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MANAGEMENT RIGHTS AND SUBCONTRACTING

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If we were a magician and could peer into a crystal ball and read the future, what would we see in the shadowland of managerial prerogatives? Undoubtedly a further shrinking and withering!

The handwriting is already clearly on the wall in large letters and bold face type, stenciled in indelibly in two cases of potentially far-reaching decisions of National Labor Relations Board—*Fibreboard Paper Products Corp. v. NLRB;*[1] and *Town and Country Mfg. Co. v. NLRB.*[2] These two cases have caused strong repercussions in management circles.

Other cases, of course, cast their shadows of various intensities, too, and there are likewise some cases which bring traces of sunshine into the penumbra. We shall direct attention to these in the latter part of this article.

It is generally recognized that unions have made their greatest penetration into the management rights area in connection with the personnel function. This is natural because the union voice in management is strongest in matters such as hiring, layoff, discharge, number of employees, promotion, wages, discipline, and hours of work. And now subcontracting is being added to the list.

It is obvious that, if a union participates in policy making decisions, such as pertaining to the financing, expansion, or contraction of the plant, the addition of new products, and the equipment to be used, the union is actually participating in directing the company and it is reasonable to say that the right to subcontract is likewise a question of management policy.

Seldom, however, does the union aggressively seek an equal partnership role in major management policy matters. Rather, the union endeavors to get the employer to agree to give it a voice in policy matters like establishing work rules, transferring employees, changing work jobs, moving employees from job to job, allocating overtime, assigning of jobs, and disciplining or discharging employees.

TOWN AND COUNTRY MFG. CO.

In substance what the U.S. 5th Circuit Court of Appeals sustained in upholding the NLRB decision in *Town and Country Mfg. Co.* are the following points:

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1. 379 U.S. 203 (1964).

2. 316 F.2d 846 (1963).

1. That the employer, a mobile home manufacturer, was motivated by an anti-union bias in subcontracting out work (its hauling operations of the mobile homes) which was normally performed by its own employees in the collective bargaining unit. These truck driver employees were laid off—and this was an unfair labor practice.
2. That even an economically motivated employer in making changes in his method of operations affecting employee job tenure must bargain on the effect upon employees of subcontracting out bargaining unit work.
3. That the actual change in working conditions considered as a unilateral change in wages, hours, and other terms and conditions of employment was unlawful.
4. That the employer's decision to subcontract bargaining unit work is a mandatory subject of collective bargaining.

Points 1, 2 and 3 are not really new. Other cases have posed similar issues and have had similar holdings. But Point 4 is a radical change. It is new and novel and without precedent! Probably, the decision of the U.S. Supreme Court in *Order of Railroad Telegraphers v. Chicago Northwestern R.R. Co.*[3] showed the handwriting on the wall. In that case, the Supreme Court held that the Chicago and Northwestern Railway was obligated to bargain with the union on the elimination of certain station agent jobs. The Railway was ordered to bargain not just on the effect of the elimination of the jobs, but on *the right itself* to eliminate the jobs.

FIBREBOARD PAPER PRODUCTS CORP.

Following its decision in *Town and Country*, a reconstituted NLRB Board reopened and reversed its decision in *Fibreboard Paper Products Co.* to bring it in line with the *new doctrine that subcontracting of unit work in and of itself is a mandatory subject of bargaining.* The U.S. Supreme Court has upheld the Board in this case as previously stated. In the original *Fibreboard* decision, the Board in a three way split, had held that since there was no evidence of union discrimination but only economic reasons for the subcontracting it was not a mandatory subject for collective bargaining—only the effects of the subcontracting was a bargainable issue.[4]

Briefly, the facts in the *Fibreboard* case are:

1. Fibreboard unilaterally subcontracted its maintenance work with-

3. 362 U.S. 330 (1960).

4. In the original *Fibreboard* decision, Chairman Frank W. McCullock and Member Gerald A. Brown took no part. They were appointed to the NLRB by President Kennedy in 1961.

out any bargaining with the union (the steelworkers) on this point.

2. Fibreboard was motivated solely by economic reasons—the saving of $225,000 annually—and there was no anti-union bias on the part of the employer.

3. Fibreboard notified the union four days prior to the expiration of the existing contract that since all inside maintenance work would be subcontracted to an independent contractor there was no point in negotiating a new contract because the present maintenance employees would be replaced by the contractor's employees.

4. Fibreboard did bargain with the union on the question of termination rights of the discharged employees.

5. On the basis of its decision in *Town and County Mfg. Co.* and the U.S. Supreme Court decision in the *Railroad Telegraphers*[5] case the reconstituted NLRB reversed its original finding and held that Fibreboard's action was an unfair labor practice.

6. The Board ordered Fibreboard to cease and desist from unilaterally subcontracting bargaining unit work or otherwise making unilateral changes in its employees' terms and conditions of employment without consulting the union.

7. The Board further ordered Fibreboard to restore the *status quo ante* by reinstituting its maintenance operation and fulfilling its statutory obligation to bargain with the union on subcontracting the unit maintenance work.

8. The Board pointed out that after the obligation to bargain had been satisfied, following the resumption of bargaining, Fibreboard would be free lawfully to subcontract its maintenance work if it desired to do so.

THE LARGER PICTURE

In the 1964 fiscal year of the NLRB, about 175 cases in which the *Town and Country* and the *Fibreboard* principle was involved came to the NLRB. In almost half of the cases the charges were dismissed, in about half of them complaints were authorized, and, in a few cases further proceedings were deferred pending the parties resort to grievance and arbitration procedures under their collective bargaining contracts.

The question presented in most of the cases was whether the employer had fulfilled his bargaining obligations by giving the union sufficient advance notice and an opportunity to bargain on the employer's decision

5. Order of Railroad Telegraphers v. Chicago Northwestern R.R. Co., 362 U.S. 330 (1960).

to subcontract or otherwise remove work from the bargaining unit. A correlative question was whether the union had timely requested bargaining with respect to such decisions.

SOME NLRB DECISIONS FAVORABLE TO MANAGEMENT ON SUBCONTRACTING

In *Shell Oil Co.*,[6] the NLRB has held that if the employer's contract with the union provides he has a right to subcontract work without prior consultation with the union he does not need to give any advance notice nor bargain on the question.

In *Westinghouse Electric Corp.*[7] the Board held that the *Town and Country* and *Fibreboard* principles did not apply. The reason was that since the early 1940's at the Mansfield, Ohio plant involved there had been continuous subcontracting. Accordingly, in 1963, when the company, without any consultation with the union, let out about 400 maintenance subcontracts, 800 subcontracts for tools and dies, and about 5000 subcontracts for component parts, the NLRB held this was the company's usual and customary way of doing business; it had no adverse effect on employees and was motivated solely by economic reasons. The Board noted that the union had unsuccessfully sought restrictions on subcontracting in 1958, 1960 and 1963 bargaining negotiations.

In *Fafnir Bearing Co.*,[8] the employer had for many years contracted out maintenance work, the union was well aware of this and had never before questioned it. The Board ruled that the employer's unilateral subcontracting of the work represented no change in the "conditions of employment" of employees in the maintenance unit and dismissed the union complaint. The Board pointed out that the union never sought in its collective bargaining negotiations any restrictions on the employer's established subcontracting practices. Furthermore, the Board noted that the contract contained a broad management rights clause which reserved exclusively to the employer the right to change its "methods or processes," "to determine the extent to which the plants shall be operated," and "to transfer any employees subject only to such factors as seniority."

In *Superior Coach Corp.*,[9] the Board held that there was no unfair labor practice in the employer's failure to bargain with the union before hiring an independent contractor to install a new wash system and to replace the plant's heating system with a new one. Such action on the part of the employer, the Board decided, was consistent with past practices and it had no adverse affect on unit employees.

6. 149 N.L.R.B. 283 (1964). Also see General Motors Corp., 149 N.L.R.B. 396 (1964).
7. 150 N.L.R.B. 1574 (1965).
8. Fafnir Bearing Co., 151 N.L.R.B. 332 (1965).
9. 151 N.L.R.B. 188 (1965).

In the *New York Mirror*[10] case in March, 1965, the NLRB by a 4-0 vote turned down union charges against the Hearst Corporation for selling and shutting down the newspaper without first discussing its decision to do so with the many unions representing the 1600 employees of the newspaper.

The Board cited the Supreme Court statement in *NLRB v. Katz*[11] to the effect that even though unilateral action by an employer without prior discussion with the union is contrary to Congressional policy, this does not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying such unilateral action.

The Board stated that, "We are satisfied that such circumstances are present here," and pointed out that:

1. The employer action was prompted solely by economic factors.
2. The sale and shutdown permanently abolished all bargaining unit jobs and no party to the case had sought restoration of the jobs and reinstatement of the employees.
3. Contracts signed following the 113 day city wide newspaper strike in 1963 contained "employees' severance pay and termination rights in the event of abolishment of unit jobs."
4. The publisher and unions had a long and effective bargaining relationship leading up to the last contract.
5. Hearst continued the bargaining relationship after the shutdown by meeting and negotiating with the unions whenever requested.
6. The union's primary and virtually sole concern after the shutdown was securing the employees' rights under the contract and the company met its obligation to bargain with the union concerning those rights and other effects of the shutdown, negotiating to full and complete settlement the employees' severance pay and co-operation in efforts to find other employment for them.
7. The Board found no evidence the employer had any hostility to the unions involved.

GENERAL AND EXCLUSIVE MANAGEMENT RIGHTS

Arthur J. Goldberg, presently U.S. Ambassador to the United Nations, spoke on *Management's Reserved Rights: A Labor View* at the 1956 Annual Meeting of the National Academy of Arbitrators. Here are some of

10. 151 N.L.R.B. 834 (1965).
11. NLRB v. Katz, 369 U.S. 736 (1962).

his statements made at the time he was general counsel of the United Steelworkers.[12]

> Not only does management have the general right to manage the business, but many agreements provide that management has the exclusive right to direct working forces and usually to lay off, recall, discharge, etc.
>
> The right to direct, where it involves wages, hours, or working conditions is a procedural right. It is a recognition of the fact that somebody must be boss; somebody has to run the plant. People can't be running around at loose ends each deciding what to do next. Management decides what the employee is to do. However, this right to direct or to initiate action does not imply a second class role for the union. The union has the right to pursue its role of representing the interest of the employee with the same stature accorded it as is accorded management. To assure order, there is a clear procedural line drawn: the company directs and the union grieves when it objects.[13]

Counsel for management would scarcely disagree with the above expression of belief.

Mr. Goldberg continued:

> In addition to these exclusive rights to do things without any union say, the exclusive rights to manage and direct should be very clearly understood by all parties. The union cannot direct its members to their work stations or work assignments. The union does not tell people to go home because there is no work. The union does not notify people who are discharged to stay put. The union does not tell employees to report for work after a layoff (except perhaps as an agent for transmitting information in behalf of management). The union does not start or stop operations unless perhaps some urgent safety matter is involved and there is some contractual or other basis for such action. This is not an easy concept. Very often union men are disturbed by decisions they consider entirely wrong. Nevertheless, a company's right to make its own judgments is clear.[14]

Mr. Goldberg also states:

> Management determines the product, the machine to be used, the manufacturing method, the price, the plant layout, the plant organization, and innumerable other questions. These are re-

12. Goldberg, *Management's Reserved Right: A Labor View* in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 118 (McKelvey, ed. 1956).

13. *Id.* at 120-21.

14. *Id.* at 124.

> served rights, inherent rights, exclusive rights which are not diminished or modified by collective bargaining as it exists in industries such as steel. It is of great importance that this be generally understood and accepted by all parties. Mature, cooperative bargaining relationships require reliance on acceptance of the rights of each party by the other. A company has got to know it can develop a product and get it turned out; develop a machine and have it manned and operated; devise a way to improve a product and have the improvement made effective; establish prices, build plants, create supervisory forces and not thereby become embroiled in a labor dispute.[15]

CONCLUSION

If both management and labor would study and reflect on Mr. Goldberg's statements, union-management relationships would inevitably improve for the magic key is that management has the right to act and the union has the right to challenge. A management which must first get approval of the union before it acts has in fact made the union the principal directing force in the operation of the company.

This is why the decisions in *Town and Country* and *Fibreboard Paper Products* are so disturbing. Because, in substance, these decisions require management to bargain with the union before management can act to subcontract work if such subcontracting would adversely affect employees in the bargaining unit. These two cases establish the NLRB rule that subcontracting, leasing, or terminating work in the bargaining unit, *which will adversely affect* employees, is a subject for mandatory bargaining with the union regardless of the motive of the employer. There is, however, no requirement that agreement be reached with the union.

However, as the *Shell Oil Co.*, the *Westinghouse Electric Corp.*, the *Fafnir Bearing Co.*, the *Superior Coach Corp.*, and the *New York Mirror* cases show, the *Town and Country* and the *Fibreboard* principle probably will not hold where:

1. A specific contract clause provides for a waiver of the mandatory bargaining requirement in subcontracting;
2. Where the pattern of past practices may be such as to preclude the necessity for mandatory bargaining on the employer's unilateral decision to subcontract work; or
3. There may be such unusual circumstances that excuse or justify unilateral subcontracting action by the employer.

In all such instances, however, perhaps the most important criterion of the Board is that the employees in the bargaining unit not be adversely

15. *Id.* at 120-21.

affected. It is evident, then, that *Town and Country* and *Fibreboard* are not as broad and all inclusive as employers have feared. As a matter of fact, it would appear that the employer's ordinary routine subcontracting need not be submitted to union negotiation at all unless there is a likelihood of an adverse impact upon bargaining unit employees.