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Labor Law--Sections 8(a)(5) and 9(a)--Subcontracting in Accordance with Established Practice Held Not Mandatory Subject of Collective Bargaining (Westinghouse Elec. Corp., 150 N.L.R.B. No. 136 (1965))

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had been a party to the litigation.[22] It has always been the policy of New York to permit the insurer to interpose such defenses.[23] Consequently, if the New York courts enforce direct action statutes as interpreted by the courts of the enacting jurisdictions, the strong public policy of this state concerning the defenses available to the insurer may be abrogated.

The direct action statute does have the advantage of preventing collusion between the insured and his insurer. Therefore, the lack of cooperation by the insured cannot defeat the right of the injured party against the insurer. However, such protection is already provided in New York's Insurance Law.[24]

If the insurer is permitted to interpose against the injured party those defenses available against the insured, and if the procedural "safety valves" are provided to keep jury verdicts in their proper perspective, deleterious implications to be drawn from the instant case will be obviated. However, the possible loss of defenses by the insurer, coupled with the fact that New York may be inviting forum-shopping by providing a forum which will enforce direct action statutes without procedural "safety valves," would seem to indicate that the Court in the instant case did not reach a wholly satisfactory result.

LABOR LAW — SECTIONS 8(a)(5) AND 9(a) — SUBCONTRACTING IN ACCORDANCE WITH ESTABLISHED PRACTICE HELD NOT MANDATORY SUBJECT OF COLLECTIVE BARGAINING. — Since the 1940's the respondent-employer, an appliance manufacturer, had unilaterally subcontracted approximately four thousand jobs, all of which could have been performed by his own employees. Although the union had never challenged this custom, in 1963 it filed a complaint with the National Labor Relations Board in which it demanded the right to bargain concerning the employer's *decision* to subcontract. In reversing the trial examiner, the National Labor Relations Board *held* that subcontracting which merely continues a long established practice, without significantly changing existing terms or conditions of employment, is not subject to man-

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[22] West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122 (1950) (failure of insured to cooperate not available as a defense against injured party). *Contra*, Cespuglio v. Cespuglio, 238 Wis. 603, 300 N.W. 780 (1941).

[23] Roth v. National Auto. Mut. Cas. Co., 202 App. Div. 667, 195 N.Y. Supp. 865 (1st Dep't 1922); Killeen v. General Acc. Assur. Corp., 131 Misc. 691, 227 N.Y. Supp. 220 (N.Y. County Ct. 1928).

[24] Under New York law, the injured party can protect himself from the insured's failure to give notice to his insurer by giving such notice himself. N.Y. INS. LAW § 167(1)(c).

datory collective bargaining. *Westinghouse Elec. Corp.*, 150 N.L.R.B. No. 136 (1965).

Section 7 of the National Labor Relations Act[1] recognizes the right of employees to bargain collectively. In fact, it is an unfair labor practice under sections 8(a)(5)[2] and 9(a)[3] for an employer to refuse to bargain with his employees' representatives concerning any decision he makes "in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." Traditionally, the scope of these provisions was generally limited to decisions in such areas as wages, hours, seniority, vacations and union status.[4] Gradually, however, the NLRB and the courts, in construing these provisions, have greatly increased the areas in which bargaining is required. For instance, it was decided in *NLRB v. J. H. Allison & Co.*[5] that merit increases were proper subjects for mandatory collective bargaining, as such increases form an "integral part of the wage structure."[6] Employer decisions affecting job reclassification[7] and retirement age[8] are also a subject of collective bargaining since they affect "conditions of employment." Thus, in determining whether there is a duty to bargain on a given subject, courts generally consider (1) whether the matter in contention affects the employer-employee relationship[9] and (2) whether the matter in contention has a direct bearing on the terms or conditions under which the employees work.[10]

All decisions by management which may affect conditions of employment do not require bargaining. Traditionally, management has certain prerogatives which may be exercised without restriction. These prerogatives included decisions concerning job content,[11] size of the work force,[12] prices[13] and appointment of supervisory

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[1] 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).
[2] 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1958).
[3] *Cf.* 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).
[4] Cox and Dunlop, *Regulation Of Collective Bargaining By The National Labor Relations Board*, 63 HARV. L. REV. 389, 401 (1950).
[5] 165 F.2d 766 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948).
[6] *Id.* at 767.
[7] See Allis-Chalmers Mfg. Co. v. NLRB, 162 F.2d 435 (7th Cir. 1947).
[8] See Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).
[9] See Detroit Resilient Floor Decorators Local 2265, 136 N.L.R.B. 769 (1962), *aff'd*, 317 F.2d 269 (6th Cir. 1963); W.W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949).
[10] See, *e.g.*, May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945); Great So. Trucking Co. v. NLRB, 127 F.2d 180 (4th Cir.), *cert. denied*, 317 U.S. 652 (1942).
[11] Woods, *Mandatory Collective Bargaining*, 6 HASTINGS L.J. 1, 14 (1954).
[12] Feldman, *The Right to Manage*, 1 LAB. L.J. 287, 288-89 (1949).
[13] Shreve, *Objective: Industrial Peace*, 1 IND. & LAB. REL. REV. 431 (1948).

personnel.[14] Such decisions were considered management prerogatives because they concerned the efficiency and operational capacity of the business and go to its very essence.[15] In addition, the employer could increase his prerogatives by inserting a management clause in his labor-management contract granting him the right to decide a particular issue.

Recent developments, however, have significantly restricted the subjects which appeared to be exclusively within the unilateral decision-making powers of employers.[16] Where once the employer had an absolute right to terminate his business operations, there are indications that today he may not decide to do so without first bargaining.[17] Furthermore, the NLRB has held that where automation would adversely affect the employees' interests, the employer is required to bargain with the union concerning both his decision to change his method of operation and the resulting effects upon the conditions of employment.[18]

Although the Board had traditionally required bargaining on the *effects* of employer decisions in automation and plant-closing cases, it was not until these recent holdings that the requirement was extended to the *decision* itself. A comparison of plant-closing cases illustrates this change. In 1953, in the case of *Brown Trucking & Trailer Mfg. Co.*,[19] the Board concerned itself only with the effects of a decision to reduce plant operations. In that case, the employer closed his plant and transferred his operations. The NLRB found that the employer had violated Section 8(a)(5) by failing to advise the union of the move, so that it could demand the opportunity to bargain collectively concerning the adverse *effects* on the employees. However, in 1963 the Board intimated that the employer had indulged in an unfair labor practice by refusing to offer the union an opportunity to bargain concerning his *decision* to close the plant and move its operations.[20]

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[14] Woods, *supra* note 11.

[15] See, *e.g.*, Union Drawn Steel Co. v. NLRB, 109 F.2d 587 (3d Cir. 1940); Ballston Stillwater Knitting Co. v. NLRB, 98 F.2d 758 (2d Cir. 1938); NLRB v. Lion Shoe Co., 97 F.2d 448 (1st Cir. 1938). See also Shreve, *supra* note 13.

[16] Rothman, *The "Right" to Go Out of Business Together With A Consideration of Plant Removal, Subcontracting And The Duty To Bargain* 6 B.C. IND. & COM. L. REV. 1 (1964).

[17] See Star Baby Co., 14 N.L.R.B. 678 (1963), *modified*, 334 F.2d 601 (2d Cir. 1964).

[18] Renton News Record, 136 N.L.R.B. 1294 (1962).

[19] 106 N.L.R.B. 999 (1953).

[20] Weingarten Food Center, Inc., 140 N.L.R.B. 256 (1962). See Rothman, *supra* note 16. *But see* NLRB v. Darlington Mfg. Co. (U.S. March 29, 1965) in N.Y. Times, March 30, 1965, p. 1, col. 6, where the United States Supreme Court held that an employer could close down his business entirely to avoid dealing with a union, but not partly if the intent and effect is to discourage unionism at his other plants.

Paralleling these developments are those in the area of subcontracting. In this area the NLRB, in determining whether subcontracting would require collective bargaining, had followed two distinct lines of reasoning. For instance, in *Timken Roller Bearing Co.*,[21] the Board found that the employer had committed an unfair labor practice by refusing to give the union an opportunity to bargain on his decision to subcontract. In other cases supporting this ruling,[22] the Board declared that employees have a right to bargain where a subcontracting decision would affect the volume of work upon which their job security depends. On the other hand, in such cases as *Fibreboard Paper Prods. Corp.*,[23] the Board had held that the union, although it could compel the employer to bargain on the effects of a decision to subcontract, lacked the right to demand that he bargain on the decision itself. Hence, the diverse NLRB rulings had not settled the issue of whether decisions to subcontract would be subject to mandatory collective bargaining. Instead, the law concerning subcontracting had been placed in a state of confusion.

The confusion rampant in Board decisions had not found its way to the courts. Thus, prior to the Supreme Court's decision in *Fibreboard Paper Prods. Corp.*,[24] the courts had generally accepted the latter view that all decisions to subcontract were management prerogatives even though the labor-management contract did not expressly reserve them to management.[25] In *Fibreboard,* however, the Supreme Court followed the recent trend evidenced by the latest NLRB decisions in plant-closing cases. In *Fibreboard,* two months after the union had notified the employer of its decision to bargain concerning a modification of the existing contract and four days before the contract terminated, the employer decided to subcontract work performed by a certain unit of employees. By so subcontracting, the employment of more than seventy workers would be terminated. The employer's decision was found to be motivated by the economic savings that would result from the work force, fringe benefits and overtime benefits being reduced.[26] Although his actions were motivated by sound economic con-

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[21] 70 N.L.R.B. 500, *enforcement denied on other grounds,* 161 F.2d 949 (6th Cir. 1947). See Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558, 1562 (1962) (dissenting opinion).

[22] Town & Country Mfg. Co., 136 N.L.R.B. 1022 (1962), *aff'd,* 316 F.2d 846 (5th Cir. 1963); Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550 (1962).

[23] Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558 (1962).

[24] 379 U.S. 203 (1964).

[25] *E.g.,* Jays Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961); NLRB v. Houston Chronicle Pub. Co. 211 F.2d 848 (5th Cir. 1954).

[26] If the employer had manifested an animus towards the union, his activity would have been set aside as violative of § 8(a)(5). See, *e.g.,* American Air Filter Co., 127 N.L.R.B. 939 (1960); Dearborn Oil & Gas Corp., 125 N.L.R.B. 645 (1959); Annot. 152 A.L.R. 149 (1944).

siderations, the Court found that the employer indulged in an unfair labor practice by refusing to bargain with the union on his *decision* to subcontract. The Court reasoned that industrial strife might be avoided if the employer is obligated to bargain in good faith concerning a *decision* to subcontract which results directly in a termination of employment. Recognizing that this reasoning could include all subcontracts, as well as all management prerogatives, the Court restricted the case to its facts.[27] Indeed, the concurring opinion made this point extremely clear by rejecting any implications which might flow from the majority ruling.[28] Thus, *Fibreboard* appears to be limited to situations where the employer terminates the employment of his workers by subcontracting work which had been previously performed by them.

The language of the Court, however, as well as the recent indications that areas of decision once considered exclusive management prerogatives are becoming required subjects for collective bargaining, caused management to believe that there was "no assurance that the majority . . . would not be willing in the next case to follow the Board further along the path it has charted." [29]

The instant case is a step by the NLRB which should allay these fears. It is consistent with, and gives meaning to, the attitude manifested by the Supreme Court in *Fibreboard*. It does this by refusing to lay down a hard and fast rule applicable to all decisions involving subcontracts. In finding that subcontracting decisions which involve merely a "recurrent event in a familiar pattern" are not subject to mandatory collective bargaining, the Board noted that there was no direct effect on the wages, or volume of work available to the employees. Thus the Board concluded that management does not have to bargain on its decision concerning the basic scope of the enterprise if there is no immediate significant impact on the employees' wages, hours or conditions of employment.

If the restrictive language of *Fibreboard* did not exist, however, the Board could have found in favor of the union. As the trial examiner in *Westinghouse* pointed out, the subcontracting of

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[27] "We are thus not expanding the scope of mandatory bargaining to hold . . . that the type of "contracting out" involved in this case . . . is a statutory subject of collective bargaining under § 8(d)." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 215 (1964). Section 8(d) of the National Labor Relations Act, 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958), defines collective bargaining as the "performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."

[28] Fibreboard Paper Prods. Corp. v. NLRB, *supra* note 27, at 217.

[29] Address by Francis A. O'Connell, Jr., Industrial Relations Society of New York, January 21, 1965, in 58 L.R.R.M. 49, 51 (1965).

work which would be performed by the employees impairs job security since there is a loss not only of overtime benefits but of work opportunities. In fact, eventually a point may be reached where one job too many is subcontracted, resulting in the termination of employment for the workers who could have performed the jobs.

Acceptance of the trial examiner's view would seem to make all management decisions subject to mandatory collective bargaining, as work opportunities are always affected by management decisions. The Board, however, decided to heed the warning implicit in the concurring opinion of *Fibreboard* by rejecting the view that all subcontracts are required subjects of bargaining.

The Board's attitude concerning subcontracting practices has been further revealed in *Shell Oil Co.*[30] which was decided immediately after *Fibreboard*. There, the Board indicated that it would not compel the employer to bargain on all subcontracts. After the labor-management contract had expired, the employer followed his established practice of subcontracting work which could have been performed by his employees. The union objected although the employer abided by the wage-scale provision which had been inserted in all prior labor-management contracts. Such a provision was to be applied to the wages of the employees when the employer exercised his right to subcontract. The Board found that the employer had the right to subcontract without bargaining with the union as long as he complied with this wage scale provision. Since the employer's practice had become a familiar custom, the Board concluded that the union had a right to bargain about this established practice when the contract was not in operation but the employer had the right to subcontract during the negotiations.

Both the *Westinghouse* and the *Shell Oil Co.* decisions clearly show that *Fibreboard* will be limited to situations where there has been no mutual understanding, either expressed or implied, between the parties with respect to the past subcontracting practices of the employer. The *Fibreboard* decision was not meant to carve away large areas of management prerogatives but was meant to give recognition to the already established areas of bargaining. Indeed, this is readily apparent from the facts of the case. The subcontracting involved no essential change in plant operations or significant capital investment. It involved only a termination of employment which had always been considered within the phrase "conditions of employment" requiring bargaining.

There are but a limited number of subcontracts falling within the scope of mandatory collective bargaining. Thus, the employer

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[30] 149 N.L.R.B. No. 22 (1964); *accord,* Shell Chemical Co., 149 N.L.R.B. No. 23 (1964).

does not have to bargain on work contracted out which cannot be performed by his employees. Likewise, the employer will not be guilty of a violation of the Act by refusing to bargain if he has formerly contracted out work in the past, or if there is a labor-management contract reserving to him the right to subcontract, even if the work could be performed by his employees.

Although it is apparent that the court does not wish to extinguish management prerogatives, the employer should still place a provision in the labor-management contract expressly reserving such prerogatives.[31] The Board will more readily reserve a subject to management where there is a contract provision relating to it. In doing so, the Board recognizes that the nature of a contract is such that there is bargaining before there is agreement. Without such provision, however, the Board's decisions on the matters subject to mandatory collective bargaining will continue to turn on the particular facts of each case.

LIEN LAW — SECTION 39-a — MEASURE OF DAMAGES FOR EXCESSIVE CLAIM LIMITED SOLELY TO AMOUNT WILLFULLY EXAGGERATED. — In a recent action to foreclose a mechanic's lien, the defendant counterclaimed for a declaration that the lien was void as a result of the lienor's willful exaggeration of the amount due. In addition, the defendant asked for damages, pursuant to Section 39-a of the Lien Law,[1] in an amount equal to the difference between the total amount of the lien filed and the amount found due. The lienor contended that if any damages at all were owing to the defendant, they should include only the willfully overstated amounts and not honest discrepancies. A divided Court of Appeals, although declaring the lien void, nonetheless accepted the lienor's contention as to damages and *held* that section 30-a was designed to permit recovery only in the amount of willful exaggeration. *Goodman v. Del-Sa-Co. Foods, Inc.*, 15 N.Y.2d 191, — N.E.2d —, — N.Y.S.2d — (1965).

Prior to any statutory authority for invalidating liens which were willfully exaggerated, a judicial practice evolved in some courts to declare such liens void on the theory that the exaggeration did not meet the requirements of the statement of value in the

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[31] Although it is advisable to include a management prerogative clause in a contract, it seems to be established that management cannot negotiate on this issue with a "take it or leave it" attitude. See General Elec. Co., 150 N.L.R.B. No. 36 (1964); Shell Oil Co., *supra* note 30.

[1] N.Y. LIEN LAW § 39-a.