Denver Law Review

Volume 43 | Issue 2 Article 2

April 2021

Plant Shutdowns and Transfers Involving Two Unions

Edwin S. Kahn

PLANT SHUTDOWNS AND TRANSFERS INVOLVING TWO UNIONS

BY EDWIN S. KAHN*

INTRODUCTION

The runaway shop and the plant transfer have engaged the attention of numerous commentators.[1] But there has been little or no consideration of the problem in the context of an economically motivated plant shutdown and transfer in a two-plant, two-union situation. It is in this context that the present article is written. The discussion is timely because of the increasing number and increasing importance of cases involving plant transfers and such related areas as plant shutdowns[2] and contracting-out.[3]

Employees and unions have pursued their claims in a variety of ways, and these will be discussed under the following headings:

I. FEDERAL CASES INVOLVING EMPLOYEE RIGHTS

II. ARBITRATION

III. THE DUTY TO BARGAIN AND THE NLRB

In order to focus the discussion to follow, the following hypothetical situation is proposed, and will be referred to in the article:

> The company operates two plants within one metropolitan area. Plant A is an older plant and operations there are either unprofitable or less profitable than the operations of Plant B, 12 miles away. The company recognized a local of Union X as the bargaining agent of Plant A about four years ago. A three-year contract expired three months ago, and a new one-year contract was signed at the expiration of the prior contract. Local 2 of Union Y was recognized at Plant B two years ago. The company signed a three-year contract with Local 2. Both plants manufacture the same products, except that Plant A produces one product, comprising 20 per cent of its output, which Plant B does not produce. No unique skills are needed to manufacture that product. Both plants have an equal number of employees. Both contracts include a broad management rights clause, a plant-wide seniority system, and comparable wage scales.

---

*Associate, Holland & Hart, Denver, Colorado. Member, Colorado Bar; B.A., *cum laude,* University of Colorado, 1958; LL.B., *cum laude,* Harvard University, 1965. This article reflects his own views and does not necessarily reflect the views of Holland & Hart.

[1] *E.g.,* Daykin, *Run-Away Shops: The Problem and the Treatment,* 12 LAB. L.J. 1025 (1961); Turner, *Plant Removals and Related Problems,* 13 LAB. L.J. 907 (1962); Note, *Labor Law Problems in Plant Relocation,* 77 HARV. L. REV. 1100 (1964); Note, *Run-Away Shop—An Impediment to Peaceful Union Management Relations,* 34 TEMP. L.Q. 136 (1961).

[2] *E.g.,* Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965).

[3] *E.g.,* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

> One month ago, the Board of Directors decided to close down Plant A in about six months. The one operation not now performed by Plant B is to be transferred there. Plant B is also to be expanded somewhat. The two changes will require the addition of a number of employees equal to about one-third the number of employees currently at Plant B. Thus, two-thirds of the employees at Plant A will lose their jobs unless they have some recourse.

I. FEDERAL CASES INVOLVING EMPLOYEE RIGHTS

Individual employees and unions have frequently sought relief in the federal courts. The jurisdictional basis for such claims is Section 301(a) of the Labor Management Relations Act.[4] Although there had been uncertainty whether individual employees could sue an employer under this section, the Supreme Court held in *Smith v. Evening News Ass'n*[5] that individual employees do have this remedy.

In the two major cases to date involving the issue of the survival of seniority rights upon a plant transfer, two courts of appeals have come to differing conclusions. In *Zdanok v. Glidden Co.*,[6] the Glidden Company had operated a plant at Elmhurst, New York, from 1929 until November 30, 1957. The company had regularly entered into two-year collective agreements with the union. According to its preamble, the latest contract was entered into by the company "for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York." The agreement also contained various seniority clauses, including a statement that any employee with more than five years of continuous service, in the event of layoff, would be entitled to be re-employed if a suitable

---

[4] 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1965):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[5] 371 U.S. 195 (1962):

> The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, and are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims for the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do. 371 U.S. at 200.

[6] 288 F.2d 99 (2d Cir. 1961), *cert. granted* on the limited issue of the participation of a Judge of the court of claims, 368 U.S. 814, *aff'd* on that issue, 370 U.S. 530, *petition for rehearing* (including a petition for rehearing on a denial of certiorari on the merits) *denied*, 371 U.S. 854 (1962).

opening should occur within three years. In September, 1957, the company announced that it would terminate the collective bargaining contract at its expiration on November 30, 1957, and remove its machinery and equipment to a newly established plant in Bethlehem, Pennsylvania. The jobs of the employees at Elmhurst were then terminated. The company offered to consider applications for employment by its Elmhurst employees only if they came to Bethlehem and applied on the same basis as new applicants.

After a motion to stay arbitration proceedings had been granted by a state court,[7] the old employees brought a suit for damages,[8] claiming that they should have been given new jobs at Bethlehem with full seniority. On appeal from a decision denying relief, it was held by the court of appeals, in a split decision, that the plaintiffs possessed seniority rights which should have been recognized by the defendant at its new location. The contract clause providing reemployment rights for a three-year period suggested to the court that seniority rights were to survive the agreement. Moreover, Judge Madden of the Court of Claims, whose participation was affirmed by the Supreme Court,[9] writing for the majority, said that the employees had worked on the assumption that they had "acquired" seniority rights and held that the seniority rights could be considered to have "vested" and could not be unilaterally annulled. He interpreted the clause specifying the location of the plant as "nothing more than a reference to the existing situation" and held that the "reasonable expectations" of the employees must prevail over the clause.[10] Chief Justice Lumbard's dissent emphasized that seniority rights arise only by virtue of contract and concluded that the agreement here did not confer such rights on the employees in seeking work at the new location.[11] Other employees of Glidden then consolidated an action previously begun with *Zdanok*,[12] and that case once more found its way to the Second Circuit. The court held that the second action was determined by the first under the doctrine of collateral estoppel and refused to hear additional evidence which the company tried to introduce.[13]

---

[7] Matter of General Warehousemen's Union, 10 Misc. 2d 700, 172 N.Y.S.2d 678 (Sup. Ct. 1958).

[8] 185 F. Supp. 441 (S.D.N.Y. 1960).

[9] 288 F.2d 99 (2d Cir. 1961), *cert. granted* on the limited issue of the participation of a Judge of the court of claims, 368 U.S. 814, *aff'd* on that issue, 370 U.S. 530, *petition for rehearing* (including a petition for rehearing on a denial of certiorari on the merits) *denied*, 371 U.S. 854 (1962).

[10] 288 F.2d at 103-04.

[11] *Id.* at 105.

[12] For an early criticism of the *Zdanok* decision, see Aaron, *Reflections on Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1552-54 (1962).

[13] Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964).

Caught between the Sixth Circuit's contrary decision in *Oddie v. Ross Gear & Tool Co.*[14] and the force of the doctrine of *res judicata,* Judge Friendly, writing for the majority said:

> What the *Oddie* ruling does create, particularly when it is superimposed on Chief Judge Lumbard's earlier dissent here and the great amount of critical discussion in the law reviews that our decision has engendered, is doubt whether, if other similar contracts should come before us for construction, we ought follow the lead of our divided decision in this case or of the unanimous contrary one of the Sixth Circuit in *Oddie.* This is precisely the situation in which "the law of the case" is decisive; in Judge Magruder's words, "mere doubt on our part is not enough to open up the point for full reconsideration."[15]

However, Chief Judge Lumbard, in a concurring opinion, said:

> I should like to point out that, while the law of these specific cases is settled . . . the prior decision rendered by this court, . . . in fact represents the views of but one Judge Waterman of this circuit and is entitled to no precedential value so far as this circuit is concerned. The two judges of this circuit who heard the first appeal were divided on the appropriate disposition of the case.
>
> As for the merits of these cases, whatever substance there may have been in the plaintiffs' position on the first appeal, had it been proper for the district court to consider the additional proof adduced by the defendant at the second trial it seems to me to be clear beyond the peradventure of a doubt that the defendant proffered the only tenable view of the collective bargaining agreement.[16]

Thus, if a similar case arose once more in the Second Circuit, it is highly doubtful that it would be decided the same way as *Zdanok.*

In *Oddie v. Ross Gear & Tool Co.,*[17] the company moved its entire Detroit division to Tennessee. The recognition clause in the agreement provided that the company recognize the union as "exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit. . . ." The union discussed the transfer with the company, but after getting no satisfaction from it, several employees filed a complaint under section 301. The court held:

> The collective bargaining agreement provides that the Company recognize the Union as the exclusive representative . . . [as stated above]. This is plain, unambiguous language. The agreement gave seniority and recall-to-work rights to employees in the defendant's plants which were within the city limits of Detroit. It gave no such rights to employees of a plant in Tennessee. * * * It is true, as the District Judge pointed out, that the plant in Tennessee has the same machinery and equipment, the same officers and supervisors,

---

[14] 305 F.2d 143 (6th Cir.), *cert. denied,* 371 U.S. 941 (1962).

[15] Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964).

[16] *Id.* at 957.

[17] 305 F.2d 143 (6th Cir.), *cert. denied,* 371 U.S. 941 (1962).

> and the same operation, but, as also stated by him, it is a "new climate," which of course recognizes that it is not in the city limits of Detroit, but in Tennessee. Whether it would be advisable or reasonable under the existing circumstances to have the agreement apply to the plant in Tennessee is not for the court to decide. We must construe the contract as it is written, rather than make a new contract for the parties.[18]

The court also rejected the "vested" rights theory embraced in *Zdanok*. It stated the issue in terms of what rights the union had under the express provisions of the agreement as to the location of the plant, rather than whether the relocation cut off any rights it may have had. It found that no rights upon relocation had been created by the agreement and, therefore, that none were cut off.

There was some prior bargaining history which indicated that the union was aware that the company might move, but not that it might move to Tennessee. In addition, *Odie* may be distinguished from the fact situation postulated in the Introduction to this discussion, in that the union responded weakly to the company notice concerning the move.

However, there are highly signifcant factors in the hypothetical situation which point to the same result as in *Oddie*: the limitation of seniority to the plant; the broad mangement functions clause; limitation of recognition to the plant; and the absence of an explicit carry-over of seniority rights beyond the term of the agreement (there was such a carry-over in *Zdanok*). However, neither *Zdanok* nor *Oddie* involved an existing two-plant, two-union situation. In each case, the company shut down an existing plant and established a new plant at a new location. There is no way of predicting with certainty whether the *Zdanok* doctrine of vested seniority rights would be applied by the Second Circuit to the two-union situation. Apart from the weakness of *Zdanok* precedent noted earlier, the court might hesitate to take this further step because of the difficulty of the two groups of employees. Just as the courts often leave questions for Congress,[19] so the courts might be tempted to leave this decision to the processes of arbitration[20] or collective bargaining.[21]

An existing two-plant situation was before the court in *Fraser v. Magic Chef-Food Giant Markets Inc.*[22] The company's Cleveland

---

[18] *Id.* at 148.

[19] *E.g.*, United Steelworkers v. Bouligny, 86 Sup. Ct. 272 (1965). For an illuminating discussion of "The Paradox of Making Law by Refusing to Make Law," see Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law, Problem 18, 515-46 (Mimeo. ed. 1958).

[20] Arbitrators have no one to whom to pass the buck once they determine the issue is arbitrable. The arbitration decisions are discussed in Part II, *infra*.

[21] The duty to bargain is discussed in Part III, *infra*.

[22] 324 F.2d 853 (6th Cir. 1963).

plant manufactured commercial cooking equipment and its St. Louis plant produced oil and gas-based heaters. The company previously had closed some of its other plants. It closed the Cleveland plant about one year after signing a three-year agreement with the union. The court did not state whether the St. Louis plant was unionized. Affirming the district court's award of summary judgment for the company the court held that in the absence of specific language in the agreement to the contrary, management's right to close a plant cannot be limited.[23]

The federal district courts, in situations where the decision to move has been economically motivated, generally have also followed *Oddie* and held that seniority rights do not carry over. In *Slenzka v. Hoover Ball Bearing Co.*,[24] the recognition clause of the agreement provided that it was binding if any existing operations were moved within a 60-mile radius. The company closed its old plant and established a new plant more than 60 miles away. The court granted the company's motion for judgment on the pleadings. In one recent case, the court refused to grant summary judgment for the employer.[25] The union had alleged violation of specific clauses and implied covenants in the agreement; it had also alleged that the company's divisional president had promised that the plant would not be moved during the term of the agreement,[26] a factor which may make the case distinguishable from *Oddie* and *Fraser.*

Although the majority of the cases in federal courts are suits for money damages, on occasion unions have sought injunctive relief to delay transfers pending arbitration. In *Local Div. 1098 v. Eastern Greyhound Lines*,[27] the union was successful in obtaining a preliminary injunction to halt the transfer of the company's repair and maintenance facilities until the completion of arbitration proceedings. The court noted that there would be only a few weeks' delay in the move as a result of the injunction. In similar cases,

---

[23] *Id.* at 856:

> Rights of employees under a collective bargaining agreement presuppose an employer-employee relationship. A collective bargaining agreement, in ordinary usage and terminology, does not create an employer-employee relationship nor does it guarantee the continuance of one. Employees' rights under such a contract do not survive discontinuance of business and a termination of operations. 324 F.2d at 856.

[24] 215 F. Supp. 761 (N.D. Ohio 1963).

[25] UAW v. Avis Industrial Corp., 56 L.R.R.M. 2632, 50 CCH Lab. Cas. ¶ 31988 (E.D. Mich. 1964).

[26] *Cf.* Penzien v. Dielectric Prods. Eng'r Co., 374 Mich. 444, 132 N.W.2d 130, *cert. denied,* 86 Sup. Ct. 73 (1965), in which the court held employees not entitled to severance pay upon a plant closing as a matter of law although the contract provided in the event of close down, severance pay would be subject to immediate negotiation.

[27] 225 F. Supp. 28 (D.D.C. 1963).

courts have either flatly refused injunctive relief[28] or have conditioned the refusal on the posting of a bond by the employer as security for the employees' recovery should they win the arbitration proceeding.[29]

Considering the foregoing cases, it can be seen that the prevailing federal case law is that employees generally have no right to damages or to carry-over seniority or other rights in plant transfer situations in the absence of specific language in the contract to the contrary.[30] Thus, the union or the employees justifiably could conclude that in the hypothetical situation postulated earlier, the federal courts are not a particularly favorable forum. Faced as they are with the lack of substantive relief in the courts, and the procedural barrier which may be invoked,[31] it is not surprising that unions and employees often turn first to arbitration in pursuit of their claims.

II. ARBITRATION

Once the arbitration proceeding is invoked, the threshold question is whether the dispute is or is not arbitrable. Arbitrators have generally held disputes over plant transfers to be arbitrable.[32] One notable exception is *Remington Rand Univac Division*.[33] Remington Rand had operated three plants at Ilion, New York, and one plant in Utica, New York, located about ten miles away. Two different unions were certified for the two areas and union shop agreements were in effect. Management decided to close two of the three Ilion plants and move portions of the operations to Utica. Three months after the company had announced the move, the union filed a griev-

---

[28] American Workers v. Liberty Baking Co., 242 F. Supp. 238 (W.D. Pa. 1965).

[29] Auto Workers v. Seagrave Division, 56 L.R.R.M. 2874, 50 CCH Lab. Cas. ¶ 31991 (E.D. Ohio 1964).

[30] For a case in which shut-down coincided with the expiration of the contract, see Woody v. Sterling Aluminum Prods., 243 F. Supp. 755 (E.D. Mo. 1965).

[31] A court may refuse to take jurisdiction on the merits until the union has pursued its arbitration rights if the contract requires arbitration. *Cf.* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); and Carey v. Westinghouse, 375 U.S. 261 (1964). The rationale for such ruling is akin to the policy underlying doctrines of the exhaustion of administrative remedies, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). See also DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 20.01-.10 (1958). For primary jurisdiction, see Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529 (1963). Such a policy is in line with the analysis that courts, legislatures, and administrative bodies serve primarily to review private nongovernmental decisions, rather than to make them in the first instance, Hart & Sacks, *supra* note 19, at 6-9.

[32] In United Steelworkers v. Warrier & Gulf Nav. Co., *supra* note 31, the Supreme Court issued a direction to the lower federal courts of which most arbitrators are aware:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. 363 U.S. at 582-83.

[33] 41 Lab. Arb. 321 (1963). *Accord,* Philco Corp., 42 Lab. Arb. 604 (1963).

ance. One month later, it filed unfair labor practice charges. The arbitrator held the dispute not arbitrable in these words:

> The most careful study of the facts . . . reveals that there are substantive differences between the present case and those to which the affirmed legal principles apply. *First,* the Warrior and Gulf Navigation Co. case . . . constituted no invitation to arbitrators to favor their authority on capricious grounds. There had to be some concrete, relevant contract references to justify arbitrability. In the instant case, the Union has mentioned clauses (recognition, check-off, general working conditions) but it is not demonstrated to the arbitrator's satisfaction that the Company action involves directly the "interpretation and application" of these clauses. In this connection it is very pertinent that the Union has not attacked the Company's basic right to move certain of its operations to Utica nor has it cited (nor could it cite) any clause to challenge such right.[34]

Once the threshold of arbitrability has been crossed, the outcome of the case seems to turn primarily on the geographical limits of the recognition clause in the agreement. Implicit in rulings based on this factor is the belief that employee rights with respect to plant transfers can be negotiated and embodied in the agreement as are other employee rights. Thus, the majority of the recently arbitrated cases have held that employees have no carry-over rights in plant transfer situation.[35]

However, arbitrators have upheld employee work or seniority rights in a few instances when the contract contained specific language barring the transfer of factories,[36] or existing work,[37] when two plants were within the area covered by one bargaining agreement,[38] and when the same union represented employees at both plants and the employer has expressed willingness to have employees transferred.[39] When seniority rights are held to carry over, the usual remedy is to slot seniority on a case-by-case basis.[40]

One reason for the prevailing doctrine of no carry-over of seniority may be the difficulty of reconciling "vested rights" of

---

[34] *Id.* at 327.

[35] Marsh Wall Prods., 45 Lab. Arb. 551 (1965); Empire Textile Corp., 44 Lab. Arb. 979 (1965); Crown Cork & Seal, 43 Lab. Arb. 1264 (1964); Paragon Bridge & Steel Co., 44 Lab. Arb. 361 (1965); Curtiss-Wright Corp., 43 Lab. Arb. 5 (1964); Metal Textile Corp., 42 Lab. Arb. 107 (1964); Sivyer Steel Casting Co., 39 Lab. Arb. 449 (1962); H. H. Robertson Co., 37 Lab. Arb. 928 (1962); Armco Steel Corp., 36 Lab. Arb. 981 (1961).

[36] Sidele Fashions, Inc., 36 Lab. Arb. 1364 (1961).

[37] White Motor Co., 43 Lab. Arb. 517 (1964).

[38] Superior Prods. Corp., 42 Lab. Arb. 517 (1964).

[39] Sonotone Corp., 42 Lab. Arb. 359 (1964).

[40] *Compare* Sonotone Corp., *supra* note 39 *with* Superior Prods., 42 Lab. Arb. 359 (1964). Slotting generally means the integration or dovetailing of two seniority lists, with the resulting rank of an employee usually dependent on his time with the company, rather than time at a particular plant.

the employees of Plant A with the divesting of rights of employees at Plant B. In other words, slotting seniority or "bumping" employees formerly at the plant which was shut down (Plant A) generally violates the spirit and probably the letter of the Plant B contract. The situation probably is even more difficult to resolve when two different unions are involved.[41]

An arbitrator's decision on the merits is generally conclusive. The decision will bar suits by dissatisfied employees under section 301.[42] It will be enforced on a motion for summary judgment,[43] even if the arbitrator's decision is debatable or the underlying contract clause is arguably void or unenforceable.[44]

The arbitrator's focus on the wording of the agreement, as the essential starting point, seems correct.[45] The simplest decision on the merits for an arbitrator would occur if there were a specific clause governing plant transfers. As can be seen from this review of the cases, however, such a clause rarely exists. The next step in the arbitrator's decisional process is generally to look at the breadth of the recognition clause. A narrow recognition clause limited to the plant, and often the specific company division involved, usually limits the applicability of the agreement to the particular plant involved and precludes plant transfer rights.[46] This conclusion seems correct, especially if the contract contains a broad management rights clause, as postulated earlier.

The primary protection for employees, therefore, would seem to be in aggressive union bargaining for the inclusion of a work or plant transfer clause in the contract. In the absence of such a contractual provision, neither litigation nor arbitration will often protect employees in plant transfer situations. Nor does the existence of the duty to bargain generally portend much relief, as will appear in the next part of this article.

III. THE DUTY TO BARGAIN

Although the NLRB has tended to hold that an employer must

---

[41] Furthermore, it is highly doubtful that an arbitrator appointed to interpret Contract A has either the jurisdiction to interpret Contract B or the authority to issue an order so directly affecting Plant B.

[42] 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1965); Panza v. Armco Steel Corp., 208 F. Supp. 52 (W.D. Pa. 1962), *aff'd*, 316 F.2d 69 (3d Cir.), *cert. denied*, 375 U.S. 897 (1963).

[43] Amalgamated Meat Cutter v. M. Feder & Co., 234 F. Supp. 564 (E.D. Pa. 1964).

[44] Selb Mfg. Co. v. IAM, 305 F.2d 177 (8th Cir. 1962).

[45] See generally, Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959).

[46] *E.g.*, United Packers, Inc., 38 Lab. Arb. 619 (1962).

bargain[47] with the union over the decision to go out of business,[48] in the area of transfer of operations it is only required that management bargain about the effects of the change but not about the making of the decision itself.[49]

Several courts of appeals have held that an employer is under no duty to bargain with respect to economically motivated decisions to shut down,[50] transfer operations,[51] or subcontract operations,[52] although the employer has a duty to bargain about the effects of the decision.[53]

Although the Supreme Court recently ruled that the contracting out of existing work is a mandatory subject of bargaining,[54] it was careful to limit the holding to the facts of that case.[55] In view of the Court's limiting language,[56] and the factors it considered important,[57] it is doubtful that the holding will be extended to cover plant transfers generally.[58] There is a sharp contrast between the hypothetical situation postulated earlier and the facts in *Fibreboard.* For example, in the postulated situation, there is a change in the basic operation of the company, only some of the work which has been performed will continue to be performed, and it will be done at another plant, capital investment is involved, and it is probable that the number of employees involved will differ.

As noted earlier,[59] it has been clearly established that the employer has a duty to bargain about the effects of the decision to shut down.[60] Nevertheless, despite the limited holding of the Supreme Court in *Fibreboard,* the NLRB has since ruled that an em-

[47] The employer's duty is enunciated in § 8(a)(5), 49 Stat. 452 (1935), *as amended,* 29 U.S.C. § 158(a)(5) (1965).

[48] Star Baby Co., 140 NLRB 678 (1963), *modified* to remove the board order on this point *sub nom,* NLRB v. Neiderman, 334 F.2d 601 (2d Cir. 1964). The Supreme Court has since ruled that an employer may cease business in a one-plant situation for anti-union as well as economic reasons without a duty to bargain over the decision itself. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 270 (1965).

[49] R.C. Can Co., 144 NLRB 210 (1963), *enforced* on this issue *sub nom,* NLRB v. R.C. Can Co., 340 F.2d 433 (5th Cir. 1965).

[50] NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955).

[51] NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).

[52] Jay Foods, Inc., v. NLRB, 292 F.2d 317 (7th Cir. 1961).

[53] NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).

[54] Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964).

[55] *Id.* at 215.

[56] *Ibid.*

[57] No change in the basic operations of the company, performance of the work in the same plant, no new capital investment, and a mere replacement of existing employees with those of an independent cotractor to do the same work. *Id.* at 213.

[58] For discussion of how far the duty to bargain with respect to the decision to move should extend, see Note, *Labor Law Problems in Plant Relocation,* 77 HARV. L. REV. 1100, 1104-05 (1964).

[59] Note 53, *supra.*

[60] *Cf.* Order of R. R. Tel. v. Chicago & N.W. Ry., 362 U.S. 330 (1960).

ployer has a duty to bargain over the decision to transfer or shut down a plant.[61] That ruling has been reversed,[62] however, and the series of cases which have held that there is no duty to bargain over the economically motivated decision to shut down or transfer has been strengthened.[63]

The actual result of the duty to bargain about the effects of a transfer has been that employers have negotiated about severance pay and related issues, but generally have not negotiated for a carry-over of seniority rights. Despite the fact that the employer is required to bargain in good faith on such matters, there is no duty to reach an agreement.[64] The economic power of the union under such circumstances is relatively meaningless, since the failure of the parties to agree leaves it with little recourse. The union has no really effective tactic available.

If six months have passed since the union was notified of the decision to shut down, it is too late for the union to file an unfair labor practice charge with the NLRB.[65] Even if a timely charge were filed and upheld, the net result would be that the employer would be compelled to bargain in good faith, but not to reach agreement. By this time, the plant would probably be closed, and the economic power of the union would be ineffectual.

If, after notice, the union felt that it was not achieving anything at the bargaining table, it could strike.[66] But such a move presumably would only accelerate the close down, and the employer would be entitled to replace economic strikers for as long as necessary.[67] Thus, the duty to bargain over the effects of the shut-down

---

[61] Royal Plating & Polishing Co., 148 NLRB 545 (1964), modified only on another issue, 152 NLRB No. 76 (1965).

[62] NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965).

[63] The court's language on the issue is reminiscent of the failing company exception to the limitations on mergers:

> We conclude that an employer faced with an economic necessity of either moving or consolidating the operations of a *failing business* has no duty to bargain with the union respecting its decision to shut down. *Id.* at 196. (Emphasis added.)

But whether operations at a particular plant are unprofitable or simply less profitable than they would be elsewhere does not seem enough of a difference to justify holding the employer to a duty to bargain with respect to the decision to shut down in the latter case though not the former. On the failing company exception in antitrust law, see Brown Shoe Co. v. United States, 370 U.S. 294, 319 (1962) (dictum).

[64] NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 403 (1952) (dictum).

[65] White Consol. Indus., Inc., 154 NLRB No. 127 (1965).

[66] The relevance of a no-strike clause in the situation is beyond the scope of this article.

[67] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). If the strike were an unfair labor practice strike, the traditional backpay award would be meaningful, but reinstatement probably is meaningless unless the employer's failure to bargain in good faith infected the decision to shut down so that it would be held to have been motivated by antiunion bias, rather than economic considerations. In the latter case, the NLRB might order reinstatement at the operating plant. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965).

offers as little hope for the carry-over of seniority and other rights as does a section 301 action or arbitration.[68]

CONCLUSION

In the absence of specific contract language preserving work and seniority rights, the current status of the law gives the union and the employees little hope of preserving such rights at other plants. The only effective way to secure such rights is for the union to bargain for them when negotiating an agreement prior to the employer's decision to close down or transfer. An alternative and probably less effective tactic would be to bargain for broad recognition and seniority clauses and narrow management rights clauses. In view of the fact that unions have been fairly aggressive in bargaining to preserve work and seniority rights in the light of automation,[69] it is somewhat surprising that they have been less aggressive in bargaining for such rights in plant transfer situations. Leaving the parties to settle the issues at the bargaining table is the general method for the settlement of such issues, and is appropriate in this situation.

---

[68] Parts I and II, *supra*.

[69] The agreements reached with the West Coast International Longshoremen's Association and the New York Newspaper Employees Unions illustrate this fact.