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CHANGES IN BUSINESS OPERATIONS: THE EFFECTS OF THE NATIONAL LABOR RELATIONS ACT AND CONTRACT LANGUAGE ON EMPLOYER AUTHORITY

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INTRODUCTION

Virtually all businesses eventually go through structural changes of one sort or another. Employers** often contract out work and shut down a part of their operations; many companies sell a part of their operations or buy part or all of another employer's business; and many employers decide to terminate operations, partially or entirely. When any such change in operations occurs, and there exists a bargaining representative of the employees affected by the change, there are several labor law problems which must be dealt with. These arise in two contexts: one involving the effects of the National Labor Relations Act,[1] and the other involving any union contract which exists at the time of the change.

The following discussion focuses on major changes in a business operation and the possible effects of the National Labor Relations Act and a union contract on such changes. The discussion should provide a reasonably reliable guide to the practicing attorney who does not often encounter problems in this complicated, intriguing, and rapidly developing area of the law.

I. COMPLETE CLOSURE

In the case of a complete termination of an employer's operations the employer has no statutory duty to bargain with the union about the decision to shut down.[2] Although the National Labor Relations Board has not yet interpreted the Act as re-

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** The author would prefer to use non-sexist pronouns in reference to employers in this article but in the interest of readability he has, following the conventions of the English language, utilized the masculine pronoun.

1. 29 U.S.C. §§ 151-68 (1970) [hereinafter cited as NLRA or the Act].

2. NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967).

quiring an employer to bargain with the union regarding a decision to cease operations entirely, in recent years the law has progressed towards requiring more bargaining with employees' representatives.[3] If this trend continues, any change in this area in the next few years will very likely favor a bargaining requirement rather than employer autonomy. For this reason, it is advisable even when totally shutting down operations to give the union an opportunity to bargain. By doing so, an employer loses nothing, but gains protection against an unfair labor practice charge in the event that the law should change soon after his shutdown.[4]

Complete closure, not followed by reopening at another location, does not constitute an unfair labor practice even if motivated by anti-union animus. The leading case in this area is *Textile Workers Union v. Darlington Manufacturing Co.*[5] in which the employer had closed one of his plants because the employees had approved union representation in an NLRB election. The Court held that where a complete shutdown of an entire business, as opposed to the closure of only one of several plants, is motivated by anti-union prejudice, closure cannot be regarded as an unfair labor practice. The court observed that a contrary holding would prevent a single businessman from going out of business, a result which

> . . . would represent such a startling innovation that it should not be entertained without the clearest manifestation of a legislative intent or unequivocal judicial precedent . . . .[6]

To open the bargaining process, the employer need only give the union notice that the closure is under consideration, and that the employer is willing to bargain with the union about the decision and its possible effects. Although formal notice is not required,[7] a letter to the union's headquarters is advisable.

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3. *See, e.g., id.*; Burns International Security Service, Inc. v. NLRB, 406 U.S. 272 (1972); Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964).

4. Complete cessation of operations should be distinguished from the situation where the employer closes his operations with the intention of opening a similar business in a new location. In such instances there may be a finding of an unfair labor practice on the theory of a "runaway shop", discussed in the text under PARTIAL CLOSURE, section II, *infra*.

5. 380 U.S. 263 (1965). However, the Darlington Company was an integrated part of a larger corporation and, as such, it was necessary to determine if the single plant closing was motivated by, and would have the reasonable effect of, chilling unionism at other plants of the same employer. See discussion in text under PARTIAL CLOSURE, section II, *infra*.

6. *Id.* at 270.

7. Section 8(d)(1) of the Act, 25 U.S.C. § 158(d)(1) (1970) requires written notice by either the employer or the union to the other party of any proposed termination or modification of the collective bargaining agreement. This language is sufficiently broad for the Board, at some future time, to find a requirement of notice before closure and resulting termination of the contract.

At present the time of notice of the pending decision to close is not legally significant since the notice itself is not required. But prudence dictates that such notice, if given, should be timely as it is designed to afford protection against a possible change in the law which would require adequate notice. Generally, the timeliness of such notices is determined on the facts of the case, with the National Labor Relations Board and the courts less concerned with the actual length of time involved than with the employer's good faith approach to the bargaining. Thus, failure to give any advance notice was an unfair labor practice when, during contract negotiations prior to closure, the employer had attempted to solidify the impression of continuation of the business.[8] Yet, closure without advance notice was held not to constitute an unfair labor practice if there was no evidence of employer bad faith.[9] In the absence of extraordinary circumstances, an employer can probably rely on the decision in *Lowery Trucking Co.*,[10] to the effect that one week's notice is sufficient.[11]

Also significant is the matter of union attention to the notice. The courts have repeatedly held that:

> [W]hen a union has sufficiently clear and timely notice of an employer's plan to relocate, close or subcontract and thereafter makes no protest or effort to bargain about the plan, it waives its right to complain that the employer acted in violation of Sections 8(a)(5) [duty to bargain collectively in good faith] and (1) [prohibition against interfering with, restraining, or coercing employees in the exercise of their rights to organize].[12]

Thus, a union's failure to respond to an employer's invitation to bargain regarding a closure, subcontract or relocation, relieves the employer of his bargaining obligation.

Despite the fact that the NLRB has not yet read the Act as requiring bargaining in advance of the decision to close, the employer may have a contractual requirement to consult the union prior to irrevocably deciding to close. Thus, an existing collec-

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8. Royal Plating & Polishing Co., Inc. v. NLRB, 350 F.2d 191 (3rd Cir. 1965).

9. G.W. Murphy Industries, Inc., 184 N.L.R.B. No. 9, 76 L.R.R.M. 1730 (1970); *cf.* NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967) (three days notice held insufficient).

10. 196 N.L.R.B. No. 74, 80 L.R.R.M. 1036 (1972).

11. However, to allow for possible enlargement of the time needed for an appropriate notice, the employer may wish to notify the union at least two weeks in advance of closure.

12. International Ladies' Garment Workers Union, AFL-CIO v. NLRB, 463 F.2d 907, 918 (D.C. Cir. 1972 (holding no timely notice, therefore no waiver). *See also* NLRB v. Spun-Jee Corp., 385 F.2d 379 (2d Cir. 1967).

tive bargaining agreement may expressly require consultation with the union when closure is contemplated. If the agreement is ambiguous concerning the duty to bargain but contains an arbitration clause, the arbitrator may interpret the contract to require bargaining. Here, also, prior notice to the union would be advisable if an employer considers discontinuing operations. Such notice and consultation, however, would not guarantee that the employer could cease operations without liability if an arbitrator found a contractual provision which prohibited cessation of business without the union's approval. Such contractual provisions are not common and can be avoided by skillful bargaining.

The employer's responsibility to the employees does not necessarily terminate with plant closure. If the collective bargaining agreement in force calls for termination benefits in the form of severance pay, re-employment preference, assistance in finding substitute employment or other requirements, the employer must comply with these provisions. Additionally, if any contract terms arguably provide for such benefits and the contract provides for arbitration for settlement of disputes, a disagreement over the meaning of the contract may result in arbitration.[13]

If the contract clearly does not provide any severance benefits for employees, or if an arbitrator resolves any ambiguity on that point in favor of the employer, under the Act the employer must, nevertheless, bargain with the union about the effects of the closure on the employees whose employment status is altered by the closure.[14] Effects include such matters as severance pay, vacation pay, seniority and pensions, and other matters of importance to employees effected by the closure.[15] These are "terms and conditions of employment" within the meaning of the bargaining requirements of section 8(a)(5) of the Act.[16] In the

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13. Arbitration will be discussed in the text in more detail under SUBCONTRACTING, section III, *infra*.

14. The company need not bargain over a decision to terminate operations, but

> once such a decision is made the employer is still under an obligation to notify the union of its decision so that the union may be given the opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision.

NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967). Thus the employer has the sole right to decide whether or not to close completely. However, if he decides to close he may still have a continuing obligation to temper the effects of closure on his employees and he must bargain with the union on the latter issue.

15. NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967); Royal Plating & Polishing Co., Inc. v. NLRB, 350 F.2d 191 (3rd Cir. 1965).

16. Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1970) declares it an unfair labor practice for an employer to refuse to bargain collectively with representatives of his employees. Section 8(d) of the Act, 29 U.S.C. § 158(d)

course of such bargaining, severance pay, re-employment rights and any other matters relating to the effects of the closure upon the employees may be raised. It should be noted, however, that the good faith bargaining obligation under the Act does not require either party to reach an agreement.[17]

II. PARTIAL CLOSURE

An employer, faced with fiscal or other pressures, may find it necessary to shut down a part of his operations. The employer may completely close a part of the operations or he may sell his own interest in part of the operations to another employer who continues the operations.

Under the National Labor Relations Act

If an employer intends to phase out a particular part of his operation, typically one of several plants owned or operated by that employer, his responsibilities under the Act are related to those involved in a complete closure. Present Board law requires that the employer give notice to the union prior to making a decision to effectuate a partial closing and, if requested, to bargain with the union about the decision.[18] The United States Courts of Appeal have not consistently supported the Board's view, and some courts have declined to enforce Board orders finding failure to notify and bargain with the union violative of the Act.[19] Nevertheless, given the Board's position and the trend of the law in this area, notice should be given to the union.

In addition to notice and bargaining over the decision itself, the employer must bargain about the effects of the closure upon the employees involved.[20] As with a complete closure, the employer would be wise to notify the union in advance of the de-

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(1970) declares that the parties must bargain collectively with respect to wages, hours and other terms and conditions of employment.

17. Section 8(d) of the Act, 29 U.S.C. § 158(d) (1970). The Act requires a good faith effort to reach agreement but does not require actual agreement. NLRB v. W.R. Hall Distributer, 341 F.2d 359 (10th Cir. 1965); Jeffrey-De Witt Insulator Co. v. NLRB, 91 F.2d 134 (4th Cir.), *cert. denied*, 302 U.S. 731 (1937).

18. *See* discussion note 6 *supra*. McLoughlin Mfg. Corp., 164 N.L.R.B. No. 23, 65 L.R.R.M. 1025 (1967) (an employer must bargain over relocation of his business, but here failure to bargain was excused); Bickford Shoes, Inc., 109 N.L.R.B. 1346, 34 L.R.R.M. 1570 (1954).

19. NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967); NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).

20. Royal Optical Mfg. Co., 135 N.L.R.B. 64, 49 L.R.R.M. 1432 (1962); Diaper Jean Mfg. Co., 109 N.L.R.B. 1045, 34 L.R.R.M. 1504 (1954), *enforced sub nom.* NLRB v. Tredway, 222 F.2d 719 (5th Cir. 1955).

cision to close in order to avoid the possibility of being found guilty of committing an unfair labor practice.[21]

In contrast to total closings, partial closings involve a wider application of the Act. The motivation behind a total shutdown may come from any source, even anti-union sentiment, and a charge of unfair labor practice under present law will not be sustained.[22] However, if a partial closing is the result of anti-union motivation or is intended to chill unionism in any of the employer's remaining plants and the employer could reasonably have foreseen that the closing would be likely to have such an effect, then he may be found guilty of violating section 8(a)(3) of the Act.[23] The Board order in such a situation may require reinstatement of the affected employees with back wages.[24]

A similar problem arises if the employer intends to close a plant and reopen it elsewhere. This action is referred to as a "runaway shop." If the employer's purpose in moving his operations is in whole or substantial part to chill unionism, the Board may order reinstatement of employees, as in the case of an ordinary partial shutdown, and may award back pay and payment of traveling expenses for the employees who accept reinstatement at the new location. It may additionally order the employer to bargain with the union.[25] It must be pointed out that, although an employer does not enjoy absolute autonomy in the matters of termination or partial termination of his business, an unfair labor practice charge will ordinarily be sustained only if the employer's sole or preponderant consideration in undertaking the action is the chilling or destruction of unionism. If the employer's motive is purely or primarily economic, he may undertake the action without fear of a section 8(a)(3) violation.[26]

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21. *See* text accompanying note 6 *supra.*

22. *See* text accompanying notes 4 and 5 *supra.*

23. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965). Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1970) prohibits discrimination in hiring or tenuring that would encourage or discourage membership in a union.

24. *See* Cooper Thermometer Co. v. NLRB, 376 F.2d 684 (2d Cir. 1967), *enforcing in part* Cooper Thermometer Co., 160 N.L.R.B. 1902, 63 L.R.R.M. 1219 (1966).

25. Local 57, International Ladies' Garment Workers' Union v. NLRB, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1969). Here, employer moved from New York to Florida. The Board ordered preferential reinstatement for New York employees, back pay and bargaining at the new location. The appeals court upheld the first two but refused to enforce the bargaining order on the premise that few New York employees would seek reinstatement and such an order would deny the employees at the new Florida location freedom of choice of representatives. In addition, the court expressed general willingness to enforce the bargaining order as a remedy for a "runaway shop." *Id.* at 303.

26. *See, e.g.*, NLRB v. Rapid Bindery, 293 F.2d 170 (2d Cir. 1961). Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1970) provides that it is an unfair labor practice for an employer to discriminate in hiring or tenure or any

Under Contract

If there is a total shutdown of one plant or a part thereof, there may be contractual obligations to be fulfilled. If the contract requires severance pay or re-employment preference for the affected employees, these obligations must be met. If the contract is silent regarding shutdowns, the employer must offer to bargain about the effects of the closure on the employees. In the event that ambiguities appear regarding the closures, and the union initiates grievance procedures, the dispute may go to an arbitrator for final resolution. This does not necessarily mean that the employer's autonomy will be upheld. In some cases, arbitrators have found collective bargaining agreements to be restrictive. For example, in 1968 an employer terminated his operations in his Hawaii plant, laid off his employees working at that facility, and offered employees a choice of severance pay or transfer to the mainland. The arbitrator read the contract as requiring the employer to pay the terminated employees a sum equivalent to their regular straight-time hourly rate for the remainder of the period covered by the existing collective bargaining agreement.[27] Thus, the employer must carefully scrutinize his collective bargaining contract for any language which may be interpreted as imposing obligations on the employer in plant closure situations.

III. PARTIAL SHUTDOWN WITH CONTINUATION (SUBCONTRACTING)

More problematic is an employer's partial cessation of operations where another employer continues in his place. This situation resembles, and in many cases will actually be, subcontracting.[28] Board policy requiring an employer to bargain with the union concerning subcontracting has won Supreme Court approval in *Fiberboard Paper Products v. NLRB*,[29] a case involving the contracting out of plant maintenance work which had previously been performed by company employees. The Court's holding there was limited to a situation where the work in question had previously been performed by company employees and the company was merely replacing existing employees with those of an independent contractor doing the same work under similar conditions. The Court held that "to require the employer to bar-

term or condition of employment in order to encourage or discourage union membership.

27. RCA Communications, Inc. v. Teamsters Local 10, 1 CCH Lab. Arb. Awards 3594 (1969).

28. If the transaction is actually a sale, then a different set of problems arises, as discussed in the text in section V *infra*.

29. 379 U.S. 203 (1964).

gain about this matter would not significantly abridge his freedom to manage the business."[30]

Some courts have construed the *Fibreboard* holding as not requiring bargaining if the subcontractor will, definitely and to a significant degree, alter the character or conditions of the work performed, change the character or size of the unit, or invest capital in the business.[31] In contrast, the Board has not shared the courts' narrow reading of *Fibreboard*, and tends to give the Supreme Court holding broad application.[32] Therefore, to foreclose any possibility of a Board order to cancel the subcontract, and to reinstate the employees laid off,[33] an employer would be well advised to bargain with the union before engaging in subcontracting.

The *Darlington* decision on complete closure also bears on this situation. In order to avoid committing an unfair labor practice, an employer should leave no doubt that anti-union sentiment was not the motivation for the partial shutdown. If the Board finds subcontracting motivated by discriminatory reasons, it will, following *Darlington*, order reinstatement with back pay.

Aside from the unfair labor practice limitations, there might be other considerations which will restrict the employer. For instance, the extant contract may prohibit subcontracting. Even if the contract is silent on the specific matter of subcontracting, the matter of the employer's freedom to subcontract is arbitrable. The arbitrator will evaluate various factors in determining whether subcontracting is prohibited by the contract, including the employ-

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30. *Id.* at 213. The court noted that:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment.

Id.

31. *See, e.g.*, NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

32. *See, e.g.*, Westinghouse Electric Corp., 150 N.L.R.B. 1574, 58 L.R.R.M. 1257 (1965) in which the Board observed that subcontracting of work without prior bargaining with the union has been found to be an unfair labor practice where,

> [there is] a departure from previously established operating practices, [and the subcontracting] effected a change in conditions of employment, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit.

Id. at 1576, 58 L.R.R.M. at 1258. The Board in this case, however, held there was not such a significant departure from previous operations, etc. to render subcontracting a mandatory subject of bargaining.

33. Both directions were ordered in *Fibreboard*.

er's reasonableness and good faith in subcontracting the work.[34] This is an imprecise test involving a combination of several factors. Among these are past practice[35] and past negotiations[36] of the parties with regard to subcontracting; the possible valid justification for the decision, including economic justifications;[37] and the intended effect on the union—that is, whether the employer intends by subcontracting to weaken or strengthen the particular union involved.[38]

A further consideration is the effect of the action on unit employees—whether seniority, job security, work load, or other factors will be affected.[39] In this regard, the arbitrator will consider the type of work involved[40] and the feasibility of its per-

34. National Sugar Refining Co., 13 Lab. Arb. 690 (1949). *See also* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 237-39 (1960).

35. *See, e.g.*, American Radiator & Standard Sanitary Corp., 44 Lab. Arb. 947 (1965); White Motor Co., 43 Lab. Arb. 682 (1964); American Airlines, Inc., 29 Lab. Arb. 594 (1957); *but cf.* Weber Aircraft Corp., 24 Lab. Arb. 821 (1955). In *Weber*, the arbitrator held that the union was not charged with knowledge and thus acquiescence in past practices of subcontracting did not bind them. The employer did not inform the union of his use of outside employees nor were union officials actually aware of them.

36. *See, e.g.*, Singer Co., 45 Lab. Arb. 840 (1965); American Airlines, Inc., 27 Lab. Arb. 174 (1956) (arbitrator ruled that the company retained the right to subcontract despite union attempts during contract negotiations to obtain a ban on such subcontracting); Carbide and Carbon Chemicals Co., 24 Lab. Arb. 158 (1955) (arbitrator ruled that management retains all its pre-contract rights unless they contract to the contrary, and here, there had never been any negotiations concerning subcontracting).

37. *See, e.g.*, National Cash Register Co., 48 Lab. Arb. 400 (1967) (expediting necessary work during period of increased temporary absences); Dalmo Victor Co., 24 Lab. Arb. 33, 37 (1954) (acceptable business justifications); Amoskeag Mills, Inc., 8 Lab. Arb. 990 (1947) (economic justification); *but cf.* Thompson Grinder Co., 27 Lab. Arb. 671 (1956) (unit employees not offered weekend overtime prior to subcontracting to independent contractor).

38. *See, e.g.*, Milprint Inc., 46 Lab. Arb. 724 (1966) (employer had obligation to notify union before subcontracting); Texas Gas Transmission Corp., 27 Lab. Arb. 413, 420 (1956) (arbitrator found subcontracting not discriminatory against union).

39. *See, e.g.*, Safeway Stores, Inc., 51 Lab. Arb. 1093 (1969) (no violation for subcontracting because other work was offered unit employees and there was no showing of specific instances of work loss produced by subcontracting); Bethlehem Steel Co., 30 Lab. Arb. 678 (1958) (subcontracting violated implied "local working conditions" agreement as to exclusivity of work being performed by unit employees); Hearst Consol. Publications, Inc., 26 Lab. Arb. 723 (1956) (subcontracting which resulted in discharge of unit employees violated contract); Koppers Co., Inc., 22 Lab. Arb. 124 (1954) (no evidence that subcontracting resulted in loss of pay or lay-off for any unit employee).

40. *See, e.g.*, Mead Corp., 52 Lab. Arb. 345 (1969) (no violation for subcontracting out new or special work); Pittsburgh Metallurgical Co., 52 Lab. Arb. 41 (1969) (subcontracting violated contract because work was normally performed by unit employees who possessed requisite skills); Bethlehem Steel Co., 30 Lab. Arb. 679 (1958) (subcontracting of work which was traditionally and historically subject of subcontracting in the industry violated contract here because of local working arrangement and implied agreement not to subcontract); Hershey Chocolate Corp., 28 Lab. Arb. 491 (1957) (no violation for subcontract-

formance by unit employees,[41] as well as the availability to the employer of any special equipment required for the work.[42] The intended duration[43] and regularity of the subcontracting[44] will also influence the arbitrator's decision; for example, objections to quarterly maintenance of buildings would be of less significant impact than a contract for continuous production of a part of the employer's product by an outside company.[45] In each case, a balancing of the factors mentioned, in addition to others which may arise, should furnish a basis for an indication of the arbitral decision.

IV. Sale of Entire Business

The sale of an entire business bears few hidden difficulties for the seller. He must avoid the "chilling" effect delineated in *Darlington*.[46] Furthermore, he must anticipate that a "sale" will be treated as such only if the transaction actually comprises a transfer of control,[47] and is not merely a "wash" sale. Except for these complications, an employer may sell his business at any time. A complete sale is, in legal effect, the same as a total closure of business for the seller. The only truly significant limita-

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ing work incidental to employer's primary operation); A.D. Juilliard Co., Inc., 21 Lab. Arb. 713 (1953) (subcontracting of work normally performed by unit employees violated contract).

41. *See, e.g.*, Bethlehem Steel Corp., 47 Lab. Arb. 1057 (1966) (subcontracting violated contract when unit employees had requisite skill and had performed like work in the past, but not when it was the most reasonable course in urgent situation); Joseph S. Finch & Co., 29 Lab. Arb. 609 (1957) (no violation for subcontracting out emergency work not feasibly performed by unit employees).

42. *See, e.g.*, Dutch Maid Bakery, 52 Lab. Arb. 589 (1969) (no violation for subcontracting when company unable to obtain replacement part for key machine thus creating continuing emergency); Hershey Chocolate Corp., 28 Lab. Arb. 491 (1957) (subcontracting permissible because substantial capital outlay to purchase new equipment would have been necessary to perform job "in-house").

43. *See, e.g*, Temco Aircraft Corp., 27 Lab. Arb. 233 (1956) (no violation for subcontracting work of limited scope and duration); General Metals Corp., 25 Lab. Arb. 118 (1955) (subcontracting violated contract since work was to be done continuously and permanently and, considered with other factors, should have been assigned to unit employees).

44. *See, e.g.*, Texas Gas Transmission Corp., 27 Lab. Arb. 413 (1956) (subcontracting did not violate contract when work had never been necessary before and work was special or unique); Temco Aircraft Corp., 27 Lab. Arb. 233 (1956) (no violation for subcontracting unique, special repair work).

45. *See, e.g*, Taylor Stone Co., 50 Lab. Arb. 208 (1967) (no violation for subcontracting work connected with employer's conversion of operations to more modernized plant); Owens-Corning Fiberglass Corp., 23 Lab. Arb. 603 (1954) (no violation for subcontracting out work when unit employees observed picket line even though it resulted in subsequent lay-offs when employees returned to work).

46. *See* text accompanying note 19 *supra*.

47. *Cf.* Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945).

tions in such circumstances arise from contractual provisions and the required notice to the union.[48]

The more difficult problem is the determination of the legal obligations of a *purchaser* of an on-going business to bargain with an incumbent union. The question is characterized as one of "successorship."

Under the Act

The problems of successorship under federal legislation are several, and have undergone change as recently as April of 1973.[49] Although this legal area is in a state of flux at the present time, there are several basic factors which have emerged from recent rulings. The Board employs the following considerations in deciding whether an employer is or is not a "successor" employer:

> (1) whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery . . . ; and (7) whether he manufactures the same product or offers the same services.[50]

In *NLRB v. Burns International Security Service, Inc.*,[51] a union had been elected to represent guards employed by Wackenhut Corporation at a Lockheed plant. Shortly thereafter, the guard service contract expired and, after bidding, the contract was awarded to a different guard service company, Burns International Security Service. Burns retained twenty-seven of the Wackenhut employees and brought in fifteen additional employees. Furthermore, Burns continued to follow an operating structure and operating practices similar to Wackenhut's. The Supreme Court adopted the Board's basic test—a union majority in an unchanged bargaining unit in essentially unchanged circumstances — and ordered the new employer to bargain with the incumbent union.[52]

If these factors indicating successorship status are absent, then a company which assumes control of another has no duty to bargain with the union, and there is no continuation of any

48. *See* note 6 and accompanying text *supra*.
49. Denham v. NLRB, 411 U.S. 945 (1973).
50. Fanning, *Labor Relations Obligations of a Purchaser*, in 1967 LABOR RELATIONS YEARBOOK 284, 286 (1967).
51. 406 U.S. 272 (1972).
52. *Id.* at 281.

pre-existing union contract. If, however, the Board determines that the new employer is a "successor", then there is a duty upon the new employer to recognize and bargain with the union, but no duty to accept any collective bargaining agreement which bound the previous employer and the union.[53]

After *Burns*, a "successor" still may be required to arbitrate pre-existing grievances, but he may not be forced to comply with the provisions of the previous contract with regard to wages, hours, working conditions, and other substantive matters.

In early 1973, the United States Supreme Court remanded for modification a decision of the Board which attempted to extend the *Burns* decision. In *Denham v. NLRB*[54] a successor employer purchased his predecessor's plant, retained all unit employees and carried on substantially the same operations. The Board found that the employer had committed unfair labor practices by refusing to adhere to a collective bargaining contract between his predecessor and the incumbent union and refusing to bargain with the union.[55] On appeal, the Supreme Court reversed the Board's finding of a violation of section 8(a)(5) (refusal to bargain in good faith)[56] arising from a unilateral change in working conditions at the beginning of a successor's business operations. The Court in *Burns* had observed that:

> It is difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatever to the bargaining unit and . . . no outstanding terms or conditions of employment from which a change could be inferred.[57]

Thus, the Supreme Court's remand of *Denham*, citing only *Burns*, indicates that *Burns* may not be interpreted as binding successor employers to previous contracts and that successor employers may make unilateral changes after giving notice to the incumbent union.

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53. Until the Supreme Court in *Burns* clarified its earlier decision of John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), some courts had required a "successor" to accept the previous collective bargaining agreement. *Wiley*, however, was a section 301 (Labor Management Relations Act (Taft-Hartley Act) § 301, 29 U.S.C. § 185 (1970)) suit to compel a successor employer to arbitrate with the union under a collective bargaining agreement with the prior employer, and should not therefore have controlled any unfair labor practice case resulting from a refusal to accept the entire contract which bound a previous employer.

54. 187 N.L.R.B. 434, 76 L.R.R.M. 1141 (1970), *review granted*, 411 U.S. 945 (1973), *modified on remand*, 206 N.L.R.B. No. 75 (Nov. 2, 1973).

55. *Id.*

56. 411 U.S. 945 (1973).

57. 406 U.S. at 294.

On remand in *Denham*, the Board rescinded its finding that the employer had illegally refused to be bound by his predecessor's contract with the union. However, the Board adhered to its finding that the employer had committed unfair labor practices by refusing to bargain with the union and thereafter unilaterally changing working conditions.[58] Thus, the duties of a successor employer are by no means resolved by the *Denham* decision and will very likely be the subject of litigation for some time.

If a successor employer is reluctant to accept union recognition as inevitable, he may attempt to avoid a "successor" determination by arguing that his hiring of employees or investment in the company effects a significant change in the structure, size, or character of the bargaining unit.[59] Or he may be in a position to intermingle employees of two plants if, for example, he purchases a larger plant and moves some of his previous employees to that plant. In such circumstances the previous bargaining unit may be considered extinct in light of the new unit and new operations.[60] If the successor employer already had a collective bargaining contract with one union, there may be grounds for a representation election to decide which of the two unions is the proper representative of unit employees after the changeover.[61] Also, the Board's unit clarification representational procedure[62] is available to the employer and the union to clarify changes in the bargaining unit effectuated by the new employer.

Under Contract

If there is a successor clause in the previous contract, requiring the new employer to recognize the union, the issue of whether the successor company is so bound is arbitrable.[63] Although the *Denham* decision does not bind a successor employer to his predecessor's collective bargaining agreement in the absence of a successorship clause in the collective bargaining contract, it is possible that an arbitrator confronted with similar

58. 206 N.L.R.B. No. 75 (Nov. 2, 1973).

59. However, an employer may be found to have violated section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (discrimination in hiring to discourage union membership) if his refusal to hire the previous employer's employees is motivated by a desire to avoid union representation. Tri-State Maintenance v. NLRB, 408 F.2d 171 (D.C. Cir. 1968).

60. *See, e.g.*, Hooker Electrochemical Co., 116 N.L.R.B. 1393, 38 L.R.R.M. 1482 (1956).

61. *Cf.* Globe Machine and Stamping Co., 3 N.L.R.B. 294, 1-A L.R.R.M. 122 (1937).

62. 29 C.F.R. § 102.61(d) (Supp. 1973).

63. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

circumstances may interpret other contract language to bind a successor employer to the agreement. It is advisable, therefore, to scrutinize existing collective bargaining contracts for such a possibility before a purchase is consummated.

V. Partial Sale

Under the Act

A partial sale is very close to a total sale in its legal ramifications with the exception that a partial sale is scrutinized more closely for a possible *Darlington* discriminatory partial closing. Discriminatory action in a partial sale as in a partial closure may result in a Board order requiring reinstatement and back pay to the affected employees. Furthermore, in partial sales as well as in partial closing, the employer must give notice to and bargain with the union involved, with respect to both the decision itself and the effects thereof on the employees.

Purchasing a portion of an enterprise imposes restrictions on the new employer, much the same as those involved in purchasing an entire operation. Indeed, if the portion of operations transferred comprises one or more complete bargaining units, the successorship problems will be the same as if a transfer of an entire business had occurred. If, however, the partial sale involves only a portion of a bargaining unit, there will be stronger arguments available to the purchaser for nonrecognition of the union, disregard of any previous contract, merger into a new unit, and in general greater successor autonomy. The union will not be as successful in retaining its status as employees' representative if the new unit includes many employees not previously associated with the union or with the selling employer. Representational questions which arise in these circumstances are normally resolved by unit clarification or other related Board representation procedures.

Under Contract

Under an existing collective bargaining agreement, there may be difficulties for both partial seller and buyer. The seller may be prohibited by contract terms from selling any portion of his operations. Sale of the facilities may be restricted to those who will agree to honor the existing contract, or rehire or offer hiring preference to a substantial number of the unit employees. Additionally, the contract may contain severance pay provisions. If the seller effects a sale in violation of any such contractual provisions, as evident from their terms or as decided by an arbitra-

tor, he may be liable to the employees for any damages they incur.

There may be contractual complications for the purchaser as well. He may be forced by the seller to agree to some of the terms just mentioned, before the sale may be completed. And he, too, may be bound to a previous collective bargaining agreement as a successor.[64]

VI. CONCLUSION

In any termination of business by an employer, the Board and courts will be concerned with the employer's motive and fulfillment of his bargaining obligation to the union. Anti-union motives or failure to fulfill any bargaining obligation may result in an order restoring in whole or in part the *status quo ante*. Furthermore, an arbitrator may read the contract as requiring that the employer must not close his business or that he must make certain remuneration to his employees.

In a partial closing or subcontracting, the employer must not be motivated by discriminatory purposes, and should bargain with the union if permitted by contract to undertake the proposed action.

Finally, in preparation for the prospective purchase of a business or a part thereof, a purchaser should scrutinize any preexisting contract. If there are no significant problems arising from possible interpretation of contract language, he should consider the disadvantages of allowing any existing certification or conduct to extend into the period after the acquisition. The purchaser should also consider alternative structures for the bargaining unit and choose and later implement, if possible, the one best suited to his business needs.

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64. *See* discussion in section IV *supra*.