. at 1507-08.

¹²⁶ Gordon, Legal Questions of Successorship, 3 Ga. L. Rev. 280, 292 (1969).

¹²⁷ 104 N.L.R.B. 117, 32 L.R.R.M. 1059 (1953).

¹²⁸ Id. at 118, 32 L.R.R.M. at 1061.

¹²⁹ 215 F.2d at 914-15, 34 L.R.R.M. at 2849.

¹³⁰ 398 F.2d 544, 548, 68 L.R.R.M. 2913, 2915 (5th Cir. 1968).

¹³¹ See Associated Transp. Co. of Texas, Inc., 194 N.L.R.B. No. 12, 78 L.R.R.M. 1678 (1971); Golden State Bottling Co., 187 N.L.R.B. No. 142, 76 L.R.R.M. 1868 (1971).

cessor's illegal motive is sufficient to bind the successor to remedy a discriminatory relocation since the successor was the beneficiary of the conduct and solely able to remedy the violation by ordering reinstatement. Yet it is inequitable to penalize the purchaser for taking advantage of the bargain offered to him unless his motive was more direct and substantial in aiding his predecessor.

Post-purchase relocations pose problems requiring a special application of the successorship doctrine. Only in unusual circumstances confined to specific industries is a post-purchase relocation feasible for discriminatory reasons. Since discriminatory relocations are frequently at less than arm's length and reasonably simple to prove, unions and their members are adequately protected by an application of the successorship doctrine that does not impose serious restrictions on the employer whose motives are economically justified. The purpose of the labor laws should not be to protect employees at the sacrifice of economic development.

Justice Rehnquist's dissent in *Burns* is persuasive that, standing alone, majority retention in the new entity is not sufficient to sustain a finding of successorship. The implication is that the amount of proof needed to substantiate successorship will be greater in the future, and the fact that four members of the Court concurred in an opinion on a subject which the majority never reached is an important omen for policy in this area of the law. The dissent in *Burns* recognizes that successorship is intertwined with economic considerations as well as employee protection. The retention of a majority of employees may be altruism for employees, or it may be merely for the purchaser's convenience. In the context of post-purchase relocation, successorship can hinder and impede a purchaser who had contemplated changes in the operation.

D. *The Impact of H. K. Porter on NLRB Remedies*

1. *The H. K. Porter Decision*

The Board is under an affirmative duty to issue remedies whenever it finds violations of the Act.¹³² The language of the Taft-Hartley Act¹³³

¹³² 29 U.S.C. § 160(c) (1970), the applicable portion of which states that:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]

See also *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262 (1969); *UAW v. NLRB*, 427 F.2d 1330, 74 L.R.R.M. 2481 (6th Cir. 1970).

¹³³ 29 U.S.C. § 141 (1970).

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vests the Board with broad discretion in fashioning remedies,¹³⁴ and it has been so interpreted by the courts.¹³⁵ In fashioning remedies the Board has several guidelines: first, the award must be remedial and not punitive;¹³⁶ second, the remedy must effectuate the policies of the Act.¹³⁷

A third guideline was recently handed down by the Supreme Court in *H.K. Porter Co. v. NLRB*.¹³⁸ There the union charged the employer with failing to bargain in good faith regarding a checkoff clause. The Board had found bad faith in the employer's refusal to bargain over the clause¹³⁹ and this was affirmed by the District of Columbia Circuit.¹⁴⁰ The employer then offered to discuss alternatives to the checkoff clause, such as permitting the union to collect dues in the plant, but the union at that point insisted on the checkoff clause. Finding an additional refusal to bargain in good faith in a supplemental order on motion of the union for a clarification of the earlier opinion, the Board ordered the employer to accept the checkoff clause,¹⁴¹ and the District of Columbia Circuit affirmed.¹⁴² The Supreme Court reversed, holding that the Board "is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement."¹⁴³

The scope of the holding in *Porter* is not entirely clear. Justice Black, writing for the majority, carefully limited the impact of the Court's decision on other Board remedies by stating: "The parties to the instant case are agreed that this is the first time in the 35-year history of the Act that the Board has ordered either an employer or a union to agree to a substantive term of a collective-bargaining agreement."¹⁴⁴ However, this dictum was probably intended to prohibit the retroactive application of the case rather than to limit its scope. While it can be argued that *Porter* should be limited to its specific facts, namely a prospective mandatory subject of bargaining already proposed by one party to the negotiations, the broad impact of the case has a significant effect on policy considerations. In passing section 8(d),¹⁴⁵

¹³⁴ 29 U.S.C. § 160(c) (1970), quoted in pertinent part in note 132 supra.

¹³⁵ *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

¹³⁶ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938).

¹³⁷ 29 U.S.C. § 160(c) (1970).

¹³⁸ 397 U.S. 99 (1970).

¹³⁹ *H.K. Porter Co.*, 153 N.L.R.B. 1370, 59 L.R.R.M. 1462 (1965).

¹⁴⁰ *United Steelworkers of America v. NLRB*, 363 F.2d 272, 62 L.R.R.M. 2204 (D.C. Cir. 1966).

¹⁴¹ *H.K. Porter Co.*, 172 N.L.R.B. 966, 68 L.R.R.M. 1337 (1968) (Supp. Dec. & Order).

¹⁴² *H.K. Porter Co. v. NLRB*, 414 F.2d 1123, 71 L.R.R.M. 2207 (D.C. Cir. 1969).

¹⁴³ 397 U.S. at 102.

¹⁴⁴ *Id.* at 106.

¹⁴⁵ 29 U.S.C. § 158(d) (1970).

Congress intended that the NLRB not mandate the terms of bargaining agreements.¹⁴⁶ This basic policy consideration overrides the Board's duty to fashion remedies for violations of the Act, for in carrying out the terms of the Act, the Board may not undermine the fundamental purposes of the Act.¹⁴⁷ Justice Black recognized that freedom of contract is slightly restrained by the Act, but stated that its purpose is merely supervision of procedure and not compulsion of terms.¹⁴⁸

Porter, if read expansively, casts doubt on some of the remedies used by the Board in redressing employer unfair labor practices in the context of plant relocations. The Board has long recognized that this is a particularly difficult area in which to achieve status quo ante.¹⁴⁹ The primary effect of a relocation without prior notice to the union is to terminate the union's status as the exclusive representative of the employer's employees unless a majority are rehired at the new plant. In addition, before the relocation actually occurs, it destroys the prestige and bargaining leverage of the union. Frustrated in being able to effect equitably its objective of status quo ante,¹⁵⁰ the Board has embarked on a series of remedies—including reinstatement, back pay, a make-whole order, and travel and moving expenses—now suspect under the *Porter* holding; and several remedies which, while not falling within the prohibition of *Porter*, at the same time do not effectuate the purposes of the Act.

Reinstatement and back pay are specifically authorized by section 10(c) of the Act.¹⁵¹ The Board may order the employer in a relocated plant to reinstate his discharged employees to substantially equivalent employment at the new site.¹⁵² Aside from serious problems with the

¹⁴⁶ The applicable portion of § 8(d) states that:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* . . . [Emphasis added.]

¹⁴⁷ 397 U.S. at 108.

¹⁴⁸ *Id.*

¹⁴⁹ Cf. Brown, Exploring the World of Remedies, 1967 Lab. Rel. Yearbook 251, 258; McCulloch, Past, Present and Future Remedies under Section 8(a)(5) of the National Labor Relations Act, 1968 Lab. Rel. Yearbook 114, 121-22.

¹⁵⁰ The Board has the power, which it has never used, to make an unconditional order that the employer return the plant to the original location. See text at note 184 *infra*. Restoring the status quo would, in most instances, have such a severe economic effect on the employer that it would be an inequitable remedy to impose on the employer; and it might even be considered a punitive rather than a remedial measure, which is proscribed by the Act. See note 136 *supra* and accompanying text.

¹⁵¹ 29 U.S.C. § 160(c) (1970), quoted in pertinent part in note 132 *supra*.

¹⁵² *Schieber Millinery Co.*, 26 N.L.R.B. 937, 7 L.R.R.M. 18, enforced as modified, 116 F.2d 281, 7 L.R.R.M. 658 (8th Cir. 1940).

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adequacy of this remedy in a relocation case, there is the difficulty of interpreting "substantially equivalent employment." The Board has held that the requirement entails restoring the employees to their former position with regard to wages, working conditions and seniority.¹⁵³ However, the existing collective bargaining agreement has no application to the new plant site;¹⁵⁴ if the employees at the new plant are organized, a new bargaining contract has to be negotiated between the employer and the representative of the employees at the new location. Hence, in prescribing that the old wage rates and working conditions are to exist at the new plant, the Board is setting the terms and conditions for prospective employment at the new plant in disregard of the *Porter* holding.¹⁵⁵

Back pay poses problems similar to reinstatement. While it is conceded that the Board may order back pay as a remedy for any employer unfair labor practice, the question in a plant relocation is the rate at which it should be paid. It would be unjust enrichment to enforce a back pay order at a higher rate of pay than the employer would have agreed to pay to employees at the new plant.¹⁵⁶ If the move had an economic motivation, back pay at the old rate of pay might impose an intolerable burden upon the employer; and since back pay continues to accrue during litigation, the ultimate award may cripple or bankrupt a company, thus decreasing or eliminating employment.¹⁵⁷ Under section 8(d), the rate of pay should not be Board-imposed, but the parties should arrive at the figure through independent bargaining.¹⁵⁸

¹⁵³ *Eagle-Picher Mining & Smelting Co.*, 16 N.L.R.B. 727, 5 L.R.R.M. 265 (1939), enforced, 119 F.2d 903, 8 L.R.R.M. 824 (8th Cir. 1941).

¹⁵⁴ *Zdanok v. Glidden Co.*, 327 F.2d 944, 951-52, 55 L.R.R.M. 2249, 2253-54 (2d Cir.), cert. denied, 377 U.S. 934 (1964); *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143, 149, 50 L.R.R.M. 2763, 2768 (6th Cir.), cert. denied, 371 U.S. 941 (1962). But see *Rittling Corp.*, 203 N.L.R.B. No. 59, 83 L.R.R.M. 1190 (1973), in which the Board applied the former contract to employees at the new location by analogizing to the same considerations as successorship.

¹⁵⁵ This problem in providing substantially equivalent employment in a plant relocation is aggravated by the fact that high labor costs may have been an important consideration in relocating.

The Second Circuit had ruled on the basis of § 8(d) even before *Porter* that the Board could not order reinstatement under the former terms of employment since the terms and conditions of future employment are appropriately the subject of collective bargaining. *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684, 690, 65 L.R.R.M. 2113, 2118 (2d Cir. 1967).

¹⁵⁶ *Id.* at 691, 65 L.R.R.M. at 2119.

¹⁵⁷ See *Adams Dairy, Inc. v. NLRB*, 350 F.2d 108, 115, 60 L.R.R.M. 2084, 2090 (8th Cir. 1965).

¹⁵⁸ *Fraser & Johnston Co. v. NLRB*, 469 F.2d 1259, 81 L.R.R.M. 2964 (9th Cir. 1972); *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684, 65 L.R.R.M. 2113 (2d Cir. 1967).

In several recent cases, of which the best known are *Tiidee Products, Inc.*¹⁵⁹ and *Ex-Cell-O Corp.*,¹⁶⁰ unions have sought make-whole orders of back pay at rates which the employers would have paid absent their refusal to bargain in good faith. The unions claimed that employers frequently bargain in bad faith to delay bargaining by unfair practice litigation since litigation is often less expensive than aggregate wage increases demanded by unions,¹⁶¹ and because protracted delays in bargaining without results weaken unions and frequently cause them a loss of majority status.¹⁶² The District of Columbia Circuit has been sympathetic to the make-whole remedy, and it held in *International Union of Electrical Workers v. NLRB (Tiidee)*¹⁶³ that the Board could issue a make-whole back pay order on the basis of the wage rate which the employer and the union would have agreed upon if the employer had not refused to bargain. The court rested its decision on the anti-union animus of the employer,¹⁶⁴ which—rather than a test of the Board's certification of the union—was the basis for his refusal to bargain. The District of Columbia Circuit later modified its theory justifying make-whole orders by allowing such orders only when the employer's refusal to bargain was patently frivolous as opposed to a situation in which the employer was motivated by at least arguable objections to the union's certification.¹⁶⁵ However, the make-whole remedy is seriously inconsistent with the Supreme Court's holding in *Porter*. As a majority of the Board recognized in rejecting the make-whole order in its *Ex-Cell-O* decision, such a remedy would be the imposition of contract terms on the parties in violation of section 8(d).¹⁶⁶ In addition, the remedy would be punitive and would have a chilling effect on the employer's right to litigate labor cases. The Board would be called upon to formulate a viable distinction between frivolous and good faith litigation as well as to calculate retrospective wage rates, which at best would be

¹⁵⁹ 174 N.L.R.B. 705, 70 L.R.R.M. 1346 (1969), remanded sub nom. *International Union of Elec. Workers v. NLRB (Tiidee)*, 426 F.2d 1243, 73 L.R.R.M. 2870 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970).

¹⁶⁰ 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970), enforcement denied sub nom. *UAW v. NLRB (Ex-Cell-O)*, 449 F.2d 1046, 76 L.R.R.M. 2753 (D.C. Cir. 1971).

¹⁶¹ Cf. Schlossberg & Silard, *The Need for a Compensatory Remedy in Refusal to Bargain Cases*, 14 Wayne L. Rev. 1059 (1968).

¹⁶² 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1452 (1972).

¹⁶³ 426 F.2d 1243, 73 L.R.R.M. 2870 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970).

¹⁶⁴ *Id.* at 1247-48, 73 L.R.R.M. at 2873.

¹⁶⁵ 441 F.2d 1027, 1035-36, 76 L.R.R.M. 2033, 2039 (D.C. Cir. 1970), aff'g *Levi Strauss & Co.*, 180 N.L.R.B. 415, 72 L.R.R.M. 1632 (1969) (2d Supp. Dec.); *United Steelworkers of America v. NLRB*, 430 F.2d 519, 521, 74 L.R.R.M. 2747, 2749 (D.C. Cir. 1970).

¹⁶⁶ *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970).

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speculative.¹⁰⁷ This was the Board's rationale in again rejecting the make-whole order in its second *Tiidee Products* decision on remand from the court of appeals.¹⁰⁸

The make-whole remedy has little sustenance remaining. The District of Columbia Circuit is the only court to sanction the remedy, and that court has limited its use to instances of frivolous litigation by employers. The conflict with *Porter* is very real since it was the District of Columbia Circuit's decision that the Supreme Court reversed in *Porter*. Only two retired Board members have favored the use of the remedy,¹⁰⁹ while those in opposition to it remain on the Board.¹⁷⁰

Frequently the Board orders travel and moving expenses in relocation cases to implement its reinstatement order. Its reasoning is that reinstatement would be a futile gesture without supplying the financial support to make movement of the employees' families and household goods feasible. However, Judge Learned Hand pointed out in a case prior to the enactment of section 8(d)¹⁷¹ that transportation expenses were punitive rather than remedial since there is no indication that the employer would have agreed to pay for transportation.¹⁷² The clear implication of such a suggestion is that transportation and moving expenses are substantive contractual terms which are the subjects of bargaining.¹⁷³ Hence, it is at least questionable under the *Porter* decision whether relocation expenses should be imposed upon the employer by the Board.

The Board has devised other remedies from time to time under its broad power to do so under section 10(c). Though they do not necessarily fall within the prohibitions of *Porter*, it is debatable whether they conform to the other guidelines within which the Board's remedial power exists: that the order of the Board be remedial rather than puni-

¹⁰⁷ Note, 19 U. Kan. L. Rev. 325, 328-31 (1971). But see the dissenting opinion in *Ex-Cell-O Corp.*, 185 N.L.R.B. at 116-17, 74 L.R.R.M. at 1749-50.

¹⁰⁸ *Tiidee Prods., Inc.*, 194 N.L.R.B. No. 198, 79 L.R.R.M. 1175, 1176 (1972).

¹⁰⁹ Former Members Brown and McCulloch.

¹⁷⁰ Chairman Miller and Members Fanning and Jenkins. Member Kennedy, who came onto the Board after the first Board decision in *Tiidee*, also shares their view; see *Tiidee Prods., Inc.*, 194 N.L.R.B. No. 198, 79 L.R.R.M. 1175 (1972). Member Penello did not assume his seat on the Board until after the second Board decision in *Tiidee*.

¹⁷¹ Section 8(d) was added to the Act in the 1947 Taft-Hartley amendments. Labor-Management Relations Act of 1947, Pub. L. No. 101, § 8(d), 61 Stat. 142 (1947) (codified at 29 U.S.C. § 158(d) (1970)).

¹⁷² *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 872, 1A L.R.R.M. 585, — (2d Cir. 1938).

¹⁷³ But cf. *Rapid Bindery, Inc. v. NLRB*, 293 F.2d 170, 177, 48 L.R.R.M. 2658, 2664 (2d Cir. 1961), in which the Second Circuit implied that it would have ordered the payment by the employer of employees' moving expenses if it had found a violation of § 8(a)(3) as well as §§ 8(a)(1) and (5).

tive; and that the remedy effectuate the terms of the Act.¹⁷⁴ Orders to bargain in good faith are particularly suitable to remedy section 8(a)(5) violations in relocation cases. The employer should be forced to discuss with the union the impact of his move on employees.¹⁷⁵ However, an order to bargain as to the decision to relocate is a futile gesture.¹⁷⁶ Rarely will wage considerations be the sole consideration and less frequently will the union be able to sufficiently compromise its wage demands to induce the employer to remain. Where the employer has already relocated his plant, the possibility of inducing the employer back to the original site is negligible.

A stronger and more effective remedy which the Board has attempted to implement in unlawful relocations is the recognition in the new plant of the union which represented the employees in the original plant. In *Garwin Corp.*,¹⁷⁷ the employer had relocated his garment plant from New York City to Miami, Florida for the purpose of defeating the unionization of the New York plant. Recognizing that the traditional remedies would not serve to deter this employer, the Board ordered the employer to recognize and bargain with the union at the new plant for one year.¹⁷⁸ The Board had previously limited the use of this remedy to relocations within twenty-five miles of the original site or where it was reasonable to expect a majority of former employees to transfer to the new plant.¹⁷⁹ Neither condition existed in *Garwin*. On appeal, enforcement of the remedy was denied on the ground that the Act provides for the compensation of injured workers rather than the punishment of employers.¹⁸⁰ In addition, the bargaining order denied

¹⁷⁴ See text at notes 136-37 *supra*.

¹⁷⁵ *NLRB v. Rapid Bindery, Inc.*, 293 F.2d at 176, 48 L.R.R.M. at 2663. The mandatory subjects of impact bargaining include employment at the new plant, transportation and moving expenses, seniority, vacation rights, pension rights and severance pay. *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 939, 65 L.R.R.M. 2861, 2866-67 (9th Cir. 1967); *Standard Handkerchief Co.*, 151 N.L.R.B. 15, 19, 58 L.R.R.M. 1339, 1340 (1965). See Section of Lab. Rel. Law, Am. Bar Ass'n, *The Developing Labor Law* 419 (C. Morris ed. 1971).

¹⁷⁶ This is suggested by the fact that relatively few collective bargaining contracts expressly limit management prerogative in plant relocation decisions by requiring bargaining. See note 58 *supra*.

¹⁷⁷ 153 N.L.R.B. 664, 59 L.R.R.M. 1405 (1965).

¹⁷⁸ *Id.* at 667, 683, 59 L.R.R.M. at 1409.

¹⁷⁹ Twenty-five miles is an approximation of the maximum distance of relocation in which the Board would certify the union at the new plant without an election or card check. Compare *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999, 32 L.R.R.M. 1580 (1953) (union not certified at new plant after 30 mile relocation) and *Bickford Shoes, Inc.*, 109 N.L.R.B. 1346, 34 L.R.R.M. 1570 (1954) (union not certified at new plant after 30 mile relocation) with *Fraser & Johnston Co.*, 189 N.L.R.B. No. 17, 77 L.R.R.M. 1036 (1971) (union certified after 25 mile relocation) and *Royal Norton Mfg. Co.*, 189 N.L.R.B. No. 71, 77 L.R.R.M. 1022 (1971) (union certified after 20 mile relocation).

¹⁸⁰ *Local 57, ILGWU v. NLRB*, 374 F.2d 295, 64 L.R.R.M. 2159 (1967).

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the Florida employees their freedom of choice in selecting a bargaining representative.

An alternative remedy with which the Board has experimented is an order that the employer supply the union with a current list of employee names and addresses at the new plant for one year, and that the employer bargain with the union in the new plant if a majority of the employees subsequently designate it as their representative. This was the remedy applied on remand of the *Garwin* case.¹⁸¹ While conforming with the appellate decision, it also balances the equities of permitting employees their freedom of choice while deterring future relocations. However, this remedy still misses the mark. It does nothing for the injured employees who choose not to transfer, it does not aid the status quo doctrine, and it fails to effectuate the policies of the Act. Section 10(c) is limited to redressing the injuries of the employees against whom the unfair labor practices were committed; it does not contemplate compensating injured unions, and penalizing the employer is prohibited.

Despite the concern of many with regard to the insufficiency of current remedies,¹⁸² there have only been a handful of flagrant violations in which these remedies were not entirely adequate.¹⁸³ For this reason, one remedy which the Board has repeatedly held to be within its arsenal of weapons, but has never used, is an order that the employer move his plant back to its original site.¹⁸⁴ Common law authority for the use of this remedy prior to adoption of the NLRA is doubtful.¹⁸⁵ While the remedy goes far toward achieving status quo ante, it is impractical in most situations, and amounts to a severe restriction on management prerogative. Certainly the Board should not issue a move-back order where the costs of the move would be confiscatory of the employer's business or would force him to operate at a loss. For the most part, only small operators in businesses with low ratios of capital to cost of production, such as apparel or shoe manufacturers, could afford discriminatory relocations.¹⁸⁶ Yet their very size enables them to defeat move-back orders by declaring bankruptcy or by dissolution. However, move-back

¹⁸¹ 169 N.L.R.B. 1030, 67 L.R.R.M. 1296 (1968).

¹⁸² See Brown, *supra* note 149, at 253.

¹⁸³ See McGuinness, *Is the Award of Damages for Refusals to Bargain Consistent with National Labor Policy?*, 14 Wayne L. Rev. 1086, 1102-03 (1968), where the author points out that most employers comply with Board bargaining orders and only 1½% exhaust all review procedures before bargaining.

¹⁸⁴ *Standard Handkerchief Co.*, 151 N.L.R.B. at 19, 58 L.R.R.M. at 1341; Note, *A Survey of Labor Remedies*, 54 Va. L. Rev. 38, 57 (1968).

¹⁸⁵ *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N.Y.S. 898 (Sup. Ct. 1936) (union won specific performance of contract clause prohibiting relocation), is usually cited as authority for a move-back order, but should be limited to its facts. Cf. Note, 50 Harv. L. Rev. 700, 701 (1937).

¹⁸⁶ See note 19 *supra* and accompanying text.

orders would be particularly appropriate to remedy relocations where only certain operations or production contracts were transferred.¹⁸⁷ There the expense of moving back would be minimal and the facility to house it still available. These types of transfers are particularly analogous to subcontracting since they involve minimal transfers of equipment without changing the basic organization of the enterprise, and the Supreme Court has enforced a Board order to resume operations previously subcontracted in *Fibreboard*.¹⁸⁸ Moreover, the move-back order applicable to part of a plant operation is easier to rationalize in the context of relocation than in subcontracting since the employer still controls the allocation of jobs in a relocation, whereas he has delegated this control in a subcontracting situation.

2. *A Proposed Remedy*

The Board has placed undue emphasis upon remedying discriminatory plant relocations when such moves are only feasible among a severely limited class of industries. Whether or not the Board is willing to recognize it, plant relocations almost invariably are dictated by economic circumstances usually beyond the power of unions to change. For this reason, decision bargaining is frequently a futile gesture utilized by unions to gain leverage in impact bargaining. Employee benefits ultimately emanate from impact bargaining. Additionally, impact bargaining effectuates the purposes of section 8(d) by permitting the parties to reach their own terms. Due to a leverage advantage inuring to the benefit of employers from the relocation itself, the enforcement of impact bargaining prior to actual relocation, absent compelling economic circumstances, is vital.

Since the availability of impact bargaining is the touchstone for vindicating employee rights in the face of relocation, providing temporary relief to enforce impact bargaining is more important for the protection of employees than devising any ultimate relief lawful under the Act. Instead of striving to achieve status quo ante once the relocation is an accomplished fact, the Board should preserve the status quo by enjoining plant relocation until impact bargaining is settled or reaches an impasse.¹⁸⁹ The Board is empowered under section 10(j)¹⁹⁰ to seek a temporary injunction from a district court to enjoin a party from continuation of present or future unfair labor practices. Section 10(j) is not available to private litigants, who would have to satisfy

¹⁸⁷ See the dissent of Member Murdock in *Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369, 1376, 34 L.R.R.M. 1209, 1212 (1954).

¹⁸⁸ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

¹⁸⁹ Cf. Note, 64 Mich. L. Rev. 741, 746-48 (1966).

¹⁹⁰ 29 U.S.C. § 160(j) (1970).

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the requirements of the Norris-LaGuardia Act¹⁰¹ to obtain injunctive relief.¹⁰² While injunctive relief has great potential for effectuating Board policies by freezing the unfair labor practices pending litigation, statistics indicate that the Board usually brings fewer than twenty such actions a year.¹⁰³ Indeed, though increased use of injunctions has been suggested as a remedy for runaway shops,¹⁰⁴ the Board has never used its powers under section 10(j) to the fullest, perhaps mindful that to do so would undermine one of the basic purposes of the Act, industrial peace.¹⁰⁵ There has been a traditional revulsion at the use of the injunction, which is grounded in the early history of the labor movement.¹⁰⁶ Additionally, an injunction is a strong weapon subjecting the charged party to potential contempt proceedings and possibly doing him irreparable harm.

Traditionally, a petitioner for a labor injunction would have to show that he has been irreparably harmed, that the remedy at law is inadequate, and that the interference threatens to continue or will cause a multiplicity of actions.¹⁰⁷ This has been modified so that currently the General Counsel must show substantial or irreparable harm and that preservation of the status quo is required, or frustration of the purposes of the Act, depending upon which circuit the case arises in.¹⁰⁸ It seems clear that a relocation without bargaining with the union should satisfy any of these standards. In addition to the above requirements, the

¹⁰¹ 29 U.S.C. § 101 (1970).

¹⁰² Note, A Survey of Labor Remedies, *supra* note 184, at 71.

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<i>Year</i>	<i>Petitions Filed</i>	<i>Injunctions Granted</i>	<i>Injunctions Denied</i>
1964	18	7	2
1965	18	10	3
1966	17	9	1
1967	22	12	2
1968	16	7	2
1969	15	6	3
1970	17	12	2

Compiled from the 1964-70 NLRB Annual Reports. Cases not adjudicated were dismissed, withdrawn or settled.

¹⁰⁴ Siegel, Section 10(j) of the National Labor Relations Act: Suggested Reforms for an Expanded Use, 13 B.C. Ind. & Com. L. Rev. 457 (1972); Note, 64 Mich. L. Rev. 741, 746-48 (1966).

¹⁰⁵ 29 U.S.C. § 141(b) (1970).

¹⁰⁶ Abodeely, Injunctive Powers under the NLRA in Collective Bargaining: Survival in the 70's, at 106 (R. Rowan ed. 1972). However, it should be noted that it was the use of the injunction to quell employee strikes, picketing and boycotts which led to labor strife, not the injunction applied against management. See generally F. Frankfurter & N. Greene, *The Labor Injunction* (repr. ed. 1963).

¹⁰⁷ F. Frankfurter & N. Greene, *supra* note 196, at 54.

¹⁰⁸ Compare *McLeod v. General Elec. Co.*, 366 F.2d 847, 63 L.R.R.M. 2065 (2d Cir. 1966) with *Minnesota Mining & Mfg. Co. v. Meter*, 385 F.2d 265, 66 L.R.R.M. 2444 (8th Cir. 1967) and *Angle v. Sacks*, 382 F.2d 655, 66 L.R.R.M. 2111 (10th Cir. 1967).

General Counsel must show that the employer is guilty of an unfair labor practice.¹⁹⁹ In making such a showing, some concrete action, such as building a new plant or incorporating in another state, is more persuasive than failure to notify the union of the pending move and to engage in impact bargaining. The employer should then be permitted to show that he has substantial business justification for the relocation and that he has fulfilled his duty to engage in impact bargaining.²⁰⁰ If the court grants an injunction, the Board's own rules of procedure require it to give the case priority in its caseloads,²⁰¹ thus minimizing the harm to the employer should he be found not to have violated the Act.

The injunction is particularly appropriate to the runaway shop. Where an employer has threatened to relocate in the face of union organization or demands, yet refused to bargain concerning the impact of the relocation, a temporary injunction restraining relocation until bargaining has taken place would promote industrial peace and preserve the status quo of the parties. While restricting management prerogative, and perhaps frustrating corporate opportunity, it is nonetheless true that an economically justified relocation has no need for threats to employees, nor should the employer be permitted to destroy the bargaining power of the union by relocating before bargaining as to the effects of the move.

Nevertheless, there are serious limitations on the practical use of the injunction in relocation cases. The injunction is useless against the employer who relocates with no warning to the union. An employer may not want to give his employees notice of the relocation until the move is imminent in order to keep morale and production quotas normal. The employer must first commit an unfair labor practice, for no injunction may be sought under section 10(j) until a complaint has issued. Even then, there may be a lapse of up to four weeks before the administrative machinery of the NLRB petitions a district court for relief.²⁰² Consequently, the employer capable of quickly relocating may escape injunctive measures.

The NLRB has once sought to enjoin a plant relocation before the employer could effect the transfer. In *Getreu v. Gas Appliance Supply Corp.*,²⁰³ the General Counsel made a prima facie showing of section 8(a)(1), (3) and (5) violations where the employer had threatened to

¹⁹⁹ Note, 64 Mich. L. Rev. 741, 747 (1966).

²⁰⁰ Id.

²⁰¹ 8 NLRB Rules and Regulations, Subpt. G, 29 C.F.R. § 102.94 (1972).

²⁰² Note, A Survey of Labor Remedies, 54 Va. L. Rev. 38, 72 (1968); Abodeely, *supra* note 196, at 110-11.

²⁰³ Civil No. 5291 (S.D. Ohio, April 5, 1963), discussed in 28 NLRB Ann. Rep. 145 (1963).

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move his operation. The court enjoined the threats and the relocation pending a full Board hearing on the allegations. However, the Board failed in *Hoffman v. Fraser & Johnston Co.*²⁰⁴ to convince the court to order the employer, after the relocation had taken place, to reinstate discharged employees at the new plant pending a full Board hearing. In other contexts the Board has obtained temporary injunctive relief in stopping an employer from subcontracting part of his operation,²⁰⁵ ordering an employer to reinstate employees allegedly discriminatorily discharged,²⁰⁶ and restraining a corporation from dissipating its assets where a substantial back pay order might result from Board proceedings.²⁰⁷

Preservation of the status quo by means of temporary restraining orders is an effective remedy which will eliminate the reliance on post-relocation remedies to achieve status quo ante in most cases. This is particularly significant in light of the fact that most post-relocation remedies contemplated by the Board are of doubtful validity under *Porter*. Enjoining plant relocations until the completion of both impact bargaining and a speedy determination of alleged unfair labor practices will protect employee rights while creating only a minimal interference with management's operation of the business.

CONCLUSION

To maximize efficiency in the face of geographical shifts in the concentration of supply and demand in a dynamic and competitive American economy, plant relocations should probably occur more frequently than they do. However, employers traditionally have been reluctant to relocate because of an attitude on the part of the NLRB adverse to management decisions which undermine employee security. In dealing with relocations, the Board has been slow to recognize that at present most plant removals are motivated by economic factors rather than anti-union sentiment, and that the runaway shop is a phenomenon having more historical color than present significance. Realistically, its occurrence is limited to specific industries, and to those small companies having a low ratio of capital to cost of production and employing largely unskilled or semi-skilled laborers. However, the recent developments in the collateral areas of anti-union discrimination,

²⁰⁴ — F. Supp. —, 73 L.R.R.M. 2348 (N.D. Cal. 1969); *Balicer v. Helrose Bindery, Inc.*, — F. Supp. —, 82 L.R.R.M. 2891 (D.N.J. 1972).

²⁰⁵ *Jacobson v. M & W Gear Co.*, Civil No. 67-89D (D. Ill. June 13, 1967), discussed in 32 NLRB Ann. Rep. 179 (1967).

²⁰⁶ *Potter v. Finesilver Mfg. Co.*, No. 3575 (D. Tex., Sept. 9, 1965), discussed in 31 NLRB Ann. Rep. 153 (1966).

²⁰⁷ *Compton v. Southland Mfg. Corp.*, No. 505-65 (D.P.R., Dec. 3, 1965), discussed in 31 NLRB Ann. Rep. 153 (1966).

decision bargaining, successorship, and unfair labor practice remedies seem to suggest that the attitude of the Board and courts toward plant relocations may be undergoing a change.

*Great Dane*²⁰⁸ served to change the function of the Board from the making of a subjective determination of the employer's motive in relocating to that of applying a test placing on the employer the burden of proving the existence of a substantial business justification for the move. As long as the Board continues to view plant relocations as employer conduct having a comparatively slight impact on the exercise of employee rights, the defense of economic justification will be available to management. Hence, while under the pre-*Great Dane* test a move to a non-union area based in part on the employer's desire to obtain lower labor costs would be considered by the Board to be predicated on an anti-union motive because of its discriminatory effect on the union at the original plant; under the *Great Dane* standard, it is arguable that lower labor costs, combined with other economic considerations, would establish substantial business justification for the move.

The decision bargaining principle of *Fibreboard*²⁰⁹ should have little effect, if any, on future plant relocations in the wake of the *General Motors*²¹⁰ decision. It is difficult to envision a relocation that is not a fundamental change in the direction of the corporate entity, although transfers of particular operations within a plant or of production contracts may still be subject to the duty to decision bargain because they are closely analogous to subcontracting. Further, *General Motors* is an indication that the Board and courts may well be more receptive in the future to the argument that decision bargaining would unduly interfere with management functions in effecting a relocation.

Post-purchase relocation is a special category of plant relocation, in which the traditional Board policy of strictly applying the successorship doctrine has impeded development and discouraged necessary economic adjustment—in the form of plant relocation—in marginal ventures. The fact that four justices of the Supreme Court in *Burns*²¹¹ were of the opinion that more restraints, rather than fewer, should be placed on the imposition of successorship suggests some possibility of relaxation of the successorship doctrine in post-purchase relocations.

After the Supreme Court's decision in *H.K. Porter*,²¹² many of the remedies with which the Board has experimented in relocation cases have become suspect as the imposition of collective bargaining terms. If, as seems likely, decision bargaining concerning relocations is no

²⁰⁸ NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

²⁰⁹ Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

²¹⁰ General Motors Corp., 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971).

²¹¹ NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272 (1972).

²¹² H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

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longer required by the Board, few employers who are not required to engage in decision bargaining by the terms of their contracts will be willing to do so, and the Board will only be willing to enforce the duty to bargain about the impact of the move. Consequently, impact bargaining will remain the mainstay of employee protection in plant relocations, and the Board must insure that the duty is performed prior to the move. Thus, section 10(j) temporary injunctions against relocations until impact bargaining has occurred will insure a maximum of employee protection with a minimum of interference with management prerogative. The injunction is of equal utility against discriminatory and non-discriminatory relocations since employers are under a duty to bargain about the impact of all relocations. Preservation of the status quo through a 10(j) injunction will eliminate the Board's quandary in its attempts to restore status quo ante.

The implication of all of these developments considered together is that the Board is now, or will be in the near future, more willing to recognize the economic efficacy of plant relocations than it has been traditionally. In addition, the Board, in devising remedies in the relocation area, will probably be more willing to experiment with heretofore unconventional remedies in an attempt to balance more equitably the protection of employee security and the management rights of employers. This policy may well lead to greater use of the 10(j) preliminary injunction by the Board, which satisfies the objective of protecting employee rights, while at the same time does not substantially impinge on management prerogative. The widespread use of the preliminary injunction rather than remedies which increase the employer's costs, thus frustrating his purpose in moving, would be consistent with a policy by the Board relaxing its restrictive attitude toward relocations, and with a recognition that a plant relocation is now more of an economic than a labor relations phenomenon.