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## UNILATERAL DISCONTINUANCE OF CHRISTMAS GIFTS BY MANAGEMENT

Christmas may be a time for giving, but some companies today are learning their well intentioned company Christmas gift has boomeranged into a locked-in fringe benefit—at least where the recipients were members of a collective bargaining unit.

Today no area of truly exclusive management prerogative can be fenced in. It used to be when an employer enjoyed a good year and decided to share the Yuletide spirit by giving a Christmas gift to each employee, both employer and employees accepted that the gift was discretionary, and, profits being illusive and uncertain at best when a less profitable year arrived, the employer could at will discontinue it. But, today a different interpretation may control, and, even though restraint and diligence were exercised in granting the gift, the uninformed employer who discontinues it may find himself learning from an Arbitrator or the National Labor Relations Board that his well intentioned Christmas gratuity has emerged in new perspective. The gift may now be considered a bonus. Under an existing benefits clause in his union contract, or interpreted as part of the wage package or as part of the working conditions of his employees, the gift probably may not be unilaterally discontinued.

Today it is well recognized that the National Labor Relations Board and the courts have repeatedly upheld the rights of unions to include in collective bargaining such fringe benefits as pensions, group insurance, bonuses, profit sharing plans and stock purchase plans, as well as the many items commonly embraced by labor contracts, such as union security, wages, incentives, merit increase, subcontracting, plant rules, vacations, etc. The only subjects definitely excluded from bargaining are those deemed illegal from the standpoint of public policy such as the "closed shop."

In the past a collective bargaining contract between a company and a union tended to represent all the overt agreements reached by the parties at the bargaining table. Today the contract may represent much more. By implication it may also include the disposition of matters settled at the bargaining table but not included in the written contract, and may even include implied understandings not even mentioned at the bargaining table. Therefore, any change which the employer wants to make in the overall employment relationship—the package, so to speak—with regard to a matter not contained in the written contract or discussed at the bargaining table, may be subject to bargaining. To a great extent this is the viewpoint increasingly advanced by the Board, and usually enforced by the

courts. Thus the contract may be said to embrace the total working relationship existing at the time the contract was signed and continuing during the life of the contract.

Unilateral action taken by the employer is action taken without the consent of the union, and, because such action tends to undermine a union, it is contrary to the concept of collective bargaining contained in the National Labor Relations Act.<sup>1</sup> As such, a unilateral act during the term of an existing contract may either violate some provision of the contract, thus coming within the scope of arbitration under the grievance clause, or may affect the total working relationship and be regarded as a refusal to bargain and hence an unfair labor practice within the jurisdiction of the National Labor Relations Board. However, the mere fact that the action is not provided for under the written contract, or that it is done without the consent of the union, does not alone suffice to make it an unfair labor practice. The action taken must be examined with reference to the total working relationship of the employer and the union.<sup>2</sup>

Increasingly, arbitrators, the National Labor Relations Board, and the courts are being called upon to determine whether, under the facts of the particular case, the employer does in fact have any right unilaterally to discontinue a Christmas gift. It becomes clear that the question hinges upon whether the gift is truly a gift, rather than some form of remuneration or benefit tied to the employment relationship.

How has the transition of a gift to a bonus come about? A gift may be defined as "a voluntary transfer of property by one to another without any consideration or compensation therefor . . . [it] must be voluntary, absolute, and without consideration."<sup>3</sup> Webster's primary definition of a bonus is "something given in addition to what is ordinarily received by, or strictly due to, the recipient."<sup>4</sup> The National Labor Relations Board in the landmark *Niles-Bement-Pond Co.*<sup>5</sup> case, adopted by footnote reference the definition of a bonus as "a sum paid for service, or upon a consideration in addition to or in excess of that which would ordinarily be given."<sup>6</sup> There are discernable factors which contribute to the transformation of an intended gift to a vulnerable bonus, but these factors must be approached with caution and with due regard to the forum where they will be tested. Generally speaking, arbitrators (with

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<sup>1</sup> National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1958).

<sup>2</sup> NLRB v. Nash-Finch Co., 211 F.2d 622 (8th Cir. 1954).

<sup>3</sup> 24 AM. JUR. Gifts § 2 (1939).

<sup>4</sup> MERRIAM-WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1940).

<sup>5</sup> 97 N.L.R.B. 165 (1951), enforced, 199 F.2d 713 (2d Cir. 1952).

<sup>6</sup> *Id.* at 166 n.3.

important exceptions) have tended to allow an employer more latitude in unilateral determination of Christmas gifts than has the National Labor Relations Board. The Board, supported generally by the courts, has increasingly demonstrated its distrust of unilateral actions by the employer.

Once management acts unilaterally to discontinue a Christmas gift the union can either let the act go by or take steps against the employer. Such steps usually take the form of pressing a grievance, under the "existing benefits" clause or another catch-all clause, through to arbitration. Where there is no appropriate clause, the union can demand that the employer bargain, and if he refuses, file an unfair labor practice charge with the Board for refusal to bargain under Section 8(a)(5) of the National Labor Relations Act.<sup>7</sup> As a general rule, the grievance procedure must first be exhausted before resort can be had to the procedures of the National Labor Relations Board. However, the NLRB General Counsel has disposed of some complaints without hearings where the unilateral action appeared to him not to violate the bargaining agreement.<sup>8</sup>

The Board today seems inclined to leave the parties to their contractual remedies when the action taken does not clearly violate the provisions of the Act. Thus, the Board has dismissed complaints charging refusal to bargain in *Crown Zellerbach Corp.*<sup>9</sup> and *United Telephone Co.*<sup>10</sup> In the latter case the Board stated:

As the Board has held for many years, with the approval of the courts: "... it will not [serve to] effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act."<sup>11</sup>

However, an action which violates the written contract may also

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<sup>7</sup> 49 Stat. 449 (1935), 29 U.S.C. § 158(a)(5) (1958), (making it unlawful to refuse to bargain on rates of pay, wages, hours of employment, or other conditions of employment).

<sup>8</sup> NLRB General Counsel Administrative Rulings, Cases No. 793 and 843 (1953). See Case 640, 32 L.R.R.M. 1231 (1953) (Regional Director sustained by General Counsel in his refusal to issue a complaint against employer where employer refused to arbitrate discontinuance of a Christmas bonus paid for 20 years. Payments of \$5 to \$35 were not in contract or mentioned in negotiations. Six weeks before Christmas the employer notified union of its intent to discontinue payment of the bonus because of the depressed condition of the textile industry. The company was at all times willing to bargain with respect to the issue but refused to submit it to arbitration. The contract provided for arbitration of unsettled grievances "in regard to wages, working conditions, or other matters arising out of enforcement of this agreement or its interpretation").

<sup>9</sup> 95 N.L.R.B. 753 (1951).

<sup>10</sup> 112 N.L.R.B. 779 (1955).

<sup>11</sup> *Id.* at 781.

involve violation of the Act, and the National Labor Relations Board has exclusive jurisdiction to remedy unfair labor practices.

As mentioned before, when a charge concerning refusal to bargain is filed, it will be under Section 8(a)(5) of the National Labor Relations Act. This section makes it unlawful to refuse to bargain on rates of pay, wages, hours of employment, or other conditions of employment. Both employer and union are required to bargain in "good faith."<sup>12</sup> It should be observed that the statute provides that neither party is compelled to "agree to a proposal" nor required to make a concession.<sup>13</sup> In the early and important *NLRB v. Jones & Laughlin Steel Corp.* case,<sup>14</sup> the Supreme Court stated: "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever."<sup>15</sup> A serious question exists as to the extent to which concessions and counter-proposals are necessary to good faith bargaining. The Board repeatedly has tried to make it appear that the employer must yield on fundamental matters, but the courts have often held otherwise, denying the Board the right to dictate terms of the agreement. In *NLRB v. American National Insurance Co.*,<sup>16</sup> the Supreme Court said: "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements."<sup>17</sup> In another important case,<sup>18</sup> the Seventh Circuit Court held that the obligation of the employer is merely to bargain in good faith, and that a direction to such effect is not a mandate to pay a pension or a bonus or whatever other benefit may be in dispute.

Earlier we stated that there were some discernible factors that have played a part in bringing the unilateral Christmas gift into the bonus area subject to collective bargaining. Against the foregoing background of the duty to bargain in good faith these factors may help to show some of the pitfalls faced by management in unilaterally ending a Christmas gift.

#### THE PERIOD OF TIME CHRISTMAS GIFTS ARE CONTINUED

The granting of Christmas gifts to employees regularly over a long period of time is apparently in itself a factor sufficient to justify

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<sup>12</sup> Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

<sup>13</sup> National Labor Relations Act, § 8(d), 49 Stat. 449 (1935), 29 U.S.C. § 158(d) (1958).

<sup>14</sup> 301 U.S. 1 (1937).

<sup>15</sup> *Id.* at 45.

<sup>16</sup> 343 U.S. 395 (1952).

<sup>17</sup> *Id.* at 408 n.22.

<sup>18</sup> *Singer Mfg. Co. v. NLRB*, 119 F.2d 131 (7th Cir. 1941), *cert. denied*, 313 U.S. 595 (1941).

the employees' expectation that they may continue to receive the gifts as part of their remuneration. Indeed, Arbitrator Jules Justin in *Felsway Shoe Corp.*,<sup>19</sup> ruled that a gift which had been given to employees for 10 years or more had become a "fixed financial arrangement" within a contract clause prohibiting any reduction in wages or other fixed financial arrangements. There is much emphasis on employee "expectancy" in Board decisions. However, the Board has not spelled out an answer as to how many Christmas seasons the employer may give his gift before it becomes part of the employee's "expectancy," and thus must enter the collective bargaining arena. This confusion is pointed out by Board member Murdock in his dissent in *Niles-Bement-Pond*<sup>20</sup> wherein he asks: "Does this [employee expectancy] mean that the first year the employer gives a Christmas bonus there is no expectancy . . . Does the first bonus provide the necessary expectancy?"<sup>21</sup> The majority of the Board neatly ducked the issue. Arbitrator Francis B. Delehanty, Jr. in *National Distillers Products Corp.*,<sup>22</sup> stated that he was "unable to accept the proposition that a wholly gratuitous payment becomes compulsory, for whatever unlimited time the employer or its successors continue in business, merely because it is repeated over a period of years."<sup>23</sup> In *Tucker Steel Corp.*,<sup>24</sup> the company had paid an annual gift equal to one week's pay for the last five years, and, prior to that, had paid substantial but varying amounts. There was no mention of the gift in the collective bargaining agreement, nor had the union ever sought to bargain with respect to the gift. The Board approved the Trial Examiner's ruling that the company could unilaterally discontinue the gift since the union had allowed the company to act unilaterally for 12 years without objection or attempt to negotiate, and by its silence the union became equitably estopped. The decision held, however, that the company could not escape its duty to bargain upon request by the union *subsequent* to the discontinuance of the gift. The Trial Examiner specifically said:

The essential ingredient of Respondent's legal unilateral termination of the bonus in December, 1960, was its reasonable reliance upon a course of conduct by the union which equitably estopped the latter regardless of the latter's intent. The foregoing ingredient is not enough to justify the subsequent refusal to bargain.<sup>25</sup>

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<sup>19</sup> 17 Lab. Arb. 505 (1951).

<sup>20</sup> 97 N.L.R.B. 165 (1951).

<sup>21</sup> *Id.* at 171.

<sup>22</sup> 24 Lab. Arb. 500 (1953).

<sup>23</sup> *Id.* at 512.

<sup>24</sup> 134 N.L.R.B. 323 (1961).

<sup>25</sup> *Id.* at 333.

Under similar circumstances, a company which unilaterally *granted* a gift was exonerated by the Board of failure to bargain charges.<sup>26</sup>

Continued payment of a Christmas gift over a period of years in an unchanging amount without relationship to the company's varying financial success will tend to cause the gift to be considered part of the employee's total yearly earnings.<sup>27</sup> Mere automatic continuation of an established custom is risky to the employer who considers the gift to be a management prerogative,<sup>28</sup> even when the amount of the bonus is based upon company profits.<sup>29</sup> Where the gift varied in amount with each employee and differed in amount from year to year, it was held not an integral part of wages and the employer could discontinue it at his discretion.<sup>30</sup> But, in *Citizens Hotel Co.*,<sup>31</sup> the employer had paid a bonus based upon a percentage of annual income ranging up to sixteen percent in some years for a period of eighteen years. Ten days after the union was certified as bargaining agent, and after the union had already submitted a "maintenance of existing privileges" clause and demanded negotiation, the company announced that it would not pay the bonus and refused to negotiate the issue. There was also evidence of past anti-union conduct, and the company was held guilty of violation of Sections 8(a)(3) and (5) of the Act.<sup>32</sup>

#### DIRECT OR INDIRECT RELATIONSHIP TO WAGES PAID AND/OR LENGTH OF SERVICE

Direct, or even indirect, relationship of the Christmas gift to wages or length of service will often cause the gift to be treated as a bonus not economically different from other kinds of remuneration, such as pensions, retirement plans or group insurance.<sup>33</sup> The First Circuit Court has upheld the Board's contention that the statutory term "wages" was intended to embrace at least the "economic benefits flowing from the employment relationship."<sup>34</sup> The Board has

<sup>26</sup> *Texas Foundries Inc.*, 101 N.L.R.B. 1642, 1671 (1952).

<sup>27</sup> *General Telephone Co. of Florida*, 144 N.L.R.B. 311 (1963), *enforced in part*, 337 F.2d 452 (5th Cir. 1964).

<sup>28</sup> *American Lubricants Co.*, 136 N.L.R.B. 946 (1962); *Electric Steam Radiator Corp.*, 136 N.L.R.B. 923 (1962).

<sup>29</sup> *Nash-Finch Co.*, 103 N.L.R.B. 1695 (1953), *enforcement denied*, 211 F.2d 622 (8th Cir. 1954).

<sup>30</sup> *Renart Sportswear Corp.*, 6 Lab. Arb. 654 (1947).

<sup>31</sup> 138 N.L.R.B. 706 (1962).

<sup>32</sup> National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. § 158(a)(3) (making it an unfair labor practice for an employer to encourage or discourage membership in labor unions by discrimination in hiring or in tenure, terms, or conditions of employment).

<sup>33</sup> *Niles-Bement-Pond Co.*, 97 N.L.R.B. 165 (1951), *enforced*, 199 F.2d 713 (2d Cir. 1952).

<sup>34</sup> *W. W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949).

also cited the policies of wage regulations under the Defense Production Act of 1950, and Internal Revenue Department decisions to support its contention that Christmas gifts paid in connection with the employment relationship are "wages."<sup>35</sup> On the other hand, Board member Murdock in his vigorous dissent to *Niles-Bement-Pond*, points out that Congress in 1949, in amending the Fair Labor Standards Act, added Section 7(d) to the Act, which section excludes from the regular rate of pay on which overtime must be paid, sums paid as gifts and payments in the nature of gifts made at Christmas time or on other special occasions as a reward for service, the amounts of which are not measured by or dependent upon hours worked, production or efficiency.<sup>36</sup> In *Nazareth Mills, Inc.*,<sup>37</sup> Arbitrator G. Allan Dash, Jr. noted that the Christmas bonus payment paid for many years was part of the total yearly earnings upon which subsequent vacation payments were computed. In addition, the mechanics of the payment caused such benefits to be expected by the employees as a year-end payment of an exact amount dependent upon their length of service. For these reasons the bonus had become an integral part of the wage structure. In *American Lubricants Co.*,<sup>38</sup> a Christmas bonus based upon length of service and amounting to as much as four weeks' pay had been paid every year between 1948 and 1958. In 1959 the union was certified; the company unilaterally reduced the bonus paid to bargaining unit employees, and the union did nothing. In 1960 the union raised the bonus issue during negotiations, but the company resisted, and no contractual provision was negotiated. Shortly thereafter, the company eliminated the bonus to bargaining unit employees, and the Board held the company guilty of refusal to bargain. Arbitrator Ralph E. Kharas in *Cortland Baking Co.*,<sup>39</sup> ruled that although the Christmas bonus amounts were historically tied to length of service, because the union contract contained no reference to them, and prior history indicated the payments were entirely at management's discretion, the company was not barred from unilaterally reducing the bonus without consulting the union despite the fact that the company had successfully argued during negotiations that it should pay lower wages because other companies didn't pay Christmas bonuses! The company had also listed the Christmas bonus along with pension, paid vacations and other benefits in a circular to employees, and company interviewers told applicants there was a bonus.<sup>40</sup>

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<sup>35</sup> *Niles-Bement-Pond Co.*, 97 N.L.R.B. 165, 166-67 n.4 (1951).

<sup>36</sup> *Id.* at 170.

<sup>37</sup> 22 Lab. Arb. 808 (1954).

<sup>38</sup> 136 N.L.R.B. 946 (1962).

<sup>39</sup> 25 Lab. Arb. 853 (1955).

<sup>40</sup> Compare *General Telephone Co. of Florida*, 144 N.L.R.B. 311 (1963), *en-*



From the foregoing it would appear inadvisable for a management desirous of retaining unilateral control over a Christmas gift in any way to tie or associate it with wage payments, length of service or any company benefit package, for to do so could well lead to classification of the gift as an emolument of value accruing to employees out of their employment relationship—in other words, “wages.”

#### EFFECT OF PRIOR NEGOTIATIONS

As would be expected, prior negotiation history, whether or not including specific mention of a Christmas gift, plays an important role in determining the status of the gift when considering unilateral action pertaining to it. Any express waiver of the right to demand collective bargaining on Christmas gifts will be respected by the Board, although the waiver must be clear and unmistakable to discharge the statutory duty to bargain.<sup>41</sup> Similarly, if the subject matter of the Christmas gift is brought up specifically during bargaining negotiations and the company indicates the possibility of its unilateral termination of the gift if the union's other demands are met, and subsequently the employees, including the union's stewards are apprised that the gift would be discontinued, and, nevertheless, the union signs a new contract, the union is estopped from contending that the unilateral termination was a refusal to bargain.<sup>42</sup> Of course, the company is not relieved of its obligation to bargain in the future should the union wish to discuss a bonus. However, where a company has given a Christmas gift for many years and offers to exchange the gift for other benefits during negotiations, the gift has become a part of the wage package, and the company can-

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*forced in part*, 337 F.2d 452 (5th Cir. 1964). In this interesting case, the employer had paid a Christmas gift in a like nominal amount to all employees for a thirty-five year period (except for three years during the depression). The union had never specifically discussed the gift in negotiations and it was not covered in the contract. However, the company had pointed out certain extra benefits, including Christmas checks, in a special news bulletin entitled “This is Your Extra Paycheck” to all employees distributed in the midst of its most recent negotiations. In addition, the company had failed to inform either the union or its employees of its unilateral decision to drop the Christmas checks when the union by chance learned of the impending discontinuance and requested discussion of the matter. Interestingly enough, the union had dropped their existing benefits clause in the same recent negotiations. The Board modified the Trial Examiner's Intermediate Report and found the company guilty of an unfair labor practice in “discontinuing the annual Christmas checks without appropriate notice to, and consultation with, the employees' certified bargaining representative.” The matter “relating as it did to wages” was held by the Board to be a mandatory bargaining subject. On appeal, the Fifth Circuit Court affirmed the unfair labor practice, and ordered the company to bargain with the union over the bonuses in dispute.

<sup>41</sup> Tidewater Associated Oil Co., 85 N.L.R.B. 1096 (1949); Shell Oil Co., 93 N.L.R.B. 161 (1951).

<sup>42</sup> Tucker Steel Corp., 134 N.L.R.B. 323 (1961).

not unilaterally discontinue it.<sup>43</sup> The importance of prior negotiations upon unilateral action can be illustrated by *Nash-Finch Co.*,<sup>44</sup> in which many employees had individual contracts with the company which called for annual Christmas bonuses. The company told its employees that if a union came in, that benefit, along with others such as hospitalization and group insurance, would probably be eliminated. Nonetheless, a union was certified, and during negotiations on an existing benefits clause, the union proposed:

The employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this agreement.<sup>45</sup>

The company rejected that proposal and instead, this compromise wording was agreed upon:

Maintenance of Standards. The employer agrees that wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest minimum standards specified in this agreement and the conditions of the employment shall be improved wherever specific provisions for improvement are made elsewhere in this agreement.<sup>46</sup>

After the contract was signed the company unilaterally discontinued the Christmas bonus for its union employees but not for its other non-union employees. The Board held that the company had violated Section 8(a)(5) stating that, while the union might be agreeable to foregoing the bonus and other benefits, it had not waived its rights to bargain about them just because it had signed a contract. The Court of Appeals, however, denied enforcement of the Board's order, holding that the contract should be taken literally in determining what the company had agreed to do. The court held that the union's members already knew the company had no intention to keep benefits it was not contractually bound to keep; that the changes in the Maintenance of Standards clause further indicated this, and the fact that the company continued the Christmas gift to those employees *not* covered by the union carried weight. The court felt that the union had made a bargain and must be bound by it, and relieved the company of any duty to maintain the Christmas bonus or even to bargain about it during the term of the contract. In *American Lava Corp.*,<sup>47</sup> arbitrated by Joseph M. Klamon, the company had

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<sup>43</sup> Budd Co. & UAW, Local 813, 61-2 ARB ¶ 8382 (1961).

<sup>44</sup> 103 N.L.R.B. 1695 (1953), *enforcement denied*, 211 F.2d 622 (8th Cir. 1954).

<sup>45</sup> *Id.* at 1704.

<sup>46</sup> *Ibid.*

<sup>47</sup> 32 Lab. Arb. 395 (1959).

obtained specific agreement during negotiations that the Christmas gift would be excluded from the existing benefits clause. Each year previously the company had accompanied the gift with a letter specifically describing it as a "gift" not a part of the employee's pay, and stating that a similar gift in the future was not guaranteed. In 1953 the company was purchased by a large national concern, and during the subsequent negotiations with the union the company was asked whether the company planned to discontinue the Christmas bonus. The company negotiator replied, "I don't know what the Board of Directors will do," and stated further that he "hoped" the Board would give the bonus the same consideration as in prior years. Early in December 1953 the company announced discontinuation of the bonus, and the union filed a grievance which the company declined to accept. The union went to court to compel arbitration under the contract, and after several years the United States District Court ordered arbitration. Each year the union filed another grievance over subsequent lack of bonuses. In 1959 the arbitrator held that the company negotiator's words led the employees into a justified "expectancy" that the bonus would be paid in 1953 even though it was outside the framework of the contract, and ruled that the company was equitably estopped from denying it had an obligation to pay in 1953, but there was no obligation for subsequent years.

#### OTHER FACTORS BEARING ON THE DETERMINATION

An unwritten "understanding" that the company would continue to distribute Christmas turkeys was held not part of the written labor contract, and therefore not arbitrable where the contract limited grievance arbitration to contract provisions.<sup>48</sup> The union claimed the turkeys were a fringe benefit and "an indirect form of remuneration." The company had cancelled the distribution after nine years allegedly to reduce costs. Ability to pay or the profitability of the business may be recognized alone in a proper case. The union usually tries to place the Christmas gift on the plane of a vested property right on a par with wages due, and the company stresses that the gift, if not an outright gratuity, is at least a discretionary payment over and above that which is legally due and should not be expected in bad financial years. At least one company<sup>49</sup> made its contention stick that it need only be responsible for payment of a Christmas bonus in profitable years despite an existing benefits

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<sup>48</sup> Boeing Co. v. International Union, UAW, 231 F. Supp. 930 (E.D. Pa 1964).

<sup>49</sup> Dupo Lumber & Hardware Co., 33 Lab. Arb. 518 (1959); *accord*, Telemetal Products, Inc., 33 Lab. Arb. 139 (1959).

clause. The company had paid a month's bonus to each employee each year, 1937 through 1957. At the time it signed a contract in 1956, it said it would pay a bonus only in profitable years and insisted that the existing benefits clause be altered to include the words "in accordance with company policy in the past." In 1957 the company failed to make a profit and accordingly in 1958 paid no bonus. An arbitrator ruled in the company's favor. Some companies have contractually agreed to pay a Christmas bonus only in profitable years, and these provisions have been upheld by arbitrators.<sup>50</sup> Another interesting situation occurred in the *Rockwell Spring & Axle Co.* case<sup>51</sup> decided by Arbitrator J. Stashower. In years up to 1956 the company had distributed turkeys at Christmas to all employees with less than one year of service and a check to employees with more than a year's service (with certain annual variations). In 1957 everyone received money. Each year the union had gone through the ritual of requesting a Christmas bonus payment, and the request was referred to higher management for decision. In 1958 the company had an unprofitable year, and the employees were notified there would be neither a turkey nor money. The union filed its grievance and the arbitrator found for the company, ruling that inasmuch as a separate decision was rendered each year by top management to the union's request, no practice had been formed ("a practice to be considered a practice binding upon a party, cannot require a separate decision each year").<sup>52</sup>

Where anti-union animus is readily evident, the employer will have a difficult time maintaining a right to unilaterally discontinue a gift, even where the impact of the act falls equally upon organized and non-union employees.<sup>53</sup> In *Toffenetti Restaurant Co.*,<sup>54</sup> the employer followed a bonus practice of nineteen years standing. A union was certified despite a vigorous anti-union campaign by the employer. During negotiations which followed the company specifically promised that if any bonus were paid, it would be paid to all. After the contract was signed the company gave the bonus only to the non-union employees. The Board found the company guilty under Sections 8(a)(1), (3) and (5) of the Act.<sup>55</sup> Where unilateral withdrawal of a Christmas gift is coupled with obvious bad faith in

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<sup>50</sup> See, e.g., *Bastian-Morley Co.*, 3 Lab. Arb. 412 (1946).

<sup>51</sup> 32 Lab. Arb. 664 (1959).

<sup>52</sup> *Id.* at 667.

<sup>53</sup> See *Zelrich Co.*, 144 N.L.R.B. 1381 (1963), *enforced*, 344 F.2d 1011 (5th Cir. 1965).

<sup>54</sup> 136 N.L.R.B. 1156 (1962).

<sup>55</sup> National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. § 158(a)(1) (1958), (making it an unfair labor practice for an employer to interfere, restrain, or coerce employees in the exercise of their rights).

negotiations<sup>56</sup> or reprisals "for voting for the DAMN union"<sup>57</sup> the company will certainly be held in violation of the Act.

#### CONCLUSION

Management rights is a most difficult concept to grasp, and the term has been much maligned. It is probably true that management has the duty and the right to manage, but in its application the concept tends to run into difficulty. Insofar as conduct of the business is concerned—where to operate, what product, what equipment, methods, etc.—management is usually unchallenged. But, insofar as the direction of the production force is involved—the jobs, working conditions, wages, etc.—management legally is limited and must consider the employees, usually represented by their union. At the present time "management rights" is subject to curtailment through the bargaining power of the union. It must be remembered:

[A] collective bargaining agreement does not necessarily express the full coverage of employment rights. It covers such matters only as the parties may have been able to agree upon and leaves unresolved such issues as the parties may not have been able to agree upon and with respect to which the law does not require a concession by either party.<sup>58</sup>

The right unilaterally to discontinue a Christmas gift is often in this unresolved area. To determine if the right exists one must consider not only the terms of the contract but also all aspects of the employment relationship.

*John Baker Weiss*

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<sup>56</sup> *E.g.*, Exchange Parts Co., 139 N.L.R.B. 710 (1963).

<sup>57</sup> Electric Steam Radiator Corp., 136 N.L.R.B. 923 (1962).

<sup>58</sup> United States Steel v. Nichols, 229 F.2d 396, 399 (6th Cir. 1956).