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BARGAINING OVER THE INTRODUCTION OF ROBOTS INTO THE WORKPLACE

Pursuant to Section 8(d) of the National Labor Relations Act, an employer must bargain with the exclusively recognized representative of its employees about "wages, hours, and other terms and conditions of employment." Whether this language includes an employer's decision to replace its workforce through automation has not yet been resolved. This Comment argues that because of the profound impact a decision to automate is likely to have upon "terms and conditions of employment," an employer should be required to bargain collectively with the union representing the affected employees prior to implementation of the decision. Only in this way can the rights of workers facing technological displacement be ensured.

INTRODUCTION

The long-term impact of industrial robots on the future factory will be great.¹ Currently, robots are used mainly for dangerous and tedious jobs;² however, they may eventually replace many human workers.

Opinions vary widely on just how many factory jobs could be eliminated by robots. Some automation experts have estimated that robots will reduce today's factory workforce 65 to 75 percent by the year 2000.³ Although labor unions have been keeping a close watch on this development, robots are not viewed as an immediate threat to workers because they must constantly be maintained and fed parts with which to work. However, a virtually unmanned factory is possible. The Italian automobile company, Fiat, believes that sensory ro-

1. *When Robots Take Over People's Jobs*, U.S. NEWS & WORLD REP., Feb. 16, 1981, at 75-76.

2. *Id.* at 75.

3. Gilcrest & Shenkin, *The Impact of Computers on Employment*, THE FUTURIST, Feb. 1981, at 49.

bots will slash manpower requirements at that plant by 90% over the next ten years.⁴

Robots are necessary to complete the automation of U.S. industry. They increase productivity and reduce costs.⁵ Additionally, robots will be able to perform dangerous and tedious jobs and may thereby result in the eventual upgrading of tasks performed by laborers.⁶ Conversely, employment tenure in many industries is threatened by the introduction of robots.⁷ Besides layoffs, automation and robot introduction may lead to the downward reclassification of workers and loss in pay.⁸ Finally, the increased use of robots in industry threatens the survival of unions as organized entities.⁹ Therefore, it is not surprising that unions wish to be included in the bargaining process with respect to management decisions to install robots.¹⁰

This Comment considers whether, and under what conditions, an employer must bargain with the union representing its workers about

4. Cornish, *The Smart Machines of Tomorrow: Implications for Society*, THE FUTURIST, Aug. 1981, at 13. According to the Congressional Office of Technology Assessment, there are approximately 7,000 industrial robots presently at work in the United States. By the end of the decade, this number is expected to increase to between 50,000 and 100,000 robots. *The Robots are Already Here*, CAL. LAW., Jan. 1984, at 31.

Adam Osborne writes,

Given the tasks that robots will be able to perform, the impact on the blue-collar force will be profound. Most assembly line jobs will be eliminated. Automobiles, washing machines, and television sets will all be assembled by robots. Robots will even assemble themselves.

A. OSBORNE, *RUNNING WILD: THE NEXT INDUSTRIAL REVOLUTION* 62 (1979).

5. Some robots cost as little as \$6.00 per hour to operate, compared to the \$20.00 in pay and benefits for the average auto worker. *The Robots are Already Here*, CAL. LAW., Jan. 1984, at 31.

6. In Japan, where over 10,000 industrial robots are currently in use, robots are used in "dangerous, unhealthy and repetitive jobs." Displaced employees have moved to jobs which are more intellectually challenging and less physically demanding. Japanese companies, unlike American companies, have assumed the responsibility of retraining workers displaced by robots. As a result, "[e]mployees consider production by robots as a means of relieving monotonous and environmentally harmful tasks." OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, *EXPLORATORY WORKSHOP ON THE SOCIAL IMPACTS OF ROBOTICS* 34-35 (1981) [hereinafter cited as *EXPLORATORY WORKSHOP*].

7. See, e.g., D. BOK, *AUTOMATION, PRODUCTIVITY AND MANPOWER PROBLEMS* 9 (1964) (Where the increase in worker productivity is so great that it outstrips consumer demand, employment levels fall off.) But see *EXPLORATORY WORKSHOP*, *supra* note 6, at 35 (If robots can cause increased economic growth (as automation generally does), more jobs will be created than lost.)

. . . [T]he relatively high tempo of real economic growth in Japan, with its consequent demand for increased labor, has more than compensated for the losses of jobs resulting from increasing productivity, automation, and robot introduction.

Id.

8. See generally Gilcrest & Shenkin, *supra* note 3, at 49-50.

9. See Taylor, *Collective Bargaining*, in *AUTOMATION AND TECHNOLOGICAL CHANGE* 80, 85-86 (J. Dunlop ed. 1962).

10. See generally Hanauer, *Bargaining for Jobs in the Automated Factory*, CAL. LAW., Jan. 1984, at 28-31.

a decision to introduce robots. Because this issue has not yet been addressed by the National Labor Relations Board (NLRB) or the courts, labor and management must rely for precedent on cases concerned with automation.¹¹ Automation cases have been infrequent and inconsistent.¹² Accordingly, this Comment will address the major rulings dealing with bargaining over subcontracting and partial plant closure¹³ as the courts generally have found these cases to be persuasive in the automation area.¹⁴

Reference will be made throughout this Comment to "decision" and "impact" bargaining. Decision bargaining generally refers to bargaining before a decision has been reached by the employer. Impact bargaining, also called effects bargaining, refers to bargaining about the rights of affected employees after the employer has implemented its decision. There is no dispute that an employer must bargain with the union about the effects of management decisions which result in the termination of bargaining unit employees.¹⁵ Rather, the controversy has centered around the issue of whether or not the union should also be given the opportunity to bargain over the decision itself.

THE LAW DETERMINING AN EMPLOYER'S DUTY TO BARGAIN OVER MANAGERIAL DECISIONS

Section 8(a)(5) of the National Labor Relations Act (NLRA) makes an employer's refusal to bargain collectively with the exclusively recognized representative of its employees an unfair labor practice.¹⁶ Section 8(d), added by the 1947 Taft-Hartley amendments, sets out the mandatory subjects of bargaining: "wages, hours,

11. *Id.* at 28.

12. *See infra* text accompanying notes 66-88.

13. This Comment will not address cases dealing with management decisions to close an entire operation. It is well established that an employer has a right to unilaterally terminate its business, although it may be required to bargain about the impact the decision will have on workers. *See Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

14. *McNeill & Libby v. Wisconsin Employment Relations Comm'n*, 48 Wis. 2d 272, 179 N.W.2d 805 (1970).

15. This Comment's focus is an employer's duty to bargain about its decision to eliminate unit work before actually doing so as opposed to its duty to bargain over the impact of its accomplished decision on the workforce. Where the decision will have a measurable impact on workers in the bargaining unit, the employer usually will be required to bargain over the effects of its decision. Gacek, *The Employer's Duty to Bargain on Termination of Unit Work*, 32 LAB. L.J. 659, 660 (1981).

16. 29 U.S.C. §158(a)(5) (1976).

and other terms and conditions of employment”¹⁷ This language must be interpreted in order to determine whether certain management decisions are mandatory subjects of bargaining.¹⁸

*Decision Bargaining over Termination of Unit Work:
Subcontracting and Partial Plant Closure*

Whether the NLRA requires an employer to bargain over management decisions which eliminate jobs in a bargaining unit depends upon various factors. When the employer’s decision is motivated by anti-union animus, the employer will be required to bargain.¹⁹ There is no consensus, however, over whether an employer must also bargain about decisions which are economically motivated.²⁰

The leading case determining whether “terms and conditions of employment” include employer decisions that terminate unit work is *Fibreboard Paper Products Corp. v. NLRB*.²¹ The Fibreboard Company employed a staff of custodial workers under a union contract. After conducting an extensive investigation, the company decided that its maintenance costs could be reduced if the custodial work were contracted out. When the union contract was about to expire, the employer informed the union of its intention to subcontract the work to an independent contractor, but refused to bargain over its decision. After the contract expired, the maintenance work was contracted out and the custodial employees terminated. Unfair labor practice charges were filed by the union.²²

The trial examiner and the Board originally found no violations.²³ The Board reversed its position on rehearing, holding the employer was obligated to bargain about its decision to subcontract, even though the decision was economically motivated.²⁴ The Board ordered Fibreboard to reinstate the custodial workers with back pay, and to bargain in good faith about its decision before subcontracting.²⁵ The Supreme Court upheld enforcement of the Board’s order, holding that Fibreboard’s decision did affect “terms and conditions of employment” and that the employer had violated section 8(a)(5)

17. 29 U.S.C. §158(d) (1976). The mandatory subjects are those about which an employer is required to bargain in good faith, as opposed to permissive subjects, which are those about which he may bargain. R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 496-98 (1977).

18. Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143, 145 (1968).

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

20. Gacek, *supra* note 15, at 660.

21. 379 U.S. 203 (1964).

22. The union filed charges of violation of §§8(a)(1), (3) and (5) of the NLRA, 29 U.S.C. §§158(a)(1), 158(a)(3) and 158(a)(5) (1976). 379 U.S. at 207.

23. 130 N.L.R.B. 1558, 47 L.R.R.M. 1547 (1961).

24. 138 N.L.R.B. 550, 51 L.R.R.M. 1101 (1962).

25. *Id.* at 554, 51 L.R.R.M. at 1102.

by refusing to bargain over a mandatory subject of bargaining.²⁶

In reaching its decision, the Court noted that the employer sought to replace one group of employees with another doing the same kind of work within the same plant.²⁷ The employer's basic operation had not changed, and an order to bargain would not therefore greatly interfere with the employer's freedom to manage his business.²⁸ The majority was careful to limit the opinion to subcontracting which resulted in the "replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment. . . ."²⁹

Chief Justice Warren, writing for the majority, stated that subcontracting was well within the literal meaning of "terms and conditions of employment" but that cases involving termination of unit work would have to be reviewed on a case-by-case basis.³⁰ The courts should look to whether (1) the employer still intended to have the work performed, (2) the decision changed the basic nature of the business, (3) the decision involved a major alteration in capital structure, and (4) industrial practice dictated that the decision would be suitable for resolution within a collective bargaining framework.³¹

In a concurring opinion written by Justice Stewart, three justices sought to limit the Court's holding.³² Justice Stewart cautioned against an expansive reading of the majority opinion to include all managerial decisions which have an impact on job security as mandatory subjects of bargaining.³³ He argued that the employer should be free to implement decisions unilaterally if they "are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security"³⁴

The Response to Fibreboard

A year after *Fibreboard*, the Board held in *Westinghouse Electric Corp.*³⁵ that subcontracting of unit work does not create a duty to bargain unless it will have a "demonstrable adverse impact on em-

26. 379 U.S. at 209.

27. *Id.* at 213.

28. *Id.*

29. *Id.* at 215.

30. *Id.*

31. *Id.* at 213.

32. Justice Stewart was joined in the dissent by Justices Douglas and Harlan. *Id.* at 217-26.

33. *Id.* at 218.

34. *Id.* at 223.

35. 150 N.L.R.B. 1574, 58 L.R.R.M. 1257.

ployees in the unit.”³⁶ Under this test, decisions having no such impact are not considered sufficiently related to “terms and conditions of employment” to require bargaining.

During the years following *Westinghouse*, the Board sought to clarify “demonstrable adverse impact.” It indicated that subcontracting is a mandatory subject of bargaining when some employees are to be laid off,³⁷ transferred to lower paying jobs,³⁸ or will lose a substantial amount of overtime.³⁹ Further, the adverse impact on the bargaining unit had to be provable rather than speculative.⁴⁰ Notwithstanding the preceding factors, the NLRB holds in most cases that subcontracting is a mandatory subject of bargaining under section 8(d) of the Act.⁴¹

In addition to subcontracting, the Board extended *Fibreboard* to partial closure cases — when the employer closes one of its plants but remains in business at other locations. For example, in *Ozark Trailers, Inc.*,⁴² the Board adopted an expansive reading of *Fibreboard*, holding that all decisions which result in the termination of unit work should be mandatory subjects of bargaining.⁴³

In *Ozark Trailers*, the employer had shut down one of its three manufacturing plants without first bargaining with the union. The NLRB stated that the right of employees to bargain about the labor they had invested in the business enterprise would always be treated on par with the employer’s prerogative to make a change in his business.⁴⁴ The Board also suggested that the imposition of the duty to decision bargain would not place an intolerable burden on management because the employer is only required to make a good faith effort to reach an acceptable solution. “If such efforts fail, the employer is wholly free to make and effectuate his decision.”⁴⁵ For sixteen years after *Ozark Trailers*, the NLRB generally required employers to bargain about decisions to partially terminate operations.⁴⁶

During this time, a split of authority existed among the courts of appeals on the issue of mandatory bargaining over economically motivated subcontracting and partial closure decisions. The Eighth Circuit took a very restrictive view of *Fibreboard* in *NLRB v. Adams*

36. *Id.* at 1577, 58 L.R.R.M. at 1259.

37. *NLRB v. Winn-Dixie Stores*, 147 N.L.R.B. 788, 56 L.R.R.M. 1266 (1964), *aff’d in part*, 361 F.2d 512, 62 L.R.R.M. (1966), *cert. denied*, 385 U.S. 935 (1966).

38. *Amcar Div.*, 231 N.L.R.B. 83, 96 L.R.R.M. 1291 (1977), *enforced*, 592 F.2d 422, 100 L.R.R.M. 2710 (8th Cir. 1979).

39. *Cities Serv. Oil Co.*, 158 N.L.R.B. 1204, 62 L.R.R.M. 1175 (1966).

40. *Westinghouse Elec. Corp.*, 153 N.L.R.B. 443, 59 L.R.R.M. 1355 (1965).

41. *See* R. GORMAN, *supra* note 17, at 514.

42. 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966).

43. *Id.* at 570, 63 L.R.R.M. at 1269.

44. *Id.* at 566, 63 L.R.R.M. at 1267.

45. *Id.* at 568, 63 L.R.R.M. at 1268.

46. *See* R. GORMAN, *supra* note 17, at 517.

*Dairy, Inc.*⁴⁷ There the court held that the employer's decision to sell its delivery trucks and contract out its delivery work was not a mandatory subject of bargaining because (1) the company's decision involved a major change in capital structure and (2) the change was not motivated by anti-union animus.⁴⁸ The court reasoned that since the employer's decision involved substantial capital expenditure, it was distinguishable from *Fibreboard*. The court relied on the concurring opinion in *Fibreboard*, stressing that the duty to bargain does not arise in situations involving significant capital investment or changes in capital structure.⁴⁹

The Ninth Circuit has also followed the language of Justice Stewart's concurring opinion and has agreed that absent anti-union animus, there is no duty to bargain over management decisions.⁵⁰ In direct conflict, the Fifth and Sixth Circuits have expanded *Fibreboard*.⁵¹ Unlike the Eighth and Ninth Circuits, they have not been swayed by the amount of capital expenditure involved, nor have they considered the presence of anti-union animus in section 8(a)(5) cases. Instead, the Fifth and Sixth Circuits have read *Fibreboard* to require bargaining over all management decisions which eliminate bargaining unit work.

Finally, the Third Circuit has developed a balancing test approach. In *Brockway Motor Trucks v. NLRB*,⁵² the court held there

47. 350 F.2d 108, 60 L.R.R.M. 2084 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011, 61 L.R.R.M. 2192 (1966).

48. 350 F.2d at 111-12, 60 L.R.R.M. at 2034. The second requirement, anti-union animus, comes from the Supreme Court decision in *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), which held that partial plant closure to chill unionism violated section 8(a)(3) of the Act. In *Adams Dairy*, the Court failed to distinguish the *Fibreboard* duty to bargain under section 8(a)(5) from the rule in *Darlington* prohibiting discrimination against employees for their union beliefs. Apparently, the Court mixed the elements of section 8(a)(5) and section 8(a)(3) violations and concluded that where a significant change in capitalization has occurred, there is no duty to bargain in the absence of anti-union animus. 350 F.2d 108, 113, 60 L.R.R.M. 2034, 2088. *See also* R. GORMAN, *supra* note 17, at 514.

49. 350 F.2d 108, 60 L.R.R.M. 2084.

50. *See, e.g.*, *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 65 L.R.R.M. 2861 (9th Cir. 1967).

51. *See, e.g.*, *NLRB v. American Mfg. Co. of Texas*, 351 F.2d 74, 60 L.R.R.M. 2122 (5th Cir. 1965). On facts very similar to those in *Adams Dairy*, the court concluded the employer was obligated to bargain over its decision to sell its delivery trucks and contract out its delivery work. Also, the court stated the duty to bargain existed apart from anti-union animus. *See NLRB v. Winn-Dixie Stores*, 361 F.2d 512, 62 L.R.R.M. 2218 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966). *See also Weltronic Co. v. NLRB*, 419 F.2d 1120, 73 L.R.R.M. 2014 (6th Cir. 1969), *cert. denied*, 398 U.S. 939 (1970).

52. 582 F.2d 720, 99 L.R.R.M. 2013 (3d Cir. 1978).

is no per se rule that an employer's decision to close part of its operations is or is not a mandatory subject of bargaining.⁵³ Instead, the matter should be resolved by a balancing of interests with a presumption that an economically motivated partial business shutdown creates a duty to bargain unless the employer has suffered severe economic loss.⁵⁴

The latest Supreme Court decision to address bargaining over management decisions is *First National Maintenance Corp. v. NLRB*.⁵⁵ There, the Supreme Court held that an employer may unilaterally shut down part of a business for purely economic reasons without first consulting the union.⁵⁶ Only the "effects" of such a decision are subjects for mandatory bargaining.⁵⁷

Justice Blackmun, writing for the majority, identified three types of management decisions.⁵⁸ First, there are decisions which are almost exclusively an aspect of the relationship between the employer and employee.⁵⁹ Bargaining in these situations is mandatory. Second, there are decisions which have only an indirect impact on employees, over which decision bargaining is not required.⁶⁰ And finally, there are those which involve a change in the scope and direction of the business enterprise, but which also have a direct impact on employment.⁶¹

The majority suggested a balancing test be used with regard to the third type of decision, and that bargaining should be required only when the "benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."⁶²

Whether *First National Maintenance* will have any effect on decision bargaining in situations other than partial closure cases is questionable. Although Justice Blackmun discussed broadly the duty to

53. *Id.* at 731, 99 L.R.R.M. at 2023.

54. *Id.*

55. 452 U.S. 666 (1981).

56. *Id.* at 686.

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

58. *Id.* at 676-77.

59. These include layoffs, recalls, production quotas and work rules. *Id.* at 677.

60. These include decisions about advertising and product type and design (i.e., decisions which are not primarily about the relationship between the employer and employee). *Id.* at 677.

61. These include subcontracting and partial plant closure decisions. *Id.*

62. *Id.* at 679.

[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

Id.

decision bargain over various types of management decisions, he added in a footnote that the majority was not suggesting any view as to "other types of management decisions."⁶³ These would have to be considered on a case-by-case basis. Further, the NLRB General Counsel, after *First National Maintenance*, issued a memorandum to the Board's regional directors stating "[t]he court expressly left open the issue of whether there is a duty to bargain about 'other types of management decisions' that may have an impact on terms and conditions of employment."⁶⁴ He added that the Board's position on plant relocation, subcontracting, automation, and consolidation would be unaffected by the Supreme Court's opinion.⁶⁵

Despite these efforts to confine *First National Maintenance* to partial shutdown decisions, some labor attorneys fear the opinion is part of a trend to limit union bargaining rights to the effects of management decisions rather than to the decisions themselves even in the area of automation and robotics.⁶⁶

Automation Cases

Very few cases have addressed the issue of an employer's duty to bargain over the introduction of automation. NLRB decisions on automation have been inconsistent due to the changing makeup of the Board.⁶⁷ Decisions at the appellate level are factually complex

63. *Id.* at 686 n.22.

64. Office of the General Counsel, Memorandum 81-38 (July 27, 1981).

65. *Id.*

66. The Board recently considered a case in which an employer operating research facilities in New Jersey and Connecticut decided to discontinue its activities in New Jersey and to consolidate them with its operation in Connecticut. *Otis Elevator Co.*, 269 N.L.R.B. No. 162 (1984). Relying on *First National Maintenance*, the Board found that although the matter was of central concern to the union and to the employees it represented, the employer was not obligated to bargain over its decision. The Board indicated that the critical factor in determining whether a decision is subject to mandatory bargaining is "whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; not its effect on employees nor a union's ability to offer alternatives." *Id.* at 6. Finally, in direct conflict with the majority opinion in *First National Maintenance*, the Board indicated that all decisions which affect the scope, direction, or nature of the employer's business are excluded from Section 8(d). *Id.* at 7.

Presumably, the Board would reject the balancing test developed by the Supreme Court to deal with decisions which involve a change in the scope and direction of the business and also impact employment. See *supra* text accompanying notes 58-62. The Board also disregards the plain and clear language of the National Labor Relations Act. Section 8(d) explicitly includes as mandatory bargaining subjects "terms and conditions of employment," suggesting that a major focus of inquiry in these cases should be the effect of the decision upon employees.

67. Hanauer, *supra* note 10, at 54. The National Labor Relations Board is comprised of five members who are appointed by the President to serve staggered, five-year

and ambiguous as to whether they require employers to decision bargain or to bargain only over the effects of such decisions.⁶⁸ The only U.S. Supreme Court case even to mention bargaining over automation is *First National Maintenance*, and then only in a footnote.⁶⁹

In one of its earliest automation cases, *The Renton News Record*,⁷⁰ the Board held that the employer had an obligation to bargain over the introduction of automation. There the employer changed its composing room from "hot" to "cold" type,⁷¹ and discharged its composing room employees. The Board stated that because automation is a matter of grave concern for the affected employees, it should be faced jointly by labor and management.⁷²

Although the NLRB found the employer violated section 8(a)(5) by refusing to bargain about both its decision to change its printing process and the impact of the decision,⁷³ it did not order the company to reinstate the terminated workers.⁷⁴ Instead, the company was required to bargain with the union only about the impact of its accomplished decision on unit employees.⁷⁵

The NLRB has similarly treated subsequent automation cases, finding a duty to decision bargain, but failing to order return to the status quo ante.⁷⁶ Although the Board, under section 10(c) of the

terms. Accordingly, the political fabric of the Board changes, with a certain amount of "lag time," with each new administration. R. GORMAN, *supra* note 17, at 7.

68. See *NLRB v. Columbia Tribune Publishing Co.*, 495 F.2d 1384, 86 L.R.R.M. 2078 (8th Cir. 1974). The employer violated sections 8(a)(5) and 8(a)(1) of the Act when it changed its printing process from "hot" to "cold" type without bargaining with the representative of the composing room employees. The union sought a guarantee that the new cold type positions would be filled by employees in the old bargaining unit. The main issue in the case was whether the union had jurisdiction over the new positions, for it was debatable whether they were substantially equivalent to the old hot type positions. The subject of decision bargaining was not really an issue, and the court's opinion is unclear as to whether or not it requires employers to bargain over decisions to mechanize. See also *Metromedia, Inc. v. NLRB*, 586 F.2d 1182, 99 L.R.R.M. 2743 (8th Cir. 1978) (The court found that the employer, the owner of a television station, violated section 8(a)(5) by failing to bargain in good faith over the use of "minicams" it had recently introduced. As in *Columbia Tribune*, the disagreement was not over the introduction of technological innovation, but rather the awarding of the "newly-created" positions to another union. The decision was ambiguous as to whether it was addressing decision or merely effects bargaining.)

69. 452 U.S. at 686 n.22.

70. 136 N.L.R.B. 1294, 49 L.R.R.M. 1972 (1962).

71. The "hot type" process is a complicated method of making press plates for newspapers which requires the use of skilled employees. "Cold type" refers to a newer and much different process which does not require any of the skilled labor necessary to the hot type process. *NLRB v. Columbia Tribune Publishing Co.*, 495 F.2d 1384, 86 L.R.R.M. 2078 (8th Cir. 1974).

72. 136 N.L.R.B. at 1297, 49 L.R.R.M. at 1973.

73. *Id.* at 1296, 49 L.R.R.M. at 1973.

74. *Id.* at 1298, 49 L.R.R.M. at 1974.

75. *Id.* at 1298, 49 L.R.R.M. at 1974.

76. See, e.g., *Richland, Inc.*, 180 N.L.R.B. 91, 73 L.R.R.M. 1017 (1969).

NLRA,⁷⁷ has the power to frame remedies for section 8(a)(5) violations, its remedies may not be punitive.⁷⁸ Accordingly, the Board has been reluctant to follow *Fibreboard* to the extent of ordering employers to stop using new equipment, reinstate terminated employees, and to bargain over management decisions before "reintroducing" automated equipment.⁷⁹

In a recent automation case, *Plymouth Locomotive Works, Inc.*,⁸⁰ the Board stated it had long held that:

where the automation of bargaining unit work will result in the elimination of unit jobs, it is the duty of the employer to bargain with its employees' bargaining representative over the decision to install automated equipment, as well as the effects of such decision.⁸¹

The employer, Plymouth, eliminated the position of timekeeper after determining that most of the timekeeper duties could be performed by a computer.⁸² Plymouth violated section 8(a)(5) because it failed to bargain with the union before eliminating the position.⁸³ The employer was ordered to reinstate the displaced timekeeper to his former position or to a substantially equivalent position if the job of timekeeper no longer existed.⁸⁴

Although the Board in *Plymouth* stated that an employer's decision to introduce labor saving equipment which results in the elimination of unit jobs was a mandatory subject of bargaining,⁸⁵ the current Board seems to disagree.⁸⁶ The current assumption is that employers are only required to bargain over the impact of such decisions.⁸⁷ However, the Board (with its present membership) has yet to decide an automation or robotics case.

77. 29 U.S.C. §160(c) (1976).

78. *Id.*

79. See Platt, *supra* note 18, at 151.

80. *Plymouth Locomotive Works, Inc.*, 261 N.L.R.B. 595, 110 L.R.R.M. 1155 (1982).

81. *Id.* at 602.

82. *Id.*

83. *Id.* at 603.

84. *Id.* at 606.

85. *Id.* at 602.

86. David B. Parker, director of information of the NLRB, says, "We've been working on the assumption that it's the employer who makes the decision about introducing new technology. But what impact it will have on the workplace or workers is the subject of bargaining." Hanauer, *supra* note 10, at 28.

87. The last case dealing with decision bargaining over automation decided by the NLRB was *Plymouth Locomotive Works* in May 1982. Three of the NLRB members who decided that case are no longer on the Board.

A DECISION TO AUTOMATE SHOULD BE A MANDATORY SUBJECT OF BARGAINING

Legislative Intent

The language and legislative history of section 8(d) of the NLRA suggest that all management decisions resulting in the termination of unit work should be included in the scope of collective bargaining. Although the original House bill specifically delimited the scope and subject matter of mandatory bargaining,⁸⁸ the Senate explicitly rejected the House proposal and substituted the present language: "wages, hours, and other terms and conditions of employment."⁸⁹ The Senate's proposal was adopted in the congressional conference report and the final legislation.⁹⁰

Some commentators have argued that this revealed a congressional intent to define broadly the mandatory subjects of bargaining, and that this intent has been substantially altered by the judicial and administrative interpretation of the Act.⁹¹ At any rate, the legislative history of section 8(d) does not suggest that Congress intended to exclude management decisions which eliminate bargaining unit work from the duty to bargain.

Decisions to install robots fall within the language of section 8(d) because such decisions drastically change the "terms and conditions" of the jobs that are eliminated as a result. An employer who has a duty to bargain over hours and wages should also be required to bargain over changes which eradicate hours and wages.

Fibreboard Should Control in Automation and Robotics Cases

Fibreboard is controlling in the context of automation and robotics because the situation in these cases parallels the situation in a subcontracting case. A decision to implement automation, like a decision to subcontract, will almost invariably have a detrimental effect on the bargaining unit. Another similarity between the introduction of robots and subcontracting is that the decision is usually motivated by economics.

The custodial workforce in *Fibreboard* was replaced by another

88. H.R. REP. NO. 245, 80th Cong., 1st Sess. 49 (1947). In the original House proposal, section 8(d) was limited to wages, hours, work requirements, discharges, suspensions, layoffs, recalls, seniority, discipline, promotions, demotions, transfers, safety and health, and vacations.

89. S. REP. NO. 105, 80th Cong., 1st Sess. 71 (1947). The Senate stated: "This section attempts to limit narrowly the subject matters appropriate for collective bargaining. It seems clear that the definitions are designed to exclude collective bargaining concerning . . . a host of . . . matters traditionally the subject matter of collective bargaining. . . ."

90. H.R. REP. NO. 510, Conference Report, 80th Cong., 1st Sess. 34 (1947).

91. See generally Gacek, *supra* note 15.

workforce which could do the same work for less money.⁹² The location, the type of work performed by the replacements, and the general operation of the company remained the same.⁹³ The difference in an automation case is that the replacement is not human.

Under *Fibreboard* and subsequent Board subcontracting decisions an employer should be required to bargain over a decision to introduce robots where the decision will foreseeably and directly result in an adverse impact on the bargaining unit or its members. Most decisions to install robots (or other labor saving machinery) will result in layoffs, which unquestionably have adverse effects on bargaining unit members. Therefore, the result of treating alike a decision to use robots to perform bargaining unit work and a decision to subcontract unit work would be to make robot introduction decisions a mandatory subject of bargaining in most instances.

Decisions to implement automation differ from subcontracting decisions in one major respect. A decision to automate or introduce robots normally requires substantial capital outlays and advanced management planning.⁹⁴ Although the Eighth and Ninth Circuits have followed Justice Stewart's concurring opinion in *Fibreboard*, holding that management decisions requiring substantial capital expenditure are not mandatory subjects of bargaining, the NLRB and the other circuits have required bargaining over all management decisions eliminating unit work.⁹⁵

The latter approach is more sensible in light of past Board statements that an employer's interest in managing its business should be weighed against the legitimate interests of employees.⁹⁶ Just as the employer has invested capital in its business, the employees have invested their labor.⁹⁷

Additionally, section 8(d) of the Act refers to "terms and conditions of employment" as mandatory subjects of bargaining. The Act does not distinguish between decisions which require substantial outlays of capital and those which do not. Also, management decisions which result in the displacement or reclassification of employees certainly involve "terms and conditions of employment" as much as do

92. 379 U.S. 203, at 205-207.

93. *Id.* at 207.

94. "Even small robots take six months to plan." Steven Miller, assistant professor of engineering and public policy at Carnegie-Mellon University's Robotics Institute, quoted in Hanauer, *supra* note 10, at 31.

95. See *supra* text accompanying notes 46-54.

96. See *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966).

97. *Id.* at 566, 63 L.R.R.M. at 1267.

decisions about hours, wages, or work rules, all mandatory subjects of bargaining.

Finally, some speculate that the balancing test announced in *First National Maintenance* will be extended to all types of management decisions "involving a change in the scope and direction of the business enterprise."⁹⁸ This could result in unions being restricted to bargaining only over the impact of automation decisions.⁹⁹ This does not seem to be a reasonable extension of *First National Maintenance* because the Supreme Court expressly stated it "intimat[ed] no view as to other types of management decisions."¹⁰⁰ Also, the NLRB General Counsel responded to *First National Maintenance* in a memorandum providing that the opinion would not affect the Board's positions on automation or subcontracting.¹⁰¹

THE IMPORTANCE OF DECISION BARGAINING

Although employers must bargain collectively over the effects of decisions resulting in the termination of unit work,¹⁰² whether they must also afford unions the opportunity to bargain about the actual decisions is unresolved. Some assert that the right to bargain over impact adequately protects employee interests;¹⁰³ however, practical considerations of timing and union economic leverage suggest otherwise.

A technical difference exists between a duty to decision bargain and a duty to bargain over impact. Under the latter, the union is restricted to discussing measures to cushion the effects of the decision. In contrast, where a duty to decision bargain exists, the union can try to dissuade the employer from implementing its decision. In a situation where a decision to install robots is pending, the union may attempt to offer evidence that the employer has made miscalculations, or that at present, automation would not be economically sound. The union could try to convince the employer either to postpone its decision or to replace workers only by attrition. Furthermore, allowing the union to participate in the decision-making process affords the union an opportunity to make concessions which the employer may not have previously contemplated.

A more important distinction between decision and impact bargaining concerns timing. It is essential that the union have the right to bargain prior to implementation of the employer's decision,

98. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981).

99. *See Hanauer, supra* note 10, at 29.

100. 452 U.S. at 686 n.22.

101. Office of the General Counsel, Memorandum 81-38 (July 27, 1981).

102. *See supra* note 15 and accompanying text.

103. Hanauer, *supra* note 10, at 30. *See also* Note, *Automation and Collective Bargaining*, 84 HARV. L. REV. 1822, 1850 (1971).

largely because the union's influence in decision-making is ultimately dependent on its ability to exert economic force. If the union is confined to bargaining after implementation, the bargaining unit is robbed of its economic leverage. Once the workers have been replaced by robots, the potential impact of a strike is greatly diminished.

A fear exists that if unions are confined to bargaining over the effects of management decisions, an employer will be able to implement its decision before bargaining with the union.¹⁰⁴ Theoretically, if an employer is not required to bargain over a decision to introduce robots, it is free to install the robots before bargaining with the union. Conversely, if a decision to introduce robots is a mandatory subject of bargaining, the employer may implement its decision only at impasse.¹⁰⁵

It has been suggested that because some members of the bargaining unit usually will remain after the robots are installed,¹⁰⁶ the union often will retain some economic leverage after implementation. Once an employer has installed robots, however, it is unlikely that any amount of pressure from the union will be able to force the employer to remove them.

CONCLUSION

Whether employers must bargain collectively over the installation of robots remains unresolved by the Board and the courts. When faced with a robotics case, the NLRB should follow *Fibreboard* and its progeny by deciding that robot introduction decisions having a "demonstrable adverse impact" on the bargaining unit or its members fall within the mandatory subjects of bargaining. This would, at the very least, necessitate bargaining where workers are expected to be terminated or transferred to lower paying positions.

Although most discussion at the bargaining table probably would concern the impact of automation on the workforce, unions must be given the right to participate in the actual decision. This would prevent an employer from waiting until it has accomplished its decision before notifying and bargaining with the union. Unless a union is

104. Hanauer, *supra* note 10, at 29.

105. If an employer bargains in good faith to impasse over a decision to automate, he is then free to implement the decision. However, the employer's freedom to act unilaterally at impasse is limited to his pre-impasse bargaining proposals. *NLRB v. Katz*, 369 U.S. 736, 745 (1962).

106. Note, *supra* note 103, at 1850 n.126.

able to bargain prior to implementation, it will be denied a meaningful opportunity to represent its members' interest in the face of technological displacement.

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